

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

AEI2, LLC

and

Case 4-CA-32421

LABORERS INTERNATIONAL  
UNION OF NORTH AMERICA,  
LOCAL 199, AFL-CIO

**Margaret M. McGovern, Esq.,**

for the General Counsel.

**John D. Meyer, Esq.,**

for the Respondent.

**Johathan Walters, Esq.,**

for the Charging Party.

## DECISION

### Statement of the Case

Jane Vandeventer, Administrative Law Judge. This case was tried on April 12, 2004, in Philadelphia, Pennsylvania. The complaint alleges Respondent violated Section 8(a)(1) and (5) of the Act by repudiating a collective bargaining agreement. The complaint also alleges Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to furnish necessary and relevant information to the Union. The Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the hearing, the parties filed briefs, which I have read.<sup>1</sup>

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

### Findings of Fact

#### I. Jurisdiction

Respondent is a corporation with an office and place of business in Berlin, New Jersey, where it is engaged in the provision of asbestos abatement services to other businesses in the construction industry. During a representative one-year period,

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<sup>1</sup> The General Counsel also filed an unopposed motion to correct the transcript which is hereby granted.



Side Letter was not approved by the Regional Office of the Union. In early July, subsequent to this telephone call, Miner met briefly with McKenna at a school in Dover, Delaware, where Respondent was performing work. According to Miner, he stated to McKenna that the June 21 Side Letter was not approved, and McKenna replied that he knew that. According to Miner, McKenna stated "they called and said it was a no-go." Miner and McKenna agreed to meet again. While McKenna testified generally that he had not discussed the June 21 Side Letter with Miner during this encounter, he did not specifically deny Miner's testimony about his remarks. It is undisputed that there exists no writing denying approval of the June 21 Side Letter. I find that McKenna knew well before August 6, 2002, that the Regional Office of the Union had rejected the June 21 Side Letter.<sup>2</sup>

On August 6, 2002, Miner, accompanied by the Union's president, William Carter, met with McKenna at a diner in Delaware. They talked about the idea of Respondent's signing the new 2002-2004 collective bargaining agreement. They also visited some large job sites together. The three men then went to the Union's office. McKenna was given a copy of the 2002-2004 collective bargaining agreement, which he read over. According to Miner and Carter, McKenna read over the agreement for an hour or thereabouts, asked a number of questions, and discussed a number of items, such as the prevailing wage. McKenna then signed the 2002-2004 collective bargaining agreement and received a copy of it, including the signature page. It is undisputed that McKenna signed the agreement, and that no mention was made by McKenna on August 6, 2002, of the June 21 Side Letter. One provision of the 2002-2004 collective bargaining agreement (Article VIII) includes language stating that "the relationship of the parties is fully and exclusively set forth herein, and by no other means, oral or written. Practices not part of the terms and conditions of this Agreement will not be recognized."

In September 2002, McKenna telephoned Miner to discuss a prospective job bid for the Delaware De-lead Project. McKenna asked how many men the Union could supply who were licensed in lead abatement. Miner informed McKenna that some licensed workers were available, and the Union would train twenty additional workers. Subsequently, McKenna submitted a pre-qualifying bid on the job, identifying Respondent as a "Union contractor" and stating therein that Respondent would employ certified, trained workers from the Union. Respondent was awarded this job, and began work in February 2003. Respondent did not, in fact, obtain its workers for the Delaware De-Lead Project from the Union's referral system.

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<sup>2</sup> There were relatively few contradictions in the testimony of the witnesses. Most of the events which occurred are not in dispute. However, in the few instances where there are small differences in testimony, I credit Miner over McKenna. Miner's testimony demonstrated a better recall, was given clearly and in detail, and was corroborated on several points by the testimony of Carter. McKenna evinced a poor memory, at times contradicted himself, and at one point contradicted a writing he had authored. I find that his testimony is less reliable than that of Miner. Specifically, I credit Miner's testimony to the effect that McKenna acknowledged to Miner that he was aware that the Letter of Intent with the attached June 21 Side Letter had not been accepted as a collective bargaining agreement by the Regional Office of the Union.

On March 17, 2003, McKenna sent a letter to the Union stating that Respondent was terminating the 2002-2004 collective bargaining agreement immediately. Shortly thereafter, on April 2, 2003, the Union responded by letter stating that Respondent could not legally do so. In the same letter, the Union also requested information  
5 concerning Respondent's Delaware jobs, locations of jobs, general contractors' names, customers, and employee names for the previous six months. It is undisputed that Respondent never provided any of the requested information to the Union.

10 In the fall of 2003, the auditors of the joint benefit trust funds named in the collective bargaining agreement conducted an audit of Respondent's payroll and benefit payments from August 6, 2002 through August 31, 2003. In doing so, the auditors of the funds had access to payroll records for a portion of this period, but not the entire  
15 period. It is likewise undisputed that the portion of the payroll records which were made available to these auditors by Respondent were never provided to the Union.

On November 5, 2003, after the charge in this matter had been filed, Respondent wrote a letter to the Board's Regional Office, with a copy to the Union, stating that it  
20 rescinded its March 17, 2003, letter.

In early 2004, Respondent notified the Union in a timely fashion of its intention to terminate the 2002-2004 collective bargaining agreement at the end of the current term,  
25 April 30, 2004.

The General Counsel and the Charging Party take the position that the collective bargaining agreement entered into by Respondent on August 6, 2002, is a complete and enforceable agreement, and that Respondent violated the Act by failing to apply the  
30 contract, and by repudiating it. Furthermore, they contend that Respondent also violated the Act by failing to provide the requested information to the Union.

The Respondent contends that the collective bargaining agreement consists of the 2002-2004 collective bargaining agreement signed on August 6, 2002, together with  
35 the June 21 Side Letter. Respondent further contends that the Board may not address contract issues, and that the current law governing Section 8(f) contracts should be reversed.

## 40 B. Discussion and Analysis

### 45 1. The Applicable Law

The leading case which defines the obligations of an employer who enters into a Section 8(f) agreement is **John Deklewa & Sons**, 282 NLRB 1375 (1987), en'f'd. sub  
45 nom. **Iron Workers Local 3 v. NLRB**, 843 F.2d 770 (3rd Cir. 1988), cert. denied 488 U.S. 889 (1988). The Board held that such agreements are enforceable under Section 8(a)(5) of the Act, and may not be unilaterally repudiated during their term. See also, **Gem Management Co.**, 339 NLRB No. 71, sl. op. at p. 13 (2003).  
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In addition, the Board has held that a respondent's conduct may be evidence of adoption of a contract in the Section 8(f) context. Once an employer has voluntarily

adopted a contract, it is foreclosed under **Deklewa** from repudiating it during its term. See, e.g., **E.S.P. Concrete**, 327 NLRB 711, 712 (1999).

5 The Board has consistently applied the parol evidence rule when deciding issues relating to contracts. The Board has held that evidence of oral agreements which vary the terms of a written contract will not be given effect, nor will evidence of written conditions or amendments be given effect. See, e.g., **America Piles, Inc.**, 333 NLRB 1118, 1119 (2001); **Sommerville Construction Co.**, 327 NLRB 514 (1999); **W. J. Holloway & Son**, 307 NLRB 487 (1992); **Sheet Metal Workers Local 208 (Mueller Co.)**, 278 NLRB 638, 645 (1986).

## 2. The Collective Bargaining Agreement

15 The collective bargaining agreement signed by the parties on August 6, 2002, was, by its terms, a complete agreement. Respondent contends that the June 21 Side Letter was a part of the agreement. However, the June 21 Side Letter is not attached to, nor referenced in the collective bargaining agreement. It was not discussed at the August 6, 2002, meeting. It was not negotiated or entered into on that date, rather it had been negotiated some six weeks earlier. In addition, it had been specifically rejected by the Union's Regional Office several weeks before August 6, 2002. It is also undisputed that McKenna did not mention the June 21 Side Letter on August 6, 2002. All these factors demonstrate that the June 21 Side Letter was not made a part of the collective bargaining agreement entered into on August 6, 2002. Board law clearly excludes it as parol evidence. I find, as the General Counsel contends, that the August 6, 2002, collective bargaining agreement was the complete agreement between the parties, and that Respondent was bound by it.

30 Even if Respondent's contention that McKenna believed the June 21 Side Letter was a part of the collective bargaining agreement were to be accepted, it is apparent that the mistake was his alone, and not shared by the Union. It is well settled that unilateral mistake is *not* grounds for rescission of a contract. See, e.g., **Carpenters Local 405**, 328 NLRB 788, 794 (1999).

40 If more is needed, the General Counsel urges that Respondent's conduct in holding itself out to the State of Delaware as a union contractor amounts to "adoption by conduct." I find that Respondent's conduct in September and October 2002 supports such a finding. In addition, it shows that in September 2002, Respondent was not intending to wait until it had performed \$500,000 worth of business to apply the contractual terms, but was acting as if it were bound to the collective bargaining agreement without that condition.

45 It is undisputed that Respondent did not adhere to the terms and conditions of employment set forth in the 2002-2004 collective bargaining agreement. I find that Respondent, by repudiating the collective bargaining agreement during its term, and by failing to adhere to the terms of a collective bargaining agreement to which it was bound, Respondent has violated Section 8(a)(5) of the Act.

### 3. The Request for Information

5 It is undisputed that Respondent failed to provide the Union with information which is patently necessary to its administration of the collective bargaining agreement. Since Respondent was bound to the collective bargaining agreement it signed, the Union had a right to information which it needed in order to administer the contract and to monitor compliance with it. I find that Respondent has violated Section 8(a)(5) of the Act by failing and refusing to supply the necessary and relevant information requested 10 by the Union on April 2, 2003. **Commonwealth Communications**, 335 NLRB 765 (2001), enfd. denied 312 F.3d 465 (DC Cir. 2002).

#### Conclusions of Law

15 1. By repudiating the 2002-2004 collective bargaining agreement, Respondent has violated Section 8(a)(5) and (1) of the Act.

20 2. By failing to adhere to the terms and provisions of the 2002-2004 collective bargaining agreement, Respondent has violated Section 8(a)(5) of the Act.

3. By failing and refusing to provide the Union with necessary and relevant information, Respondent has violated Section 8(a)(5) of the Act.

25 4. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

#### Remedy

30 Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. I shall recommend that Respondent be ordered to reimburse all its unit employees employed since August 6, 35 2002, for the deficiencies in their wage rates and other benefits. As for contractual benefit funds and other payments, the determination of which such payments Respondent should have made and the amounts necessary to remedy Respondent's failure to comply with its contractual obligations will be left to the compliance stage. See **Merryweather Optical Co.**, 240 NLRB 1213, 1217, fn. 7 (1979). Respondent shall 40 comply with the provision of information requirements of the collective bargaining agreement in order to allow the Union and the benefit funds trustees to calculate funds due and owing under the collective bargaining agreement consistent with the findings and conclusions of this decision. Respondent shall also be required to make 45 employees whole by reimbursing them for any expenses resulting from Respondent's failure to make required benefit fund payments in the manner prescribed in **Kraft Plumbing & Heating**, 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as provided in **New Horizons for the Retarded**, 283 NLRB 1173 (1987).

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

ORDER

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The Respondent, AEi2, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Repudiating the 2002-2004 collective bargaining agreement.

(b) Failing to adhere to the terms and provisions of the 2002-2004 collective bargaining agreement.

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(c) Failing and refusing to provide the Union with necessary and relevant information.

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

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

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(a) Immediately comply with the request for information from the Union dated April 2, 2003.

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(b) Make whole, with interest, all employees in the bargaining unit for any loss of earnings or other benefits they may have suffered as a result of Respondent's failure and refusal to adhere to the terms of the collective bargaining agreement.

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(c) Make whole, with interest, the unit employees by paying the pension and other benefit funds contributions mandated by the collective bargaining agreement that Respondent failed to make, and reimburse unit employees for expenses ensuing from Respondent's failure to make the required payments, with interest, in the manner set forth in the remedy section of this decision.

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(d) Remit to the Union the dues that employees through signed checkoffs authorized Respondent to deduct from their wages, with interest.

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(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

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

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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.

5 (f) Within 14 days after service by the Region, post at its Berlin, New Jersey,  
location copies of the attached notice marked "Appendix." Copies of the Notice shall  
also be posted at all Respondent's Delaware jobsites, and mailed to all employees who  
10 were employed in Delaware from August 6, 2002, through April 30, 2004. 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  
15 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  
20 current employees and former employees employed by the Respondent at any time  
since August 6, 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  
25 the steps that the Respondent has taken to comply.

Dated, Washington, D.C., June 30, 2004.

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**Jane Vandeventer**  
**Administrative Law Judge**

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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** repudiate the terms and conditions of our collective bargaining agreement with Laborers International Union of North America, Local 199, AFL-CIO during the term of the agreement.

**WE WILL NOT** fail and refuse to recognize and abide by the terms of that agreement.

**WE WILL NOT** refuse to bargain collectively with the Union by failing and refusing to adhere to the terms of the collective bargaining agreement, including but not limited to making contractually required payments to pension and other benefit funds that are mandatory subjects of bargaining and making dues-checkoff payments on behalf of employees who have authorized us to deduct them from their wages.

**WE WILL NOT** refuse or fail to provide relevant information requested by the Union for the purpose of carrying out its representational duties.

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

**WE WILL** make whole, with interest, all employees in the bargaining unit for any loss of earnings or other benefits they may have suffered as a result of our unlawful failure and refusal to adhere to the terms of the collective bargaining agreement.

**WE WILL** make whole, with interest, the unit employees by paying the pension and other benefit funds contributions mandated by the collective bargaining agreement that we failed to make, and reimburse unit employees for expenses ensuing from our failure to make the required payments, with interest.

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

**WE WILL** immediately comply with the request for information from the Union dated April 2, 2003.

**AEI2, LLC**  
\_\_\_\_\_  
**(Employer)**

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

**This is an official notice and must not be defaced by anyone.**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

615 Chestnut Street, One Independence Mall, 7th Floor, Philadelphia, PA 19106-4404  
(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-7643.