

**Western Pacific Roofing Corporation and United  
Slate, Tile and Composition Roofers, Damp and  
Waterproof Workers' Association, Local No. 36.**  
Case 21-CA 1o088

August 21, 1979

**DECISION AND ORDER**

BY CHAIRMAN FANNING AND MEMBERS PENELLO  
AND TRUESDALE

On May 18, 1978, Administrative Law Judge Earledean V.S. Robbins issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and a reply brief; the General Counsel and Charging Party filed cross-exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge and to adopt her recommended Order, as modified herein.<sup>3</sup>

<sup>1</sup> The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

The Administrative Law Judge found merit to Respondent's contention that the existence of a bargaining impasse constituted an "unusual circumstance" justifying its otherwise untimely withdrawal from the multiemployer unit. We continue to adhere to the principle that impasse does not constitute such an "unusual circumstance." *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB No. 140 (1979). Moreover, on the basis of the entire record, we find that no impasse existed at the time Respondent attempted to withdraw from the multiemployer group. In fact, the parties had reached agreement on all issues only a few days before Respondent informed the Union of its withdrawal. The contract was ratified by the Union shortly thereafter.

<sup>2</sup> Chairman Fanning adheres to the position that an untimely withdrawal from multiemployer bargaining does not, of itself, constitute a violation of the Act. Rather, the refusal to execute and apply the contract reached through multiemployer bargaining is the essential part of the 8(a)(5) violation. *Preston H. Haskell Company*, 238 NLRB 943, fn. 1 (1979); *Ringside Liquors, Inc., d/b/a Dino's Lounge, et al.*, 237 NLRB 30, fn. 2 (1978); *Independent Association of Steel Fabricators, Inc., et al.*, 231 NLRB 264, fn. 2 (1977). See also *Teamsters Union, Local 378 affiliated with International Brotherhood of Teamsters, etc. (Olympia Automobile Dealers Association)*, 243 NLRB No. 138, fn. 1 (1979). Accordingly, Chairman Fanning, while agreeing with his colleagues in all other respects herein, would not find that Respondent's withdrawal from the unit, of itself, is violative of the Act.

<sup>3</sup> The Administrative Law Judge recommended a broad remedial order. The Board has recently reconsidered its policy regarding the application of the so-called broad order and has decided that such is warranted only when a respondent is shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees' fundamental statutory rights. *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979). Inasmuch as Respondent's unlawful acts described herein are not of such a nature, we shall modify the recommended Order of the Administrative Law Judge by substituting the word "in any like or related manner" for the phrase "in any other manner" in par. 1(h) of said recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Western Pacific Roofing Corporation, Bell, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(h):  
“(h) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.”
2. Substitute the attached notice for that of the Administrative Law Judge.

**APPENDIX**

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

After a hearing at which all parties had the opportunity to present their evidence the National Labor Relations Board has found that we violated the National Labor Relations Act, has ordered us to post this notice, and we intend to abide by the following:

The Act gives all employees these rights:

- To engage in self-organization
- To form, join, or help unions
- To bargain as a group through a representative of their own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refuse to do any and all of these things.

WE WILL NOT refuse to bargain collectively with United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association, Local No. 36, as the exclusive representative in its territorial jurisdiction of our employees in the following appropriate unit:

All employees employed by the employer-members of the Roofing Contractors Association of Southern California, Inc., in the job classification set forth in the collective-bargaining agreement between the Roofers Unions and RCA, effective from August 15, 1974, to August 15, 1977.

WE WILL NOT withdraw from said 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, or

at such other time we may lawfully withdraw.

WE WILL NOT refuse to sign, and acknowledge that we are bound by the terms of, the collective-bargaining agreement between the Roofers Unions and RCA effective August 15, 1977.

WE WILL NOT unilaterally change the wage rate or discontinue making payments to the various benefit funds and the reporting of total hours worked by our employees as required by the above-described collective-bargaining agreements without first bargaining with the Union.

WE WILL NOT deal directly and individually with our employees in derogation of the Union's status as exclusive collective-bargaining representatives.

WE WILL NOT unlawfully discharge our employees.

WE WILL NOT attempt to persuade our employees to abandon the Union and remain in our employ by promising employees better working conditions if they do so.

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

WE WILL forthwith sign and acknowledge that we are bound by the terms of the collective-bargaining agreement between the Roofers Unions and RCA effective August 15, 1977, and comply with the terms and conditions thereof, both retroactively and for the balance of its term, including making payments to the Roofers Union depository for the various benefit funds as prescribed in said agreement; and WE WILL make payments to the various benefit funds as prescribed in the 1974-77 agreement which we failed to make as a result of individual wage agreements with our employees.

WE WILL reimburse our employees for any loss of wages and benefits they may have suffered as a result of our failure to comply with the terms and conditions of the above-described agreement, with interest.

WE WILL offer Willie Williams and Simon Rangel immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, and WE WILL reimburse each of them for any loss of pay he may have suffered because we discharged him, with interest.

WESTERN PACIFIC ROOFING CORPORATION

DECISION

STATEMENT OF THE CASE

EARL DEAN V.S. ROBBINS, Administrative Law Judge:

This case was heard before me in Los Angeles, California, on March 13 and 14, 1977. The charge was filed by United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association, Local No. 36, herein called the Union, and served on Respondent on October 11, 1977. The complaint, which issued on December 7, 1977, alleges that Respondent violated Section 8(a)(1) and (5) of the Act.

The basic issue herein is whether, at the time of Respondent's attempted withdrawal from the multiemployer bargaining unit, there existed "unusual circumstances" of a nature to justify such withdrawal after the commencement of negotiations.

Upon the entire record, including my observation of the witnesses and after due consideration of the briefs filed by the parties, I make the following:

## FINDINGS OF FACT

### I. JURISDICTION

Respondent is engaged in the business of roofing construction and related operations with its principal office located in Bell, California. The complaint alleges, and I find as more fully set forth below, that at all times material herein Respondent has been, and is now, an employer-member of the Roofing Contractors Association of Southern California, Inc., herein called RCA, for the purpose of collective bargaining with labor organizations.

The complaint alleges, the answer admits, and I find that RCA is an association comprised of various employers engaged as roofing contractors in the building and construction industry in Southern California which exists for and engages in collective bargaining for, and negotiates and executes collective-bargaining agreements on behalf of, its employer-members, including Respondent, with various labor organizations, including the Union. The parties stipulate that the employer-members of RCA in the aggregate annually purchase goods, products, and services valued in excess of \$50,000 either directly from suppliers located outside the State of California or directly from suppliers located within the State of California, each of whom in turn receives the same goods, products, and services directly from suppliers located outside the State of California.

Upon the pleading and the evidence, I find that RCA and its employer-members, including Respondent, are now, and have been at all times material herein, employers engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. LABOR ORGANIZATION

The Union is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Alleged Conduct*

It is undisputed that until September 1977,<sup>1</sup> Respondent had been a member of RCA since about 1965. It is admit-

<sup>1</sup> All dates herein will be 1977, unless otherwise indicated.

ted that RCA, on behalf of its employer-members, and Roofers Local No. 36, Roofers Local No. 72,<sup>2</sup> and Roofers Local No. 220, herein referred to collectively as the Unions or the Roofers Unions, have been parties to successive collective-bargaining agreements, the most recent of which was effective from August 15, 1974, until and including August 15, 1977, with the Union, within its territorial jurisdiction, as the exclusive majority representative for purposes of collective bargaining of the employees of the employer-members of the association, including Respondent, in an appropriate unit comprised of all employees working within the job classifications covered by the above-stated collective-bargaining agreement, excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

By letter dated June 7, the Unions timely notified RCA of their intent to modify the existing collective-bargaining agreement. The first negotiation session was held on July 15. RCA submitted to the Unions a document dated July 14, which lists the employers represented by RCA in the negotiations. Respondent is listed on this document.<sup>3</sup>

Johnny Zamrzla, president of Respondent, was a member of the RCA negotiating committee<sup>4</sup> and participated in most of the negotiation sessions. Upon the expiration of the 1974-77 collective-bargaining agreement the union negotiating committee informed the RCA negotiating committee that they would not work without a contract and the Unions went on strike against the employer-members of RCA. Negotiations continued without hiatus and the Unions recommended to their membership on September 9 that they ratify the RCA proposal. The membership rejected the proposal. Other proposals had been rejected on two previous occasions.

During the course of the negotiations, the Union made several economic concessions which made the new contract more favorable to the employers than the recently expired contract, *viz.*, cutting the starting wages of apprentices from 60 percent of journeymen wages to 40 percent and lowering subsequent progressive increases; extended the free zone<sup>5</sup> from 25 miles to 30 miles effective August 15, 1978;<sup>6</sup> deleted the requirement that a thermostatically controlled kettle or tank car be attended by an employee; and reduction of crew size from two men for eight squares<sup>7</sup> to two men for 20 squares.<sup>8</sup> The Union's original wage proposal was \$1.25 an hour for each of 3 years plus a cost-of-living increase. The

<sup>2</sup> Subsequent to the negotiations, the Roofers International Union withdrew the charter of Local No. 72 and transferred all of its members to Local No. 36.

<sup>3</sup> Unless otherwise indicated, the facts herein concerning collective-bargaining history and the 1977 negotiations are not disputed.

<sup>4</sup> At the time of the negotiations, Zamrzla was secretary of RCA. He resigned upon Respondent's attempted withdrawal from the unit. He was also a member of the safety committee and vice president of the National Roofing Contractors Association and is secretary-treasurer of the Western States Contractors Association. He has not resigned these latter positions.

<sup>5</sup> Subsistence pay is not required in the free zone.

<sup>6</sup> The association had proposed that the entire geographical area covered by the contract (Orange County, Los Angeles County, and Ventura County) be considered a free zone.

<sup>7</sup> One hundred square feet.

<sup>8</sup> Rivera testified that the average residence is about 13 squares. Zamrzla testified that the average residence and two-car garage is about 25 squares. According to Rivera, the association had proposed two men to 25 squares. According to Zamrzla, the proposal was two men to 50 squares.

association counterproposed \$3 an hour over a 3-year period. They reached agreement prior to the final negotiation session on \$1.10 an hour for the first year and \$1 an hour for each of the 2 succeeding years.

The last negotiation session was held on September 12. Zamrzla was present. The major outstanding issues at the commencement of that session were subsistence pay, the proposed inclusion of a pre-apprentice classification, and the proposed contribution to an industry fund. During the course of the September 12 negotiation session, agreement was reached on these issues and certain other minor items. The Unions agreed that they would recommend to their membership that the proposal be ratified.

A ratification meeting was held on September 17 and the proposed modifications to the previous agreement was ratified by the membership of the Unions. On September 16, Respondent, who operates in the geographical jurisdiction of the Union, sent the Union a telegram stating:

THIS IS TO ADVISE YOU THAT WESTERN PACIFIC ROOFING CORPORATION IS WITHDRAWING THEIR BARGAINING RIGHTS PER OUR LETTER OF SEPTEMBER 15 1977.

Fernando Rivera, secretary-treasurer of the Union and chairman of the union negotiating committee, testified that the Union did receive the September 15 letter; as he recalls it was received before receipt of the telegram.

John Mitchell, assistant business agent for the Union, testified that on about September 28 he asked Zamrzla to sign the new contract. Zamrzla said he was not ready to sign at that time. About a week later, Mitchell telephoned Zamrzla and asked if he was ready to sign the new agreement. Zamrzla said he was not going to sign the agreement.

Zamrzla testified that Mitchell came to his shop twice and asked him to sign a document. According to him, the first time Mitchell had a one-page document which he assumed to be an interim agreement, but he admits he did not read the document. The second time, Mitchell had a multi-page document. Both occasions were in the last week of September or the first week in October. He admits that he refused to sign the agreement. Shortly thereafter, Rudy Heil telephoned Zamrzla and said he was sending Union Business Agent Hallal over with the contract for Zamrzla to sign. Zamrzla said he was not going to sign. They had a short conversation regarding Zamrzla's opposition to the new contract—piecework, free travel zone, etc. Later that day Hallal came to Zamrzla's office and asked him to sign the new collective-bargaining agreement. Zamrzla told him to take the agreement back and Heil would fill him in.

The parties stipulated that no trust fund payments have been made by Respondent for any period subsequent to August 15. Zamrzla admits that he is not complying with the new agreement as to wages and that only one employee is receiving health insurance coverage.<sup>9</sup>

Employee Willie Williams testified that during the first half of 1977 he worked between 40 and 45 hours a week.

<sup>9</sup> Zamrzla admits that he is presently providing medical and dental coverage only for Cooke. This is under a plan different from that provided in the collective-bargaining agreement.

and that in June, July, and August he averaged about 40 hours a week. During that period he was paid by check for some of the hours and in cash for some of the hours. His rate of pay was \$12.34. When he was paid in cash he received cash at the rate of about \$8 an hour which is what his take-home pay after deductions would normally be.<sup>10</sup> Since he understood that those hours for which he was paid in cash would not be reported to the Union, he inquired on several occasions if Respondent was reporting enough hours work to ensure that he would be entitled to various benefits. On each occasion he was assured by Zamrzla or office personnel that sufficient hours were being reported.

Zamrzla admits that he made these cash payments and that he did not make contributions to the various trust funds for the hours worked for which Williams was paid in cash.

Williams testified that he saw other employees being paid in cash, but overheard no conversation which would explain such payments. It is undisputed that for more than a year Respondent's payroll checks were frequently returned for insufficient funds. On these occasions he redeemed the bad checks by giving employees cash.

Employee Simon Rangel testified that he was paid twice in cash. According to Rangel, in about July he was given half of his pay in cash and half in a check. On a second occasion in September, Zamrzla paid him in cash. Rangel went to the office and protested to Zamrzla and his wife that he wanted a check stub setting forth the various deductions. He was then given a slip of paper that listed the deductions. Rangel asked why they did not deduct for the Union and for vacations. Mrs. Zamrzla said there was no more Union.<sup>11</sup> Rangel said he wanted to belong to the Union.

Mrs. Zamrzla did not testify. Zamrzla testified that on this second occasion he paid Rangel in cash and at the same time asked him to endorse a check. Zamrzla further testified that on this and other occasions he would give employees a check to endorse merely as a receipt and then pay them in cash.

Zamrzla denied that any employees were paid partially in cash and partially by check other than Williams and Douglas Cooke. He contends that Williams and Cooke sometimes performed work for Respondent as subcontractors and it was for this work that he paid them in cash. Respondent would supply the material and load the roof. Williams and Cooke would then apply the roofing at a flat rate.<sup>12</sup> Since there is no evidence to indicate whether these cash payments were only partial payments, initial payments or redemption of insufficient fund checks, I find that the evidence is insufficient to establish that these other employees were paid cash under the same arrangement as existed with Williams and Cooke.

<sup>10</sup> Several times Williams inquired of both Zamrzla and his wife as to whether they were reporting sufficient hours to the trust funds for him. Each time they assured him that they were.

<sup>11</sup> Rangel testified through an interpreter. Also, a fellow employee interpreted for him during this conversation.

<sup>12</sup> Zamrzla testified that he does not know whether Williams has a contractor's license, and that Cooke used Zamrzla's license.

Williams testified that in September, Zamrzla told him he was not going to sign a union contract and that he wanted Williams to remain in Respondent's employ. He said he would ensure that they had insurance coverage. Zamrzla further said that the Union did not do that much for them, that they were going to work without being hassled by the Union. As to health insurance, Zamrzla said that Williams would not have to worry about getting in sufficient hours, that as long as one paid the premiums, one received the benefits.

Williams quit his employment with Respondent in September. Rangel quit in October. They both testified that they quit because Respondent withdrew recognition from the Union. They both also testified that another reason that they quit was because of the insufficient funds payroll checks.

#### B. Facts as to Respondent's Economic Defense

Zamrzla testified that Respondent has been having financial difficulties for 3 or 4 years. These difficulties flow in part from a contract on a particular job, herein referred to as the Zapata job, which started in 1974. Zamrzla testified that in the fiscal year ending June 30, 1976, Respondent suffered an out-of-pocket loss on the job of about \$140,000. During this time Respondent experienced a critical cash flow problem resulting in numerous checks being dishonored by the bank for lack of funds. Payroll checks were not honored on an almost weekly basis.

During 1976 and 1977, Respondent became delinquent in payments to material suppliers. As a result these suppliers either stopped extending credit to Respondent or extended credit only on a limited job-by-job basis. Currently Respondent's principal supplier is Modern Materials Incorporated.

Certain unaudited financial statements were introduced into evidence by Respondent through Sol Roniss, an outside accountant retained by Respondent. They show, *inter alia*, the following for the fiscal years ending on June 30, 1974-77 and the 6-month period ending December 31.

	Balances				
	6/30/74	6/30/75	6/30/76	6/30/77	12/31/77
Cash in bank (overdraft)	\$ 6,586	\$( 5,217)	\$(6,346)	\$(9,757)	\$( 96)
Current assets <sup>13/</sup>	288,510	266,691	314,751	295,116	285,176
Current liabilities <sup>14/</sup>	249,117	255,689	452,811	412,662	400,875
Retained earnings (deficit) <sup>15/</sup>	28,679	36,695	(100,327)	(70,716)	(73,792)
Addition (reduction) to retained earnings	17,104	6,353	(145,895)	29,611	( 3,076)
Union costs	30,679	32,017	35,311	40,296	3,312
Salaries-officer <sup>16/</sup>	26,000	26,000	20,000	24,500	12,500
Gross profits	163,338	153,712	101,568	142,644	46,852
Net income (loss)	17,104	6,353	(145,985)	29,611	<sup>17/</sup> (2,918)

<sup>13</sup> Current assets are all assets expected to be converted to cash within the period of a year.

<sup>14</sup> Current liabilities are those liabilities which are expected to be paid within a year.

<sup>15</sup> Retained earnings are the profits after income taxes, that are reinvested into the business. It is a cumulative figure which starts with the first year of operations.

<sup>16</sup> This refers to Zamrzla's salary.

<sup>17</sup> The accountant's note on this item reads, "Federal income tax liability on current year's earnings were offset by prior year loss carryover."

Stephen H. Anderson, of Modern Materials, testified that over the last 2 or 3 years, Respondent had become delinquent in the payment of its account with Modern until by 1977 Respondent's overdue account was approximately \$25,000. During this period, Modern severely curtailed the amount of credit extended to Respondent. In July or August, Anderson met with Zamrzla concerning this account and his line of credit. Anderson pointed out Respondent's poor financial position and suggested that Respondent would have to make some major changes in its operations. Zamrzla agreed and said he had a plan. His plan as outlined to Anderson was to substantially discontinue new work and to engage primarily in recover work. Therefore, Zamrzla explained, he would not be required to use union help as he would be on new work and this would substantially increase his profits. Anderson said, "In other words, you are only going to do work which you personally can oversee." Zamrzla said, "Yes." Anderson said, on those conditions, Modern would extend credit to Respondent.

Although Anderson kept referring to Respondent being nonunion as a condition of extending credit, it is apparent from his testimony as a whole that his interest was in Respondent restricting itself primarily to recover work, and that he agreed to extend credit to Respondent on the basis of Zamrzla's representation that he would engage primarily in recover work.<sup>18</sup> On redirect, Anderson testified that he told Zamrzla that he was interested in Respondent becoming a recover contractor and to ensure that Respondent would not get into new work, he did not want Respondent to be union.

Anderson testified that he did not recall exactly when the conversation occurred, but thinks it was in August. Zamrzla testified that in August, Anderson did begin to extend Respondent additional credit, however, he did not reach agreement with Anderson on an unlimited line of credit until after he sent his letter attempting to withdraw from the multiemployer bargaining unit, perhaps as late as October. He further testified that he first presented his plan to Anderson in the latter part of July. At that time Anderson requested more details on Respondent's accounts payable and accounts receivable. This was delivered to him at a meeting during the course of the strike.

Anderson testified that in managing the line of credit extended to Respondent, he periodically reviews Respondent's financial reports. He further testified that Respondent had an exceptionally weak balance sheet even prior to the Zapata job, that it made money one year and lost it the next, and that Respondent did not appear to be reasonably adept in managing the credit liability that was being extended.

Zamrzla testified that Respondent could not survive under the financial burdens of the new collective-bargaining agreement. According to him, survival as a union contrac-

tor would have been possible only if negotiations had resulted in certain decreases in the economic cost of the agreement. According to Zamrzla, Respondent was seeking a piecework rate for tile and composition shingle work; a free travel zone which would encompass the three counties covered by the agreement; crew size modification to two men for 50 squares; and a temporary helper or preapprentice classification with a wage rate of \$4.50 an hour for work other than actual roofing application and no, or minimal, fringe benefits.<sup>19</sup>

However, the testimony of both Zamrzla and Rivera show that whatever argument Zamrzla made as to Respondent's individual need for these provisions, was made within the RCA negotiating Committee, not at the negotiation table. Nor did Respondent, prior to September 15, inform the Union that it wished to negotiate separately from RCA or that it was in dire financial straits. Also, when Zamrzla refused to sign the new agreement he did not plead dire economic difficulty.<sup>20</sup> Although Zamrzla testified that at some time prior to negotiations he made an extensive survey on piecework done by carpenters and discussed with Rivera his thinking as to piecework, he does not contend, and there is no evidence, that this discussion was couched in terms of Respondent's economic survival.<sup>21</sup>

Zamrzla also testified that the only change in Respondent's financial position between the commencement of negotiations and its attempted withdrawal was that Forest Lumber sued Respondent. Apparently it was for the balance of Respondent's account with Forest. A default judgment was entered sometime after September 12. Zamrzla is unsure as to whether the suit was filed prior to Respondent's attempted withdrawal.

### Conclusions

It is undisputed that Respondent consented to be bound by multiemployer bargaining and that Respondent actively participated in the negotiations which led to the 1977 collective-bargaining agreement. Thus, the threshold issue is whether circumstances justified Respondent's withdrawal from the multiemployer bargaining unit after the commencement of negotiations. It is well established that once the multiemployer bargaining unit is established, the employer-members and the Union are bound by multiemployer bargaining absent compliance with the rules governing withdrawal from multiemployer bargaining set forth by the Board in *Retail Associates, Inc.*, 120 NLRB 388, 393-394 (1958).

<sup>19</sup> Zamrzla denies that he frequently uses helpers.

<sup>20</sup> In this regard, Zamrzla testified that on one occasion he mentioned the things he did not like about the contract.

<sup>21</sup> According to Zamrzla, he is 99 percent sure that piecework was discussed during negotiations. As he recalls the discussion was basically as to composition shingles, but there was also some discussion as to tile. The roofers have been striving for jurisdictional control over the tile market. Presently most of the tile work is being done by carpenters on a piecework basis and almost all of the wooden shingle work is done by carpenters. Many roofing contractors are using carpenters on a piecework basis. Respondent was signatory to a carpenter's agreement in 1975 and 1977. He never signed a new contract following the 1976 expiration of the new carpenters agreement.

<sup>18</sup> It is apparent from Anderson's testimony that he considers recover work to be more profitable and that he does not consider that Respondent has the organization or management expertise to efficiently and profitably handle commercial jobs.

In *Retail Associates*, the Board stated that the stability requirements of the Act dictate that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted from such a unit. Accordingly, the Board held that prior to the date set by the contract for modification, or to the agreed-upon date to commence negotiations, withdrawal can only be effected by an unequivocal written notice expressing a sincere intent to abandon, with relative permanency, the multiemployer unit, and to embrace a different course of bargaining on an individual employer basis. Once actual bargaining negotiations on a multiemployer basis have begun, withdrawal can be effected only on the basis of "mutual consent" or when "unusual circumstances" are present. Here the attempted withdrawal came after the final negotiation session and prior to ratification of the agreement by the union membership. Also, there is no "mutual consent."

Respondent contends that "unusual circumstances" exist—specifically the existence of a bargaining impasse, the fragmentation or dissipation, of the multiemployer bargaining unit, and dire economic circumstances which threaten Respondent's existence as a viable business entity. I find the first two contentions without merit. The Board has consistently rejected the contention that a bargaining impasse constitutes the requisite "unusual circumstances." *Hi-Way Billboards, Inc.*, 206 NLRB 22 (1973); *Bill Cook Buick, Inc.*, 224 NLRB 1094 (1976); *Charles D. Bonano Linen Service, Inc.*, 229 NLRB 629 (1977). Although four circuit courts of appeal have rejected the Board's rationale in this regard, I am bound by the decisions of the Board. *Insurance Agents International Union, AFL-CIO (Prudential Insurance Company of America)*, 119 NLRB 768 (1957). As to the second contention, there is insufficient evidence to support any dissipation of the unit. Of the 31 employers in the unit, 6, including Respondent, attempted to withdraw after the final negotiation session. The Union did not consent to any of these withdrawals. Clearly, this does not constitute a fragmentation of the unit.

Respondent cites *Connell Typesetting Company, et al.*, 212 NLRB 918, 921 (1974) as holding that withdrawal was justified by the combined effect of several factors—impasse and substantial reduction of the unit. Respondent errs in its reliance on *Connell*. In that case, the Board specifically based no finding on impasse or any factor other than the reduction of the size and strength of the unit. There, of the 36 employers with a total complement of 209 employees, 23 employers with 173 employees, had either completely withdrawn from the unit or had signed interim or individual agreements which, in effect, constituted a withdrawal of their strength from the unit. In these circumstances, the Board concluded:

The Board is always concerned as to stability in the collective-bargaining relationship. However, in our opinion, this unit has, with the consent of the Union, been so reduced in size and strength that it would be unfair and harmful to the collective-bargaining process to require Respondents to continue in a unit merely because the Union, which consented to the withdrawal

of so many others, is unwilling to consent to their withdrawal. In these unusual circumstances we conclude that Respondents were not required to remain within the multiemployer bargaining-unit.

Such is not the situation here where the Union has not consented to the attempted withdrawals by 6 of the 31 employers and no interim agreements have been signed by any unit employers.<sup>22</sup>

Respondent's principal argument is that its withdrawal was justified by extreme financial hardship threatening its existence as a viable business entity. Specifically, Respondent argues that it was insolvent at the time it withdrew from the unit and that it could only become solvent and a viable economic unit by drastically changing its method of operations from large, commercial contracts to recover work.<sup>23</sup> This allegedly involved totally different economic circumstances and pricing structure, making the continuation of the business under union regulations and union scale impossible because it would not be competitive.

Respondent defines insolvency as the inability of one to pay ones debts as they become due in the ordinary course and contend that even though it had not filed a petition for bankruptcy, it would have been entitled to do so under the Bankruptcy Act. It could not pay its bills as they became due, credit was no longer extended to it by its suppliers, and its checks were returned due to insufficient funds. Thus, Respondent concludes, it would be manifestly unjust to punish Respondent for its willingness to continue operations and to attempt to continue its business in spite of the extreme financial hardship it was suffering.

Finally, Respondent argues, it made every effort to make an arrangement with the Union which would solve the particular financial problems and continued to be willing to negotiate with the Union on an individual basis after its

<sup>22</sup> Respondent contends that an interim agreement was signed by one employer-member, Federal Roofing. However, Federal Roofing is not listed by RCA as an employer-member. Respondent contends that it is, since it is owned by the same owner as Robert Nichols, Inc., who is a member. Even assuming that Federal Roofing was a member, its signing of an interim agreement can hardly be deemed to have an adverse impact on the integrity of the unit.

<sup>23</sup> The Union argues that Respondent's alleged financial condition is questionable since Zamrzla was involved in related transactions with other entities owned and controlled by him. Western Pacific Roofing of California is owned by Zamrzla. According to Roniss, it is a paper corporation used for expense-saving purposes. It operates solely as a labor-providing unit whose net profit ranges between 0 and \$600. All labor expenses and officer's salaries are paid through this corporation. Western Pacific of Orange County, also engaged in roofing construction, is equally owned by Zamrzla and his brother-in-law, Zig Hall. According to Zamrzla, he exerts no active control over Western Pacific of Orange County. It is managed solely by Hall. At times Respondent subcontracts work to Western Pacific of Orange County and vice versa. According to Zamrzla, when this occurs, the corporation doing the work bills the other corporation in the same manner that a stranger would be billed, and the other corporation would pay in the same manner that it would pay a stranger. Williams testified that in June, July, and August, Respondent sent him and his crew, at various times, to work for Western Pacific of Orange County. On these occasions, he would drive either his own truck or Respondent's truck. Materials would be delivered to the jobsite by Respondent's trucks and he was paid in cash by Respondent.

withdrawal from the multiemployer bargaining unit, but the Union refused to cooperate in any manner.

In the years since *Retail Associates, supra*, the Board has had a number of occasions to consider its "unusual circumstances" rationale. These cases were reviewed in *Hi-Way Billboards* where the Board stated at p. 23:

In cases after *Retail Associates, supra*, the Board has limited application of the term "unusual circumstances" to those cases in which the withdrawing employer has been faced with dire economic circumstances, i.e., circumstances in which the very existence of an employer as a viable business entity has ceased or is about to cease. Thus, the Board has held that an employer may withdraw from a multiemployer bargaining association after negotiations with the union have begun where the employer is subject to extreme economic difficulties which result in an arrangement under the bankruptcy laws;<sup>6</sup> where the employer is faced with the imminent prospect of such adverse economic conditions as would require it to close its plant;<sup>7</sup> or where the employer is faced with the prospect of being forced out of business for lack of qualified employees to do the job and the union refuses to assist the employer by providing replacements for the employees he lost.<sup>8</sup>

The Board has refused to permit an employer to withdraw from a multiemployer bargaining association when an employer states he has a good-faith doubt as to the continued majority status of the union where the claim is limited to his own employees;<sup>9</sup> all of the employer's employees whom the union represented were discharged;<sup>10</sup> the union entered into separate agreements with individual employer members of the association;<sup>11</sup> the employer has been suspended from the association because it failed to pay its dues;<sup>12</sup> the employer was subject to a strike;<sup>13</sup> or the employer suffered a sharp decline in its business.<sup>14</sup> In the foregoing instances, the Board has found that there was no likelihood that the employer's continued existence as a viable business entity was jeopardized, and, therefore, the employer's withdrawal could not be excused on the ground of "unusual circumstances."

<sup>6</sup> *U.S. Lingerie Corporation*, 170 NLRB 750, 751.

<sup>7</sup> *Spun-Jee Corp., and the James Textile Corp.*, 171 NLRB 557, 558.

<sup>8</sup> *Atlas Electrical Service Co.*, 176 NLRB 827, 830.

<sup>9</sup> *Sheridan Creations, Inc.*, 148 NLRB 1503, 1505-06.

<sup>10</sup> *The John J. Corbett Press, Inc.*, 163 NLRB 154, fn. 8.

<sup>11</sup> *WE Painters, Inc.*, 176 NLRB 964, 965-966.

<sup>12</sup> *Senco, Inc.*, 177 NLRB 882, 886.

<sup>13</sup> *State Electric Service, Inc.*, 198 NLRB 592.

<sup>14</sup> *Serv-All Company, Inc.*, 199 NLRB 1131.

Thus, the critical question is whether the very existence of an employer has ceased or such cessation is imminent. Mere business inconvenience or economic hardship, or apprehension that bargaining is progressing toward an agreement which would be economically burdensome, inability to maintain a competitive position or other business exigencies, will not justify an untimely withdrawal from group bargaining. *Siebler Heating & Air Conditioning, Inc.*, 219 NLRB 1124 (1975); *Serv-All Company, Inc.*, 199 NLRB

1131 (1972). Cf. *Spun-Jee Corporation, supra; U.S. Lingerie Corporation, supra*.

Respondent contends that its situation falls within the ambit of *Spun-Jee* and *U.S. Lingerie*. I do not agree. In *Spun-Jee*, the association had informed the union before the commencement of negotiations that the employers in the industry in the geographical area were facing a difficult financial situation. When it became apparent that the union would not change its bargaining stance in order to alleviate this financial plight, the respondents therein separately advised the union that without the special consideration they sought continuance of their own operation under the existing contract regardless of association bargaining they could not continue to operate in the area. Nevertheless, the union remained intransigent in its refusal to accord any special consideration. Thereafter, the respondents withdrew from group bargaining and relocated outside the area.

In *U.S. Lingerie*, the employer had filed a petition for an arrangement pursuant to the Bankruptcy Act and notified the union of its financial difficulty and sought some special consideration from the union until its business improved. The Board found that the employer's withdrawal from group bargaining was justified in the circumstances including the fact that the employer withdrew in order to relocate outside of the geographical area, the employer unsuccessfully sought help from the union in its effort to overcome its economic difficulty, the employer's status was that of a debtor in possession under the bankruptcy laws, and that the employer's intention to relocate its plant raised issues inherently more amenable to resolution through collective bargaining confined to the parties directly involved than to group bargaining.

Contrary to the circumstances in those cases, here cessation of Respondent's existence is not imminent. In the circumstances herein the negative ratio of Respondent's current assets to its current liabilities do not portend imminent doom. Respondent has existed on shaky financial ground for a long time. Nevertheless it managed to survive for some 2 to 3 years in spite of the loss occasioned by the Zapata job, its cash flow problems reflected by its chronic bank overdrafts, and the severe curtailment and cessation of credit extended by its principal suppliers. Moreover, according to Anderson, whom I credit in this regard, Respondent had a history of many years standing of seesawing between operating at a profit and operating at a loss.

At the time of its attempted withdrawal, Respondent's financial outlook had definitely improved. It made a profit during the fiscal year which ended in June. A principal supplier had reinstated an open line of credit to Respondent, and the Union had made significant economic concessions during the negotiations.

Furthermore, the legitimacy of Respondent's economic defense is placed in serious doubt by its failure to notify the Union of any financial difficulties prior to or during the course of the negotiations, or to inform the Union that its refusal to sign the agreement was based on financial difficulties. *Tulsa Sheet Metal Works, Inc.*, 149 NLRB 1487-1488 (1964), enfd. 367 F.2d 55, 58 (10th Cir. 1966). *Acme*

*Wire Works, Inc.*, 229 NLRB 333 (1977). In all of the circumstances, I find that "unusual circumstances" do not exist which would justify Respondent's untimely withdrawal from group bargaining.

Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act by its untimely attempt to withdraw from the multiemployer bargaining and by, its refusal to sign, and abide by the collective-bargaining agreement negotiated by RCA and the Unions and effective as of August 15, 1977.

I further find that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the wage rates of its employees; by failing to appropriately report the total hours worked by unit employees, and to remit to the appropriate benefit funds contributions on behalf of unit employees as prescribed in the collective-bargaining agreement in effect at the time involved;<sup>25</sup> and by entering into an arrangement directly with Williams and Cooke for payment of wages in derogation of the provisions of the collective-bargaining agreement, and of the Union's status as exclusive bargaining representative.<sup>26</sup>

The complaint alleges that Respondent illegally discharged Williams and Rangel. I find that Williams and Rangel quit their employment with Respondent primarily because Respondent repudiated the collective-bargaining agreement. Accordingly, I find that they were constructively discharged in violation of Section 8(a)(3) and (1) of the Act. *Marquis Elevator Company, Inc.*, 217 NLRB 461 (1975); *Superior Sprinkler, Inc.*, and *William Augusto d/b/a William Augusto Fire Protection Service*, 227 NLRB 204 (1976).

Finally, I find that Respondent violated Section 8(a)(1) of the Act by attempting to persuade Williams to abandon the Union and remain in Respondent's employ by promising him better working conditions if he did so. *Gulf States Cannery, Inc.*, 224 NLRB 1566 (1976).

#### CONCLUSIONS OF LAW

1. RCA, and its employer-members including Respondent, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. All employees employed by the employer-members of RCA in the job classification set forth in the collective-bargaining agreement between the Unions and RCA, effective from August 15, 1974, to August 15, 1977, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein the Union, within its territorial jurisdiction, has been, and is now, the exclusive repre-

sentative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By repudiating the agreement that RCA negotiated with the Unions effective from August 15, 1977, to August 15, 1980, in said multiemployer bargaining unit; by untimely withdrawal from said unit; by unilaterally changing the wage rate and discontinuing the payments to the various benefit funds and the reporting of total hours worked by its employees as required by the collective bargaining agreement described above, and the preceding agreement; and by making direct arrangements with employees for payment of wages in derogation of the provisions of the collective-bargaining agreement and the Union's status as exclusive bargaining representative, Respondent has violated Section 8(a)(5) and (1) of the Act.

6. By constructively discharging employees Willie Williams and Simon Rangel, Respondent has violated Section 8(a)(3) and (1) of the Act.

7. By attempting to persuade employees to abandon the Union and remain in Respondent's employ by promising them better working conditions if they did so, Respondent has violated Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent has violated Section 8(a)(1) and (5) of the Act, *inter alia*, by its untimely withdrawal from the multiemployer bargaining unit, and by repudiating the collective-bargaining agreement effective from August 15, 1977, to August 15, 1980, between RCA and the Unions. I shall therefore recommend that Respondent recognize and bargain with the Union, within its territorial jurisdiction as the exclusive bargaining representative of its employees in the multiemployer bargaining unit found appropriate herein, that, upon request by the Union, it sign said agreement and comply with the terms and conditions thereof, both retroactively and for the balance of its term, including making payments to the Union Roofers depository for the health and welfare fund and the various other benefit funds as prescribed in said collective-bargaining agreement; make whole the employees in the appropriate unit for any loss of wages or other benefits they may have suffered as a result of Respondent's unlawful refusal to bargain; and make the payments to the various benefit funds as prescribed in the 1974-77 agreement which Respondent did not make as a result of its wage agreement with Williams and Cooke.

I have also found that Respondent constructively discharged Simon Rangel and Willie Williams in violation of Section 8(a)(1) and (3) of the Act. It is therefore recommended that Respondent offer each of them immediate and full reinstatement to his former job or, if that job no longer

<sup>25</sup> *N.L.R.B. v. Joseph T. Strong d/b/a Strong Roofing and Insulating Co.*, 393 U.S. 357 (1969). *Goodsell & Vocke, Inc.*, 223 NLRB 60 (1976).

<sup>26</sup> *Bueter Bakery Corporation and Albert Kelly, Receiver in Bankruptcy*, 223 NLRB 888 (1976). *Everbrite Electric Signs, Inc.*, 222 NLRB 679, 684 (1976).

<sup>27</sup> Both Rangel and Williams state that another reason they quit was the payroll checks written on insufficient funds. In view of the fact that Williams had continued in Respondent's employ for more than a year and Rangel for several months in spite of such checks, I find that their quitting was precipitated by the repudiation of the contract.

exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make each of them whole for any loss of pay suffered by reason of the discrimination against him. All backpay is to be computed with interest thereon in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>28</sup>

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>29</sup>

The Respondent, Western Pacific Roofing Corporation, Bell, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive representative, in its territorial jurisdiction of Respondent's employees in the following appropriate unit:

All employees employed by the employer-members of the RCA in the job classification set forth in the collective bargaining agreement between the Unions and RCA, effective from August 15, 1974 to August 15, 1977.

(b) Withdrawing from said 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; or except at such other time it may lawfully withdraw.

(c) Refusing to sign, and acknowledge that it is bound by the terms of the collective-bargaining agreement between the Unions and RCA effective August 15, 1977.

(d) Unilaterally changing the wage rate and discontinuing making payments to the various benefit funds and the reporting of total hours worked by its employees as required by said collective-bargaining agreements.

(e) Dealing directly and individually with unit employees in derogation of the Union's status as exclusive collective-bargaining representative.

(f) Unlawfully discharging its employees.

(g) Attempting to persuade its employees to abandon the

Union and remain in Respondent's employ by promising employees better working conditions if they did so.

(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

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

(a) Forthwith sign, and acknowledge that it is bound by the terms of, the collective-bargaining agreement between the Unions and RCA effective August 15, 1977; and comply with the terms and conditions thereof, both retroactively and for the balance of its term, and make such payments to the union roofers depository for the various benefit funds as prescribed in said agreement, and the preceding agreement as set forth in the remedy section herein.

(b) Make its employees whole for any loss of wages and benefit they may have suffered as a result of its failure to comply with the terms and conditions of the above-described agreement in the manner set forth in the section herein entitled "The Remedy."

(c) Offer Willie Williams and Simon Rangel immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(d) Make Willie Williams and Simon Rangel whole for any loss of pay they may have suffered by reason of the discrimination against them in the manner set forth in the section herein entitled "The Remedy."

(e) Preserve and, upon reasonable request, make available to the Board and its agents, for examination and copying, all payroll records, and reports and all other records required to ascertain the amounts, if any, of any backpay due under the terms of this recommended Order.

(f) Post at its place of business in Bell, California, copies of the attached notice marked "Appendix."<sup>30</sup> Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(g) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>28</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>29</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>30</sup> In the event that 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."