

Nos. 08-71053 & 08-71763

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL UNION NO. 169**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

RONALD MEISBURG

General Counsel

JOHN E. HIGGINS, JR.

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

ROBERT J. ENGLEHART

Supervisory Attorney

STEVEN B. GOLDSTEIN

Attorney

National Labor Relations Board

1099 14th Street, N.W.

Washington, D.C. 20570

(202) 273-2978

(202) 273-3711

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Laborers' International Union of North America, Local Union No. 169 ("the Union") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's Decision and Order issued against the

Union. The Board's Decision and Order issued on February 6, 2008, and is reported at 352 NLRB No. 8. (BSER 236-47.)¹

The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, because the unfair labor practice occurred in the state of Nevada.

The petition for review and the cross-application for enforcement were timely filed on March 13, 2008, and April 28, 2008, respectively; the Act places no time limit on the institution of proceedings to review or enforce Board orders. Frehner Construction Co., Inc. ("the Company") has filed a motion for reconsideration of the Court's denial of its motion to intervene on the side of the Board.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably found that the Company is not bound to the Union's 2004-2010 successor collective-bargaining agreement with a

¹"BSER" references are to the Board's Supplemental Excerpts of Record. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

multiemployer association, and that the Union therefore violated Section 8(b)(3) of the Act by refusing to bargain with the Company for a separate collective-bargaining agreement upon its certification as the Section 9(a) representative of the Company's employees.

STATEMENT OF THE CASE

This case highlights the fact that building and construction industry employers and unions have different rights and responsibilities depending upon whether their dealings with each other through a multiemployer association are governed by Section 8(f) or Section 9(a) of the Act (29 U.S.C. § 158(f) or 159(a)).² After the Union was certified as the

² Section 8(f) of the Act (29 U.S.C. § 158(f)) provides in relevant part:

It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged . . . in the building and construction industry with a labor organization. . . because . . . the majority status of such labor organization has not been established . . . prior to the making of such agreement[.]

Section 9(a) of the Act (29 U.S.C. § 159(a)) provides in relevant part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment[.]

representative of the Company's laborers pursuant to Section 9(a) of the Act, the Company asked the Union to bargain for a collective-bargaining agreement covering its laborers. The Union refused, claiming that the Company was already bound to a successor collective-bargaining agreement that the Union had negotiated with a multiemployer association--months *before* the Union was certified as the 9(a) representative of the Company's employees.

The Company then filed an unfair labor practice charge over the Union's refusal to bargain. Based on the Company's charge, the Board's General Counsel issued a complaint alleging that the Union's admitted refusal to bargain with the Company violated the Act. (BSER 237; 77, 78-82, 83-99.) After a hearing, an administrative law judge issued his decision, finding that the Company was not bound to the Union's successor collective-bargaining agreement with the multiemployer association, and that the Union therefore violated the Act by refusing to bargain with the Company for a separate collective-bargaining agreement covering just the Company's employees. (BSER 243-46.) After the parties filed exceptions, the Board issued its decision, finding, in agreement with the judge, that the Union's refusal to bargain was unlawful. (BSER 236 & n.1.)

STATEMENT OF THE FACTS

I. The Board's Findings of Fact

A. Background; in 2000, Company President Michael Pack Participates in Multiemployer Bargaining with the Union, and the Company Becomes Bound to the Multiemployer Association's 2000-2005 Section 8(f) Collective-Bargaining Agreement with the Union

The Company is a Nevada corporation engaged in the building and construction of roads and buildings. (BSER 237; 78-79 paragraph 2(a), 83 paragraph 2.) The Company performs work with its own employees, but subcontracts certain specialty work to subcontractors. (BSER 238; 14-15.) The Company has been a long-standing member of the Nevada Chapter of the Associated General Contractors of America ("AGC"), a multiemployer association composed of employers who are engaged in the building and construction industry and which negotiates union collective-bargaining agreements on behalf of certain of its members. (BSER 238; 30-31, 42-43, 54-56, 100, 101-19.)

In May 1995, the Company entered into a proxy agreement with the AGC that appointed the AGC to be its lawful proxy "to represent [it] and negotiate a labor agreement on [its] behalf, and if such agreement is satisfactory to [its] proxy to sign such labor agreement" with the Union. (BSER 238; 7, 100.) Shortly thereafter, the AGC and the Union entered into

a collective-bargaining agreement, to which the Company was bound.

(BSER 238; 17.)

In 2000, Company President Michael Pack served as a member of the AGC's bargaining committee and participated in contract negotiations between the AGC and the Union that led to a Section 8(f) collective-bargaining agreement between the AGC and the Union, effective by its terms from July 16, 2000 to July 15, 2005. (BSER 238; 7-9, 16, 22, 24, 28, 101, 114-15.) The Company was bound to that agreement, and observed it at all relevant times. (BSER 238; 8, 9.)

B. In 2003, the Union Refuses To Grant the Company All the Relief It Seeks from the Subcontracting Provision of the Union Contract

The 2000-2005 agreement contained a subcontracting provision that required covered employers to ensure that their subcontractors observed the terms of the union contract, and made them responsible if their subcontractors did not observe the terms of the union contract. (BSER 238-39; 103.)

Prior to 2003, the Company normally subcontracted certain work in Northern Nevada to an entity known as United Rentals, which was party to a contract with the Union. (BSER 238; 9, 18.) However, in 2003, the Company began experiencing difficulty with the Union because United

Rentals ceased work entirely in the area, and the Company could not find other unionized subcontractors to perform the work that United Rentals used to perform. (BSER 238-39; 9-11, 19-20.) Although the Union gave the Company some concessions, the Union did not give the Company all the relief it sought from the subcontracting provision. (BSER 238-39 & n.4; 10-11, 21, 23, 230-35.)

C. On June 1, 2004, the AGC and the Union Agree To Engage in “Informal Discussions” About the Possibility of Modifying or Extending the Collective-Bargaining Agreement Set To Expire in 2005; the Company Does Not Participate in the Informal Discussions Between AGC and the Union

In 2004, the AGC and the Union decided to engage in early “informal discussions” about the possibility of modifying or extending their existing collective-bargaining agreement. By labeling the talks “informal discussions” rather than negotiations, the parties wished to avoid a situation whereby they might resort to economic weapons such as strikes or lockouts to advance their positions. (BSER 239; 43, 44-45, 47-49.) Accordingly, on June 1, 2004,³ the AGC and the Union signed a memorandum of understanding, agreeing that they would engage in informal discussions concerning the possibility of modifying or extending the collective-bargaining agreement, and that, if the parties reached agreement over the

³ All dates in this section are in 2004, unless otherwise noted.

terms of a proposed renewal during the informal discussions, they would then formally open that agreement to make such modifications. The AGC and the Union also agreed that, by entering into the informal discussions, they were not terminating or opening the existing agreement, and that, if the “informal discussions” failed, the formal termination and opening language of the existing agreement would remain in effect. (BSER 239; 44-46, 120.)

Pursuant to their memo of understanding, the AGC and the Union met several times between June 22 and July 21 to engage in their “informal discussions” for a successor collective-bargaining agreement. (BSER 239; 37A, 58A, 120A.) The Company did not attend any of the informal discussion sessions between the AGC and the Union, and did not give any indication to AGC whether it wished to be bound to a successor agreement between the AGC and the Union. (BSER 241 & n.15, 246; 13, 27, 61-62.)

On July 21, the AGC and the Union shook hands on an apparent deal, but their “agreement” did not specify an effective date for the new contract to take effect. (BSER 239-40; 65-67, 70-71.)

D. On July 26 or 27, 2004 the Company Withdraws Its Proxy from the AGC, and Tells the AGC that It Does Not Wish To Be Bound to a Successor Agreement Between the AGC and the Union; on July 27 or 28, the Company and the AGC Tell the Union that the Company Has Withdrawn Its Proxy from the AGC, and that the Company Does Not Wish To Be Bound to a Successor Agreement Between the AGC and the Union; on July 30, the AGC and the Union Formally Reopen Their Contract, and Sign a Successor Agreement

On July 26 or 27, Company President Pack spoke to AGC Executive Director John Madole Jr., and learned that the AGC and the Union had reached, or were close to reaching, a tentative understanding for a new collective-bargaining agreement. (BSER 240-41; 29-30, 35-36, 54.) Pack said that the Company did not wish to be bound to the new agreement, and Madole suggested that the Company should withdraw its proxy. (BSER 241; 29, 36, 56, 57-58.) On July 27, the Company withdrew its proxy via a faxed letter to the AGC that stated:

You are hereby notified that Frehner Construction Company, Inc. herewith revokes any or all proxies heretofore given you with respect to negotiations on a new bargaining agreement with the Laborers' International Union of North America, Local 169.

You are not authorized nor empowered to act as proxy holder or agent on our behalf in any negotiation, nor to execute any bargaining agreement on our behalf, with any of the foregoing named Union.

The withdrawing of our proxy is for future agreements only, not the agreement to which we are currently bound to with the Laborers' International Union of North America, Local 169, which is currently in place until July 15, 2005.

(BSER 241; 12, 56-57, 121.)

On July 27 or 28, Company President Pack telephoned Union Business Manager Richard “Skip” Daly, and told him that the Company had sent AGC a letter withdrawing its proxy, and would not be bound to any contract extension. (BSER 241; 33, 68-69, 72-73, 75-76.) AGC Executive Director Madole also told the Union that the Company had withdrawn its proxy, and sent the Union a letter dated July 27, 2004 confirming that the Company had withdrawn its proxy. (BSER 59-60, 63-64, 229.) Pursuant to the Union’s request, the AGC subsequently sent the Union a copy of the Company’s July 27 letter. (BSER 241 n.16; 59-60, 74, 144-45.)

On July 30, the AGC and the Union formally opened negotiations and extended the agreement, with certain modifications, through July 15, 2010. (BSER 241; 143, 146-47.) That same day, the AGC and the Union entered into a memorandum of understanding, which stated as follows:

WHEREAS the Union and the AGC entered into a MEMORANDUM OF UNDERSTANDING dated June 1, 2004 to engage in informal discussions with respect to the possibility of amending, modifying, extending, and/or renewing the Laborers Master Agreement dated July 16, 2000 prior to the formal expiration of the existing Laborers Master Agreement; AND

WHEREAS, as a result of the informal discussions, the Union and the AGC have arrived at a mutual agreement and understanding as to the terms and conditions of the amendments, modifications,

extension, and/or renewal of the existing Laborers Master Agreement;

THEREFORE, the Union and the AGC agree as follows:

The Union and the AGC will formally open the existing . . . Agreement for the sole and exclusive purpose of executing a successor . . . Agreement that incorporates the amendments, modifications, extension and/or renewal that have been agreed to during the informal discussions.

The Successor Laborers Master Agreement shall be effective July 30, 2004. The agreed to amendments, modifications, extension and/or renewal derived from the informal discussions shall be incorporated by reference . . . and shall remain in full force and effect to and including July 15, 2010

(BSER 241; 143.)

That same day, the Union also sent a letter to the Company and other contractors, which stated, “On July 30, 2004, [the Union and AGC] formally opened the Laborers Master Agreement and agreed to . . . amend, modify, extend, and/or renew the [existing collective bargaining agreement] through July 15, 2010.” (BSER 241; 37, 146.)

E. On May 4, 2005, the Union Seeks Certification as the Section 9(a) Representative of the Company's Employees; the Company Recognizes the Union as the Section 9(a) Representative of Its Employees, and Repeatedly Requests that the Union Bargain with It over a New Contract; the Union Refuses, Claiming that the Company Is Already Bound to the Union's Successor Contract with the AGC

By letter dated March 24, 2005, the Union informed the Company that it represented a majority of the Company's laborers, and demanded recognition as the representative of the Company's employees pursuant to Section 9(a) of the Act. (BSER 242; 122-27.) When the Company did not respond, the Union filed a petition with the Board on May 4, 2005, seeking certification as the 9(a) representative of the Company's employees. (BSER 242; 128.)

By letter dated May 9, 2005, the Company reminded the Union that that the Company had previously withdrawn authority from any other entity, including the AGC, to bargain on its behalf, and gave the Union notice of its intent to terminate the contract set to expire on July 15, 2005. At the same time, the Company indicated that it wished to bargain with the Union for a new collective-bargaining agreement, and asked the Union to contact it. (BSER 242; 130-31.) In a May 18, 2005 reply, the Union claimed that the Company was already bound to the successor agreement that the Union had negotiated with the AGC. (BSER 242; 132-34.)

On July 12, 2005, after the Union won a Board conducted election, the Company recognized the Union as the representative of its laborers pursuant to Section 9(a) of the Act. (BSER 242; 135.) The Company asked the Union to bargain for a new agreement to replace the one set to expire on July 15, 2005. (BSER 242; 135.) The Company also stated that, if the parties did not reach agreement over a new contract by July 15, it would continue to abide by the terms of the expired contract until impasse or until the parties reached a new agreement. (BSER 242; 135.)

On July 18, 2005, the Board certified the Union as the exclusive collective-bargaining representative of the Company's full-time and regular part-time laborers pursuant to Section 9(a) of the Act. (BSER 242; 129.) In a July 22, 2005 reply to the Company's July 12 request to bargain, the Union repeated its contention that the Company was already bound to the 2004-2010 successor agreement that the Union had negotiated with the AGC. The Union claimed that the Company's withdrawal of its proxy was untimely, because the Company had not withdrawn its proxy until after the Union and the AGC had already begun negotiations for, and reached agreement over, the terms of a successor agreement. (BSER 242; 136-39.) The Union further claimed that the Company's request to bargain over a separate

contract covering just its employees was therefore untimely. (BSER 242; 138.)

On July 29, 2005, the Company denied that it was bound to AGC's successor agreement, and repeated its request to bargain. (BSER 242; 140-41.) On August 4, 2005, the Union reiterated its contention that the Company was bound to the 2004-2010 successor agreement. The Union further stated that it "would be inappropriate, and not in the best interest of our Members, to comply with your request to negotiate until this disagreement over the timeliness of your request is resolved." (BSER 242; 142.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On February 6, 2008, the Board (Members Liebman and Schaumber) issued its decision, finding, in agreement with the administrative law judge, that the Union violated Section 8(b)(3) of the Act (29 U.S.C. § 158(b)(3)) by refusing to meet, and bargain in good faith with, the Company for a new collective-bargaining agreement upon the Union's certification as the 9(a) representative of the Company's laborers. (BSER 236 & n.1, 246.)

The Board's Order requires the Union to cease and desist from the unfair labor practice found. (BSER 236.) Affirmatively, the Board's Order requires the Union to, on request, meet and bargain with the Company and to

embody any understanding that is reached in a signed agreement; to post an appropriate notice for the usual length of time; and to provide signed copies of the notice for posting by the Company at its option. (BSER 236-37.)

SUMMARY OF ARGUMENT

The Union's admitted refusal to bargain with the Company for a collective-bargaining agreement covering the Company's employees violates the express language of the Act. The Board reasonably rejected the Union's claim that it was entitled to refuse to bargain with the Company for a separate contract because the Company was already bound to the successor collective-bargaining agreement that the Union had negotiated with a multiemployer association. Thus, the Board found that the Company was not bound to that agreement because it was not part of the multiemployer bargaining unit prior to the dispute, and it, in any event, had not engaged in a distinct affirmative act recommitting to the Union that it would be bound by the multiemployer negotiations.

The Union's arguments to the contrary largely ignore that there is a fundamental difference between the rules governing Section 8(f) bargaining relationships and those governing Section 9(a) bargaining relationships. Because an 8(f) employer, unlike a 9(a) employer, has no obligation to bargain with a union for a successor contract, mere inaction on the part of

the 8(f) employer during the multiemployer negotiations does not suffice to demonstrate that the 8(f) employer has chosen to bargain for a successor contract and to be bound by the results of multiemployer bargaining.

Accordingly, where, as here, a union has a Section 8(f) relationship with an employer and a multiemployer association, the 8(f) employer's failure to withdraw from the multiemployer bargaining arrangement before the commencement of negotiations for a successor contract does *not* suffice to bind that employer to the association's successor agreement with the union.

The case law cited by the Union is inapposite. The Board, with court approval, has held that the rules the Union references are not applicable to 8(f) bargaining relationships, but rather govern only 9(a) bargaining relationships. And, given the settled state of the law in 2004, the Union could not reasonably have believed, based on the Company's mere inaction, that the multiemployer association had authority to bind the Company to a successor agreement.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE COMPANY IS NOT BOUND TO THE UNION’S 2004-2010 SUCCESSOR COLLECTIVE-BARGAINING AGREEMENT WITH A MULTIEMPLOYER ASSOCIATION, AND THAT THE UNION THEREFORE VIOLATED SECTION 8(b)(3) OF THE ACT BY REFUSING TO BARGAIN WITH THE COMPANY FOR A SEPARATE COLLECTIVE-BARGAINING AGREEMENT UPON ITS CERTIFICATION AS THE SECTION 9(a) REPRESENTATIVE OF THE COMPANY’S EMPLOYEES

A. Standard of Review

The Board’s construction of the Act is entitled to affirmance if it is “reasonably defensible,” even if the court would have preferred another view of the statute. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496-97 (1979). The Board’s rules are entitled to affirmance as long as they are rational and consistent with the Act. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990).

The Board’s underlying findings of fact are “conclusive” if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e)). A reviewing court may not displace the Board’s choice between two fairly conflicting views of the facts, even if the court “would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). The Board’s application of the law to particular facts is reviewed under the

substantial evidence standard. *NLRB v. United Insurance Co.*, 390 U.S. 254, 260 (1968).

B. Introduction and Applicable Principles; an Employer that Is Party to a Section 8(f) Multiemployer Association Agreement with a Union Is Not Bound to the Association’s Successor Agreement with the Union Unless (1) the Employer Was a Member of the Multiemployer Bargaining Unit Prior to the Dispute, and (2) the Employer Has, by a Distinct Affirmative Act, Recommitted to the Union that It Would Be Bound by the Multiemployer Negotiations

Section 8(b)(3) of the Act (29 U.S.C. § 158(b)(3)) makes it an unfair labor practice for a union to “refuse to bargain collectively with an employer[.]” Section 8(d) of the Act (29 U.S.C. § 158(d)) defines the obligation to bargain collectively as the “performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement[.]”

In the present case, the Union, since its became the Section 9(a) representative of the Company’s employees, has admittedly (Br. 4, 9) refused to meet, and bargain with, the Company for a contract covering the Company’s employees, claiming it had no obligation to bargain with the Company because, by the time the Company asked it to bargain, the Company was “already bound” to the 2004-2010 successor agreement that

the Union had negotiated with the AGC. Accordingly, if the Board reasonably rejected the Union's claim that the Company was bound to the successor agreement between the Union and AGC, the Union's admitted refusal to bargain for a separate agreement covering just the Company's employees plainly violated the Act. *NLRB v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County*, 459 F.2d 694, 695-97 (9th Cir. 1972); *ILGWU (West Side Sportswear)*, 286 NLRB 226, 226 n.2, 227, 231-33 (1987) (union's refusal to bargain over a separate contract violated the Act because employer was not bound to union's agreement with a multiemployer association), *enforced mem.*, 853 F.2d 918 (3d Cir. 1988); *UFCW Local 1439 (Layman's Market)*, 268 NLRB 780, 785 (1984) (union's mistaken belief that employer had adopted a contract did not privilege union's refusal to meet and bargain with employer).

Under the Act, a building and construction industry employer, like its counterparts outside the building and construction industry, may deal with a union either directly on an individual basis or through a multiemployer association on a multiemployer basis. *See Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 406 n.1, 409 & n.3 (1982) ("*Bonanno*") (discussing 9(a) multiemployer bargaining); *John Deklewa & Sons*, 282 NLRB 1375, 1385 n.42 (1987) (noting that multiemployer bargaining is

permissible under 8(f)), *enforced*, 843 F.2d 770 (3d Cir. 1988). However, the rules used to determine whether an employer member of a multiemployer association is bound to the association's successor bargaining agreement with a union differ depending upon whether the union's relationship with the association is governed by Section 9(a) or Section 8(f) of the Act (29 U.S.C. § 159(a) or 158(f)). That difference flows from the fact that a building and construction industry employer and union have different rights and responsibilities depending upon whether their relationship is governed by Section 9(a) or Section 8(f) of the Act.

A union enjoys a 9(a) relationship with an employer (“the 9(a) employer”) when a majority of the employer's employees have designated or selected the union (“the 9(a) union”) to be their collective-bargaining representative. *See* Section 9(a) of the Act (29 U.S.C. § 159(a)). It is well settled that a 9(a) union is entitled to a conclusive presumption of majority status during a collective-bargaining agreement's term up to three years; and upon the contract's expiration, the 9(a) union enjoys a rebuttable presumption of majority status. *See generally, Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996). And, as the Third Circuit has explained, because a 9(a) union enjoys a presumption of majority status even after the expiration of its contract with an employer, it “is well established that an

employer with a § 9(a) relationship [with] a union has an obligation to negotiate a successor contract with the union.” *Sheet Metal Workers’ Int’l Ass’n Local 19 v. HERRE Bros., Inc.*, 201 F.3d 231, 239 (3d Cir. 1999) (“*HERRE Bros.*”). Accord *James Luterbach Construction Co., Inc.*, 315 NLRB 976, 979 (1994) (“*Luterbach*”).

It is equally well established that, if the 9(a) employer is part of a multiemployer unit, the 9(a) employer’s obligation to bargain in that unit will likewise continue, unless the employer timely chooses to bargain for a successor contract on a single employer basis. *Luterbach*, 315 NLRB at 980. And, because the 9(a) employer is obligated to bargain with a union for a successor contract, the Board has long held, with judicial approval, that a member of a multiemployer association that has a 9(a) relationship with a union *is* bound to the association’s successor contract with the union unless, among other things, the employer withdrew from the multiemployer bargaining arrangement *before* negotiations for the successor contract began. *Bonanno*, 454 U.S. at 408, 410-11, 419; *HERRE Bros.*, 201 F.3d at 244. See *Retail Associates, Inc.*, 120 NLRB 388, 395 (1958) (discussing rules governing a 9(a) employer’s withdrawal from multiemployer bargaining). Accordingly, a 9(a) employer’s “mere inaction during the multiemployer negotiations”--i.e., the 9(a) employer’s failure to timely withdraw from the

multiemployer bargaining arrangement--will bind the 9(a) employer to a successor contract reached through those multiemployer negotiations.

Luterbach, 315 NLRB at 979.

By contrast, an employer and a union have very different rights and responsibilities when they have a Section 8(f) relationship. Section 8(f) of the Act (29 U.S.C. § 158(f)), by its terms, permits, but does not require, a building and construction industry employer to enter into a collective-bargaining agreement with a union whose majority status has not been established.⁴ However, it is well settled that once an employer's Section 8(f) agreement with a union expires, the 8(f) employer is free to repudiate its entire collective-bargaining relationship with the 8(f) union and may thus refuse to bargain with the union for a new contract. *HERRE Bros.*, 201 F.3d at 239-40; *John Deklewa & Sons*, 282 NLRB 1375, 1386, 1389 (1987) ("*Deklewa*"), *enforced* 843 F.2d 770 (3d Cir. 1988). *See Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 861 F.2d 1124, 1126, 1132 n.7 (9th Cir. 1988). This is so because a Section 8(f)

⁴ Outside the building and construction industry, however, an employer violates the Act if it recognizes, or enters into a collective-bargaining agreement with, a union that has not been selected by a majority of its employees. *Int'l Ladies Garment Workers' Union v. NLRB*, 366 U.S. 731, 732, 737-38 (1961); *NLRB v. Pacific Erectors, Inc.*, 718 F.2d 1459, 1462, 1465 (9th Cir. 1983).

union, unlike a 9(a) union, does not enjoy a presumption of majority status, given that a majority of the 8(f) employer's employees, by definition, never selected the Section 8(f) union to be their collective-bargaining representative. *See HERRE Bros.*, 201 F.3d at 239; *Lutrbach*, 315 NLRB at 978-79; *Deklewa*, 282 NLRB at 1387.

On the other hand, an 8(f) employer, if it chooses to do so, may bargain for, and obligate itself to be bound to, a successor contract with a union, just as it chose to bargain for, and to be bound to, the initial contract with a union. And, if the 8(f) employer chooses to bargain for a successor contract, it may choose to do so through a multiemployer association, just as an 8(f) employer may choose to bargain on a multiemployer basis for an initial contract with a union. *Lutrbach*, 315 NLRB at 978-80.

However, as the Board explained in *Lutrbach*, because an 8(f) employer, unlike a 9(a) employer, is not obligated to bargain with a union for a successor contract on either an individual or multiemployer basis, "mere inaction" by the 8(f) employer during the multiemployer negotiations "is not sufficient to show" that the 8(f) employer has chosen to bargain for a successor contract and be bound by the results of multiemployer bargaining. *Id.* at 980-81. Accordingly, the Board held in *Lutrbach* that an employer member of a multiemployer association--that is party to an 8(f) contract with

a union--is not bound to the association's successor contract with the union unless the employer "was part of the multiemployer [bargaining] unit prior to the dispute giving rise to the case [and] has, by a distinct affirmative action, recommitted to the union that it will be bound by the upcoming or current multiemployer negotiations." *Id.* at 980. *Accord HERRE Bros.*, 201 F.3d at 240.

In short, while an employer which has a 9(a) collective-bargaining relationship and is in a multiemployer association generally is bound to the association's successor agreement with the union unless the employer withdrew before negotiations commenced, an employer with an 8(f) collective-bargaining relationship who is a member of a multiemployer association is not bound to the association's successor agreement unless, among other things, the employer affirmatively manifested to the Union its intention to be bound to the successor agreement. *Luterbach*, 315 NLRB at 979-80; *HERRE Bros.*, 201 F.3d at 240.

Before this Court, the Union concedes (Br. 3, 11) that it had a Section 8(f) relationship with the Company and with the AGC in July 2004, when it met with the AGC and reached agreement on the 2004-2010 successor contract to replace the 2000-2005 contract. As we now show, the Board reasonably found that the Company was not bound to AGC's 2004-2010

successor collective-bargaining agreement with the Union. Thus, the Company was not part of the multiemployer bargaining unit when the AGC and the Union reopened their 2000-2005 Section 8(f) contract on July 30 and entered into the successor agreement, and the Company, in any event, did not engage in a distinct affirmative act that recommitted to the Union that it would be bound by the results of the AGC's meetings with the Union in the summer of 2004.

C. The Board Reasonably Found that the Company Was Not Part of the Multiemployer Unit on July 30, when the Union and AGC Reopened Their Current Contract and Agreed to the Successor Contract, and that the Company Did Not Engage in a Distinct Affirmative Act that Recommitted to the Union that It Would Be Bound to a Successor Contract

The Board reasonably found (BSER 236 n.1, 245-46) that the Company is not bound to the 2004-2010 successor agreement between the AGC and the Union. In the first place, as the Board noted (BSER 245), the Company was not part of the multiemployer bargaining unit on July 30, when the AGC and the Union reopened the 2000-2005 contract and entered into the 2004-2010 successor agreement. Thus, by July 27, the Company had withdrawn its proxy from the AGC; the Company had informed the AGC that it was not empowered to execute an agreement on its behalf with the Union; and the Company had told the AGC that it did not wish to be bound to a successor agreement with the Union. (BSER 241, 245; 29, 36,

56-58, 121.) Moreover, by July 28, the Company and the AGC had told the Union that the Company was withdrawing its proxy and would not be bound to any extension. (BSER 241; 32-34, 59-60, 63-64, 72-73, 75-76, 229.)

As the Board further noted (BSER 236 n.1, 245-46), the Company did not engage in any distinct affirmative act that recommitted to the Union that the Company would be bound by the results of the AGC's meetings with the Union in the summer of 2004. Thus, there is no evidence that the Company ever told the Union in 2004 that it would be bound to a successor agreement that the AGC and the Union negotiated. Moreover, as the Union concedes (Br. 12), the Company "did not attend any of the meetings between the AGC and the Union" in the summer of 2004 that led to the successor 2004-2010 agreement. (BSER 246; 13, 27.) The Company's failure to attend the AGC-Union discussions in the summer of 2004 stands in stark contrast to the Company's behavior leading up to the predecessor 2000-2005 Section 8(f) agreement, when the Company did participate in the multiemployer negotiations between the AGC and the Union. (BSER 238; 8-9, 16, 22, 28.)

D. There Is No Merit to the Union's Arguments that Both Parts of the Two-Part *Luterbach* Test Are Satisfied

- 1. The Union's first claim--that the Company was still a member of the multiemployer bargaining unit prior to the dispute--is premised on its mistaken contention that the Union and AGC had reached agreement on the successor contract on July 21**

The Union argues (Br. 15-17, 24-26) that the Board should have found that the Company was still a member of the multiemployer bargaining unit prior to the dispute at issue, because, according to the Union, the Union reached agreement with the AGC over the successor contract on July 21, and the Company did not notify the AGC and the Union that it was withdrawing its proxy until July 27.

There is no merit to the Union's argument. The Union's dispute with the Company centers around its claim that the Company is bound to the Union's successor contract with the AGC. As the Board noted (BSER 241, 245; 143, 146), the memorandum of understanding between the Union and the AGC demonstrates, by its express terms, that the Union and the AGC did not reopen the prior 2000-2005 Section 8(f) agreement until July 30, 2004. The Board also reasonably found (BSER 240, 245) that, contrary to the Union's claim, the Union and the AGC had not agreed to the successor contract on July 21.

Thus, it is well settled that parties cannot be deemed to have reached agreement on a contract when they have not agreed on the contract's essential terms, such as the contract's effective date. *Transit Service Corp.*, 312 NLRB 477, 481-83 (1993); *Magic Chef, Inc.*, 288 NLRB 2, 2 n.1 (1988). The Union and AGC cannot be deemed to have reached agreement over the successor contract on July 21, because, as Union Business Manager Daly himself admitted (BSER 240; 68-69, 70), the parties had *not* agreed on the successor contract's effective date by July 21, but rather had only agreed to have it be effective as soon as the parties could physically get all the agreed-upon changes in writing. Indeed, the executive director of the AGC admitted (BSER 54, 65) that during the period July 21 to July 30, the AGC and the Union were "all over the block" regarding the successor contract's effective date. *See Transit Service Corp.*, 312 NLRB 477, 482-83 (1993) (rejecting union's claim that parties had reached agreement because the parties had not agreed on contract's effective date); *Magic Chef, Inc.*, 288 NLRB 2, 2 n.1, 11 (1988) (union's offer to let employer choose commencement date of new contract does not establish that parties had agreed to effective date). As the Board noted (BSER 240, 245; 50-51, 52-53, 65-67, 70-71, 143, 146, 151-210, 211-12, 213-14, 215-25, 226-28), the record indicates that it was not until July 30 that AGC and the Union finally

agreed on the successor contract's effective date, by which time the Company had withdrawn its proxy.

The Union incorrectly suggests (Br. 16) that the Board rejected its claim that the parties had reached an agreement on July 21 merely because they had not reduced their agreement to writing by that date. However, as the Board's decision makes clear (BSER 240), the Board based its rejection of the Union's claim on the fact that the parties had not agreed on the successor contract's effective date by July 21.⁵

In sum, the Board reasonably found (BSER 245) that the Company was not a member of the multiemployer bargaining unit prior to the dispute, because the Company had withdrawn its proxy on July 27, 2004--three days before the Union and AGC reopened their 2000-2005 agreement and agreed to the successor 2004-2010 contract. In any event, as the Board also noted (BSER 245-46), even assuming for purposes of argument that the Company

⁵ The Union also is disingenuous in claiming (Br. 17) that the Company's letter to the AGC withdrawing its proxy "arguably did not include the just completed negotiations" for the successor 2004-2010 agreement. As the Board noted (BSER 245), the remainder of the Company's letter makes clear that the Company was withdrawing authority from the AGC to negotiate any successor agreement to the 2000-2005 agreement. Thus, the letter explicitly states in the final paragraph: "The withdrawing of our proxy is for future agreements only, not the agreement to which we are currently bound to with the Laborers' International Union of North America Local 169, which is currently in place until July 15, 2005." (BSER 121.)

could be deemed a member of the multiemployer bargaining unit as of July 30, the Company would still not be bound to the association's successor agreement with the Union, because, as we now show, the Company had not engaged in a distinct affirmative act that recommitted to the Union that it would be bound to a successor agreement.

2. Contrary to the Union's second claim, the Company did not engage in a distinct affirmative act that recommitted to the Union that the Company would be bound by the results of the meetings between the AGC and the Union

The Union also argues (Br. 21, 26-34) that the second part of the *Luterbach* test is satisfied here. The Union points out (Br. 27-34) that, although the Company was aware that the AGC and the Union would be engaging in informal discussions in the summer of 2004, the Company never told the Union prior to the start of those informal discussions that it would not be bound to any agreement that the AGC might reach with the Union.⁶ According to the Union (Br. 27), the Company's "allowing" the informal discussions "to continue without objecting thereto constitute[d] 'a distinct affirmative action'" of recommitment.

⁶ The Union argues at length (Br. 28-31) that the Company "conveniently" denied receiving the Union's notification that it would be engaging in informal discussions with the AGC. However, as the judge noted (BSEER 240; 25-27), the Company admitted it was aware that the Union and the AGC would be engaging in informal discussions.

The short answer is that, as the Board noted, the Company's allowing the informal discussions to continue without objecting thereto until July 26 or 27 merely constitutes "inaction," rather than an affirmative act recommitting to the Union that the Company would be bound. And, as the Board emphasized here, *Luterbach* squarely holds that "there must be affirmative conduct that recommits an employer to multiemployer bargaining," and that "mere inaction" on the part of a member of a multiemployer association that is party to an 8(f) agreement with a union "is not sufficient to show that the 8(f) employer has reaffirmed its intention to be bound by the results of multiemployer bargaining." (BSER 236 n.1, 246) (quoting *Luterbach*, 315 NLRB at 979-80). *Accord HERRE Bros.*, 201 F.3d at 240. The Union fails to cite a single post-*Luterbach* 8(f) case in support of its argument that an 8(f) employer's failure to object to informal discussions between a multiemployer association and a union satisfies *Luterbach*'s requirement that there be a distinct affirmative act of recommitment.

Contrary to the Union's claim (Br. 23-24), this case is not "on all fours" with *Luterbach*. Put simply, the employer in *Luterbach* had by distinct affirmative acts recommitted to the union that it would be bound by the multiemployer negotiations, whereas here the Company did not. Thus,

the president of Luterbach participated in three bargaining sessions between the multiemployer association and the union that led to the successor agreement; the president chaired the joint bargaining committee; and the president served for a time as the joint bargaining committee's chief spokesperson. *See Luterbach* 315 NLRB at 977.

As the *Luterbach* Board noted, those “overt affirmative actions reasonably conveyed a commitment by the [employer] to continue, as it had in the past, to participate in, and be bound by, group negotiations.” *Id.* at 981 & n.12. By contrast, as shown, the Company did not attend any of the informal discussions between the AGC and the Union in June and July 2004, let alone serve as AGC's chief spokesperson. (BSER 246; 13, 27.) *See Iron Workers Tri-State Welfare Plan v. Carter Construction, Inc.*, 530 F.Supp.2d 1021, 1030-31 (N.D. Ill. 2008) (rejecting union's claim that employer is bound to multiemployer association's successor agreement, because, unlike *Luterbach*, the employer had not participated in the multiemployer bargaining that led to the successor agreement).⁷

⁷ The Union's reliance (Br. 23) on the concurring opinion of two Board members in *Luterbach* does not help it. Thus, the Union ignores that the majority of the Board in *Luterbach* rejected the analysis contained in that concurring opinion. *See Luterbach*, 315 NLRB at 980-81, 982. As the Board noted here (BSER 236 n.1), the common rationale of the majority in *Luterbach* (Members Stephens and Cohen, and Chairman Gould) was that

The Union does not advance its case by noting (Br. 27-28) that a company representative attended a single internal AGC strategy session at which the possibility of engaging in informal discussions with the Union was the topic of discussion. Thus, the Union does not contest the Board's finding (BSER 245-46) that there is no evidence that the Union was aware of the Company's attendance at that session. Accordingly, as the Board noted (BSER 246), the company representative's attendance at an internal AGC meeting "hardly constitutes a distinct affirmative act of recommitment" to the Union that the Company would be bound by the results of the multiemployer bargaining.

E. The Union's Reliance on *Retail Associates* Is Misplaced Because *Retail Associates* Is Not Applicable in the Section 8(f) Context

Alternatively, the Union contends (Br. 18-21) that the Company is bound to the successor 2004-2010 agreement it negotiated with the AGC

there must be affirmative conduct that recommits an employer to multiemployer bargaining, and here there was none.

under *Retail Associates, Inc.*, 120 NLRB 388 (1958).⁸ As shown, under *Retail Associates*, mere inaction by an employer that has a Section 9(a) relationship with a union--i.e., failure to withdraw from the multiemployer bargaining arrangement prior to the start of the multiemployer negotiations--generally is sufficient to bind the employer member of the association to the association's successor contract. *See Luterbach*, 315 NLRB at 979 ("In a Section 9 context, the inaction of the employer, during the multiemployer negotiations, would bind it to the successor multiemployer contract.") The Union claims (Br. 20-21, 35-36) that the Company's withdrawal from the multiemployer arrangement should be deemed untimely under *Retail Associates*--and thus the Company should be deemed bound to the successor agreement--because the Company did not withdraw until July 27, which was after the Union began its informal discussions with the AGC.

⁸ *Retail Associates*, which involved a multiemployer bargaining relationship that was governed by Section 9(a), held that once negotiations for a new contract have commenced, an employer's attempted withdrawal from multiemployer bargaining generally will be deemed untimely. *See Retail Associates*, 120 NLRB at 390, 393-95 ("the stability requirement of the Act dictates that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted from an established multiemployer bargaining unit"); *HERRE Bros.*, 201 F.3d at 244 (discussing policy reasons behind *Retail Associates* rule).

The short answer is that, as the Board noted (BSER 243), the *Retail Associates* rule simply is not applicable here. Thus, nearly 10 years before the events at issue in this case, the Board held in *Luterbach* that it would not apply the *Retail Associates* rule to Section 8(f) bargaining relationships, and the Union admittedly (Br. 3, 11) had an 8(f) bargaining relationship with the AGC and the Company in the summer of 2004. *Luterbach*, 315 NLRB at 979. See *Iron Workers Tri-State Welfare Plan v. Carter Construction, Inc.*, 530 F.Supp.2d 1021, 1032 (N.D. Ill. 2008) (“Courts only apply the . . . *Retail Associates* rules . . . once it is determined that the parties had a 9(a), as opposed to an 8(f), relationship.”).

As shown, the Board has chosen not to apply the *Retail Associates* rule to Section 8(f) bargaining relationships, because “the underlying premise for the *Retail Associates* rule--[that the employer in question has] an obligation to bargain [with the union for a successor contract]--does not exist in the context of an 8(f) relationship.” *Luterbach*, 315 NLRB at 979. The Supreme Court has explained that Congress “intended to leave to the Board’s specialized judgment the resolution of conflicts between union and employer rights that were bound to arise in multiemployer bargaining.” *Bonanno*, 454 U.S. at 409. The Board’s *Luterbach* rule has been cited with approval by the courts (see *HERRE Bros.*, 201 F.3d 231, 239-40 (3d Cir.

1999); *Iron Workers Tri-State Welfare Plan v. Carter Construction, Inc.*, 530 F.Supp.2d 1021, 1029-34 (N.D. Ill. 2008)), and the Union does not even attempt to show that it is irrational or inconsistent with the Act.

Accordingly, the Union provides no basis for the Court to disturb the *Lutzbach* rule. See, for example, *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (“We will uphold a Board rule as long as it is rational and consistent with the Act . . . even if we would have formulated a different rule had we sat on the Board”).

Contrary to the Union’s suggestion (Br. 18), the Supreme Court did not approve the application of the *Retail Associates* rule to 8(f) bargaining relationships in *Bonanno*, 454 U.S. 404 (1982). Put simply, the *Bonanno* Court did not even have occasion to address the rules governing withdrawal from multiemployer units in cases governed by Section 8(f) of the Act, because *Bonanno* involved employers outside the building and construction industry, which, by definition, are not entitled to enter into 8(f) bargaining relationships. See *id.* at 406-07 (*Bonanno*, a member of the New England Linen Supply Association, is a corporation engaged in laundering, renting, and distributing linens and uniforms). Moreover, the *Bonanno* Court could not possibly have rejected the Board’s *Lutzbach* rule, because the Supreme Court decided *Bonanno* 12 years before the Board issued its *Lutzbach*

decision.⁹ Nothing in the Court's decision suggests that the Board is precluded from establishing one set of rules for 9(a) bargaining relationships and a different set of rules for 8(f) bargaining relationships. To the contrary, as shown, the Court indicated that the Board was entitled to wide latitude in resolving the conflicts between union and employer rights that were bound to arise in multiemployer bargaining. *Id.* at 409-10.

F. Given the Board's 1994 Published Decision in *Luterbach*, the Union Could Not Reasonably Have Believed, Based on the Company's Mere Inaction, that the AGC Had Authority To Bind the Company to a Successor Agreement in 2004

Relying on general agency principles, the Union also argues (Br. 13-24) that, when it began its informal discussions with the AGC in the summer of 2004, it reasonably believed that the AGC could bind the Company to a successor agreement. In support of its agency argument, the Union points out (Br. 8, 13-14) that the Company was a member of the AGC; the Company had executed a proxy in 1995 authorizing the AGC to negotiate a collective bargaining agreement for it; the Company had abided by the 2000-2005 Section 8(f) agreement between the AGC and the Union; and that the Company and AGC failed to tell the Union prior to the start of the informal

⁹ Similarly, the circuit cases cited (Br. 18-20) by the Union likewise predate *Luterbach*.

discussions in 2004 that AGC did not have authority to negotiate for the Company.

There is no merit to the Union's agency argument. There is no evidence that in 2004 the Company ever explicitly authorized the AGC to negotiate a successor agreement to the 2000-2005 Section 8(f) agreement that was then in effect. Nor is there any evidence that in 2004 the AGC explicitly told the Union in the Company's presence that it was negotiating a successor agreement on behalf of the Company. Moreover, as shown, AGC's executive director testified that prior to July 26, he had no indication whether the Company wished to be bound by the results of the AGC's informal discussions with the Union. (BSER 241 n.15; 54, 61.)

Accordingly, the Union fails to show that the AGC had express authority to bind the Company.

The Union also fails to show that the AGC had apparent authority to bind the Company to the successor agreement. According to the Restatement (Second) of Agency § 27 (1957):

[A]pparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

It is well settled that a third party's mere belief that the alleged agent has authority to act on behalf of the principal is not sufficient to establish the existence of apparent authority; the third party's belief must be reasonable. *Anderson v. Int'l Union, United Plant Guard Workers of America*, 150 F.3d 590, 593 (6th Cir. 1998) (apparent authority "exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized"). See *Nelson v. New Hampshire Fire Insurance Co.*, 263 F.2d 586, 589 (9th Cir. 1959) (apparent authority cannot exist when the third party should have known of the alleged agent's lack of authority). Cf. *Crane Sheet Metal, Inc. v. NLRB*, 675 F.2d 256, 259 (10th Cir. 1982) (The union's misapprehension of the association's authority to bind employer is not controlling). The "burden of proving apparent authority rests on the party asserting that the act was authorized." *Moreau v. James River-Otis, Inc.*, 767 F.2d 6, 10 (1st Cir. 1985). Accord *Fenton v. Freedman*, 748 F.2d 1358, 1361-62 (9th Cir. 1984); *Trump v. Eighth Judicial District Court of State of Nevada*, 857 P.2d 740, 745 n.3 (Nev. 1993).

In determining the reasonableness of a third party's belief that the alleged agent had authority to bind the principal, the Board and the courts consider the behavior of the principal and the alleged agent in light of the state of the law at the time of the events in question. See, for example,

Metco Products, Inc. v. NLRB, 884 F.2d 156, 159-60 (4th Cir. 1989) (the Board reasonably found that the negotiator appointed by the employer had apparent authority to bind the employer to a labor agreement with the union in light of Board rule that a labor negotiator is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary) (enforcing 289 NLRB 76 (1988)); *Streetman v. Benchmark Bank*, 890 S.W.2d 212, 216 (Tex. App. 1994) (bank officer, who promised customer that bank would honor all its overdrafts, did not have apparent authority to bind bank in that regard; customer could not reasonably believe that bank would honor all its overdrafts, because customer knew that banks have lending limits and that a bank could not legally promise to pay all overdrafts).

The Union fails to show that it could reasonably have believed in the summer of 2004 that the AGC had authority to bind the Company to a successor agreement. Put simply, the Company did not engage in any affirmative act recommitting to the Union that it would be bound by the multiemployer negotiations. And for nearly 10 years before the events in question, the law governing 8(f) relationships was clear: an employer member of a multiemployer association that is party to the association's 8(f) agreement with a union is *not* bound to the association's successor

agreement unless, among other things, the employer member engaged in a distinct affirmative act recommitting to the union that it would be bound by the successor multiemployer negotiations. *See Luterbach*, 315 NLRB at 979-80.

The Union does not advance its case by pointing out (Br. 8, 13-16) that the Company had abided by prior agreements that the AGC had negotiated with the Union and that the Company failed to notify it prior to the start of the informal discussions that the Company was withdrawing from the multiemployer bargaining arrangement. As the Board stated in *Luterbach*, “[t]he fact that an employer chose to bargain a *past* contract on a multiemployer basis does not establish that the employer has agreed to bargain a *successor* contract, much less that the employer has consented to bargain a successor contract on a multiemployer basis. Some affirmative act is necessary to establish that consent.” *Luterbach*, 315 NLRB at 980-81. And, “the absence of timely notice to the union is simply a species of ‘inaction’ upon which a union in an 8(f) relationship is *not* entitled to rely.” *Iron Workers Tri-State Welfare Plan v. Carter Construction, Inc.*, 530 F.Supp.2d 1021, 1032 (N.D. Ill. 2008) (*citing Luterbach*, 315 NLRB at 979 (“in order for an employer to obligate itself to be bound by multiemployer

bargaining, there must be more than inaction, i.e., the absence of a timely withdrawal”).

To be sure, as the Union points out (Br. 31-32), the Board recognized in *Luterbach* that the requisite manifestation of an unequivocal intention to be bound will not be made to depend on a formal delegation of authority from the employer to the multiemployer association. *See Luterbach*, 315 NLRB at 981 n.13. Thus, the *Luterbach* Board recognized that an employer who, through a course of conduct, signifies that it has authorized the association to act on its behalf with regard to the successor contract will be bound by that apparent creation of authority. *Id.* at 980, 981 n.13. And, consistent with those principles, the Board found in *Luterbach* that the employer was bound by the association’s successor agreement--even though the employer did not explicitly inform the union that it was authorizing the association to negotiate a successor agreement for it--because the employer engaged in affirmative acts that “reasonably conveyed [to the union] a commitment by the [employer] to continue, as it had in the past, to participate in, and be bound by, group negotiations.” *Id.* at 981 & n.12. Thus, as shown, the employer attended three multiemployer bargaining sessions with the union, and the employer’s president chaired the

association's joint bargaining committee and served for a time as the association's chief spokesperson. *Id.* at 976-77, 981 & n.12.

But, here, as shown, the Company did not attend any of the informal discussions between the AGC and the Union. Indeed, the Company did not engage in *any* affirmative act of *any* kind that could have reasonably conveyed to the Union that it intended to be bound by the results of the AGC's informal discussions with the Union. Accordingly, given the Board's published 1994 decision in *Luterbach*, the Union could *not* have reasonably believed, based on the Company's mere inaction, that the AGC had authority to bind the Company to a successor agreement in 2004.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment denying the petition for review, and enforcing the Board's order in full.

ROBERT J. ENGLEHART
Supervisory Attorney

STEVEN B. GOLDSTEIN
Attorney

National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-3711

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
June 2008
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STATEMENT OF RELATED CASES

Board counsel are unaware of any related cases pending in this Court.

LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

June 2008

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LABORERS' INTERNATIONAL UNION OF)
NORTH AMERICA, LOCAL UNION NO. 169)
)
Petitioner/Cross-Respondent) Nos. 08-71053, 08-71763
)
v.) Board Case No.
) 32-CB-05976
NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)
)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 9,534 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this day of June 2008

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)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's brief and the Board's supplemental excerpts of record in the above-captioned case, and has also served two copies of the Board's brief and one copy of the supplemental excerpts of record by first-class mail upon the following counsel at

the addresses listed below:

Michael E. Langton, Esq.
Nevada Bar No. 0290
801 Riverside Drive
Reno, NV 89503
775-329-7577

James T. Winkler, Esq.
Littler Mendelson, P.C.
3960 Howard Hughes Parkway
Suite 300
Las Vegas, NV 89169-5937
702-862-8800

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 20th day of June, 2008