NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

A.W. Farrell & Son, Inc. and United Union of Roofers, Waterproofers, and Allied Workers, Local 162 and Sheet Metal Workers International Association, AFL-CIO, Local Union No. 88. Cases 28-CA-023502, 28-CA-060627, and 28-CA-062301

July 11, 2013 DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On December 28, 2011, Administrative Law Judge Lana H. Parke issued the attached decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed an answering brief, and the Charging Party filed a reply brief.

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

The Union excepts to the judge's failure to find that the Respondent unlawfully repudiated the parties' 2010–2012 agreement and to the judge's failure to direct the

¹ No party filed exceptions to the following findings of the judge: (1) that the Respondent established a 9(a) relationship with the Charging Party Union when those two parties executed a collective-bargaining agreement in June 2007 and a successor agreement effective from August 1, 2007 through July 31, 2010; (2) that the Respondent violated Sec. 8(a)(5) on April 28, 2011, when it withdrew recognition from the Union, and when it thereafter refused to provide the Union with some of the information it requested, delayed providing other information, and imposed limits on the Union's use of information. Accordingly, we affirm those findings.

² We shall modify the judge's recommended Order to include the appropriate language for the violations found. In addition, in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB No. 44, slip op. at 1 (2012), we shall order the Respondent to compensate the unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarter for each unit employee. We shall substitute a new notice to conform to the Order as modified.

The Union excepts to the judge's failure to direct that the Respondent furnish *all* of the information sought in the information request rather than, as the judge phrased it, "relevant information." Although the exception might well have been unnecessary—on its face the information request seeks only information that is presumptively relevant to the Union's role as the exclusive bargaining representative of the Respondent's employees—we have modified the relevant provisions of the Order and notice.

The facts underlying the information-request violations are set forth in the judge's decision.

standard remedial relief that would flow from such a finding. For the reasons stated below, we find merit in these exceptions.

Background Facts

In June 2007, the Respondent purchased the assets of Progressive Roofing, Inc., a commercial roofing enterprise located in Las Vegas, Nevada. The Respondent retained Progressive's employees and began operating the business essentially unchanged. Within days of starting operations, the Respondent executed a contract with the Union effective through July 31, 2007. The contract stated that the Respondent "voluntarily recognizes [the Union] as the majority collective bargaining representative of all the employees," and that the Respondent had established with the Union "a collective bargaining relationship within the meaning of Section 9(a) . . . based upon [the Union's] majority representative status." Not long afterwards, the Respondent and the Union executed a successor agreement, effective from August 1, 2007 through July 31, 2010, that contained the same recognition language.

On four dates in May and July 2010,³ the Respondent and four other roofing contractors met with the Union to negotiate a new agreement. The contractors did not constitute a multiemployer bargaining group, but bargained jointly with the Union for the convenience of all concerned. Their intent was to enter into five separate but essentially identical contracts. At the bargaining sessions, Union Business Manager Modesto Gaxiola represented the Union; Paul McKellar, a representative of one of the other contractors, served as the general spokesperson and chief negotiator for the contractors; and Wade Landrum, the Respondent's Las Vegas branch manager, represented the Respondent. Landrum attended all the bargaining sessions, indicated on the sign-in sheets that he was present on behalf of the Respondent, and received copies of all emails and letters that the contractors and the Union exchanged. Landrum never mentioned before or during the bargaining that he lacked authority to bind the Respondent to an agreement.

On July 28, McKellar presented the contractors' last best offer to the Union, and on July 29, by email, Gaxiola notified the contractors' representatives that the Union accepted the offer and that the Union's membership had ratified the agreement. The email, in relevant part, read:

I am pleased to report that we have met with our Membership tonight and they have agreed to accept the terms as discussed at our meeting yesterday (July 28, 2010). All items marked as pending or negotiable we

³ Except where otherwise stated, all subsequent dates are in 2010.

will accept. The only pending item I have is the language discrepancy on Addendum B, Roofers & Waterproofers Research [and] Education [Joint Trust] Fund. I will contact our International to see if they are willing to accept changes.

I will begin drafting our new 2010–2012 Collective Bargaining Agreement tomorrow, please contact me if there are any issues you would like to discuss before CBA's go to print.

On August 4, Respondent's representative, Landrum, sent an email to McKellar, the contractors' spokesperson, stating:

Please be aware that no signatory contractor speaks on behalf of [the Respondent] and that . . . I have no authority to sign a new contract. Once the proposed contract is presented for review it will go to the corporate office for consideration.

Landrum did not send a copy of the email to the Union or otherwise advise the Union of its content.

On August 5, 10, and 11, McKellar and Gaxiola exchanged emails concerning the language of the agreement; copies of all of the emails were sent to Landrum and the other contractors' representatives. On August 17, the Union transmitted copies of the final agreements to the Respondent and the other contractors. By their terms, the agreements' effective dates were September 1, 2010 through July 31, 2012. Each of the other contractors promptly executed its agreement with the Union; the Respondent did not.

On August 31, Gaxiola contacted Landrum about the delay. Landrum told Gaxiola that the agreement had to be accepted and signed by William Farrell, the Respondent's owner, and that Gaxiola should send it to Farrell in New York. In the months that followed, Gaxiola called both Farrell and Landrum to inquire about the Respondent's executing the new agreement. Farrell told Gaxiola that he first wanted to resolve some issues with another union, but when that was done he would have Landrum contact Gaxiola.

The Respondent never signed the 2010–2012 agreement, but it continued to abide by the terms of the expired agreement. By letter dated April 28, 2011, the Respondent withdrew recognition from the Union, indicating that "[it] ha[d] elected not to renew its collective bargaining agreement with [the Union] pursuant to Section 8(f)...."

Analysis

Under Section 8(d) of the Act, the duty to bargain includes "the execution of a written contract incorporating any agreement reached if requested by either party" Inherent in the obligations specified in Section 8(d) is the requirement that parties designate responsible representatives with "genuine authority to carry on meaningful bargaining regarding fundamental issues." *Teamsters Local* 771 (Ready-Mixed Concrete), 357 NLRB No. 173, slip op. at 4 (2011).

The Board has long recognized that an agent assigned to negotiate a collective-bargaining agreement is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary. Id.; University of Bridgeport, 229 NLRB 1074, 1074 (1977). A principal may limit its agent's authority, however, by giving clear and timely notice to the other parties that any tentative agreement is contingent upon subsequent approval or ratification. Id; see also Teamsters Local 771, 357 NLRB No. 173, slip op. at 5 (union agent deemed to have full authority to conclude agreement absent clear and timely notice of a limitation). To be timely, the limitations must be disclosed to the other party before an agreement is reached. See Cablevision Industries, 283 NLRB 22, 29 (1987) (bargaining agent with apparent authority to bind the employer unlawfully imposed a condition subsequent—approval by board of directors after parties arrived at a tentative agreement); Maury's Fluorescent, 226 NLRB 1290, 1292 (1976) (negotiator had apparent authority to enter into a binding agreement in the absence of contrary notice). Where a party refuses to execute a duly negotiated collective-bargaining agreement, the Board will direct it to do so and to give retroactive effect to the terms of the agreement. See Cablevision Industries, 283 NLRB at 31; Maury's Fluorescent, 226 NLRB at 1294.

By designating Landrum as its bargaining representative for the 2010 successor contract negotiations, the Respondent clothed him with apparent authority to bind the Respondent to an agreement. Landrum alone attended negotiations on behalf of the Respondent, signed in as the Respondent's representative, and participated in the

bargaining agreement, it is unclear whether the complaint is referencing the 2010–2012 agreement or the 2007–2010 agreement. The complaint alleges that the terms of the 2010–2012 agreement were applied and then repudiated, but the record establishes that the Respondent never applied the terms of that agreement. In fact, the Respondent adhered to the terms of the expired 2007–2010 agreement until it withdrew recognition from the Union in 2011. Notwithstanding the inconsistency between the pleadings and the evidence, the record demonstrates that the validity of the 2010–2012 collective-bargaining agreement was fully litigated.

⁴ As the judge notes, although the consolidated complaint alleges that the Respondent unlawfully repudiated the terms of the collective-

discussions in that capacity. But neither Landrum nor his principal, the Respondent, informed the Union that Landrum's authority was limited in any way before the agreement was reached on July 28. Landrum's August 4 email to McKellar advising McKellar of his limited authority was plainly insufficient to convey that information to the Union: Landrum sent the email only to McKellar, and he sent it only after the agreement was reached.

The judge found that the contractors and the Union arrived at an agreement on August 17 when the Union delivered the contract in its final form to the Respondent. We disagree, and find that an agreement was reached on July 28, the day before the Union's membership ratified it. But even if the judge's finding were correct, the crucial fact remains that the Respondent failed to inform the Union of any limitations on Landrum's authority until August 31, when Gaxiola asked Landrum when the Respondent would execute the agreement.⁵

The Respondent argues that the Union should have known, based on the parties' past dealings, that Landrum lacked authority to bind the Respondent. The Respondent relies on Landrum's testimony that, in past negotiations, when Gaxiola's predecessors urged the Respondent's predecessor, Progressive Roofing, to enter into an agreement with the Union, Landrum informed them that only then-owner Mark Farrell (William Farrell's son) could make that decision. The Respondent also relies on Landrum's testimony that during the bargaining in 2007 that led to the 2007–2010 collective-bargaining agreement, he "had to keep telling [the union representatives] I don't sign, that's New York." The Respondent further points out that William Farrell signed the 2005–2007 and 2007–2010 agreements.

Contrary to the Respondent's contentions, the manner in which the Respondent's predecessor dealt with union representatives who preceded Gaxiola lends no support to the proposition that, in 2010, the Union had clear and timely notice that Landrum's authority to enter into a contract was limited. And even assuming that bargaining history could be used to establish notice of an agent's limited authority, the bargaining history between the Respondent and the Union was insufficient to put the Union on notice that Landrum lacked authority to bind his prin-

cipal. It is true that it was owner William Farrell who signed the 2005–2007 agreement just after he purchased the company, and soon afterward signed the newly negotiated 2007–2010 agreement. But his execution of those two agreements, which occurred within the first few months of the Respondent's 3-year bargaining relationship with the Union, is hardly adequate to establish a past practice or custom of always granting only limited authority to the Respondent's representative in negotiations. Although Farrell's actions in 2010 might have put the Union on notice that Farrell would be the person actually signing the agreement, his actions would not have made clear to the Union that anyone whom Farrell subsequently sent to represent the Respondent at the bargaining table lacked authority to enter into an agreement. See Sands Hotel & Casino, 324 NLRB 1101, 1109 (1997) (employer bargaining agent's advising the unions' negotiators that the contract had to be sent "to Boston" for signing and "run past" attorneys for "a check over wording" was insufficient to constitute notice of the agent's limited authority to bind the employer), enfd. 172 F.3d 57 (9th Cir. 1999).

In the absence of clear and timely notice to the Union of the limits on Landrum's authority, we find that the Respondent vested Landrum with apparent authority to bind the Respondent to the 2010–2012 agreement. The Respondent, therefore, was obligated to sign and give effect to terms of the agreement that Landrum entered into on its behalf. See *Teamsters Local No. 771*, supra. Its failure to do so constituted a repudiation of that agreement and violates Section 8(a)(5) and (1) of the Act.

AMENDED REMEDY

Having found that the Respondent has engaged and is engaging in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to execute and implement the 2010-2012 agreement it reached with the Union, we shall order the Respondent to execute and implement the agreement and give retroactive effect to its terms. We shall also order the Respondent to make whole the unit employees for any losses attributable to its failure to execute the agreement, as set forth in Ogle Protection Service, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and Kraft Plumbing & Heating, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987),

⁵ Mid-Wilshire Health Care Center, 337 NLRB 72 (2001), on which the judge relied, is readily distinguishable. There, the employer's administrator told union negotiators that the employer's president would have to approve any agreement. The union's repeated insistence that the president attend the negotiations indicated that it understood the

⁶ Gaxiola's predecessor dealt with the Respondent over the first two agreements.

compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

We shall also order the posting of an appropriate notice, attached hereto as "Appendix."

ORDER

The National Labor Relations Board orders that the Respondent, A.W. Farrell & Son, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns shall

- 1. Cease and desist from
- (a) Refusing to recognize and bargain with United Union of Roofers, Waterproofers, and Allied Workers, Local 162 as the collective-bargaining representative of the Las Vegas, Nevada employees in the following bargaining unit:

All regular full-time and part-time skilled roofer and damp and waterproof workers, including apprentices, pre-apprentices, allied workers, other classifications of workers and any person performing the duties of all safety monitoring of work, excluding managers, guards, and supervisors as defined in the Act.

- (b) Failing and refusing to execute and implement, as requested by the Union in about August 2010, the 2010–2012 collective-bargaining agreement agreed to by the Respondent, containing the terms and conditions of employment of the unit employees set forth in paragraph 1(a).
- (c) Failing and refusing to bargain collectively with the Union by delaying, failing and refusing to provide it with the information described in the Union's June 29, 2011 written request.
- (d) Unreasonably limiting the Union's use of the information provided.
- (e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action.
- (a) Recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees concerning terms and conditions of employment for all the employees in unit described above in paragraph 1(a).
- (b) Execute and implement the agreement with the Union, described above in paragraph 1(b), and give retroactive effect to its terms to the effective date of the agreement
- (c) Make unit employees whole for any losses they have suffered as a result of the Respondent's failure to sign and effectuate the agreement, plus daily compound interest, as set forth in the remedy section of this decision.

- (d) Compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.
- (e) Furnish to the Union in a timely manner the information requested by it on June 29, 2011.
- (f) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically such as by email posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
- (g) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 11, 2013

Mark Gaston Pearce,	Chairman
Richard F. Griffin, Jr.,	Member
Sharon Block,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 refuse to recognize and bargain with United Union of Roofers, Waterproofers, and Allied Workers, Local 162 as the exclusive collective-bargaining representative of our Las Vegas, Nevada employees in the following bargaining unit:

All regular full-time and part-time skilled roofer and damp and waterproof workers, including apprentices, pre-apprentices, allied workers, other classifications of workers and any person performing the duties of all safety monitoring of work, excluding managers, guards, and supervisors as defined in the Act.

WE WILL NOT fail and refuse to execute and implement the 2010–2012 collective-bargaining agreement reached with the Union.

WE WILL NOT refuse to bargain collectively with the Union by delaying or failing or refusing to provide the Union with the information described in its June 29, 2011 written request.

WE WILL NOT unreasonably limit the Union's use of the information provided.

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

WE WILL recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees concerning terms and conditions of employment in the bargaining unit.

WE WILL execute and implement the 2010–2012 collective-bargaining agreement negotiated with the Union and give retroactive effect to its terms.

WE WILL make unit employees whole for any losses they have suffered as a result of our failure to sign and effectuate the 2010–2012 agreement, plus daily compound interest.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the So-

cial Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.

WE WILL promptly provide the Union with the information described in its June 29, 2011 written request.

WE WILL refrain from unreasonably limiting the Union's use of the information provided.

A.W. FARRELL & SON, INC.

Pablo A. Godoy, Atty., for the General Counsel.

Julie Pace and Heidi Nunn-Gilman, Attys. (The Cavanaugh
Law Firm), of Phoenix, Arizona, for the Respondent.

David Rosenfeld and Manuel Boigues, Attys. (Weinberg, Roger
& Rosenfeld), for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. Pursuant to unfair labor practice charges filed by United Union of Roofers, Waterproofers, and Allied Workers, Local 162 (the Union), the Regional Director for Region 28 of the National Labor Relations Board (Region 28 and the Board, respectively) issued Second Consolidated Complaint and Notice of Hearing (the complaint) dated September 28, 2011. The complaint alleges that A.W. Farrell & Son, Inc. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The complaint further names Sheet Metal Workers International Association, AFL–CIO, Local Union No. 88 (Sheet Metal Workers) as a party in interest. This case was tried in Las Vegas, Nevada, on October 24 and 25.

II. ISSUES

- A. Was the collective bargaining relationship between Respondent and the Union one permitted under Section 8(f) of the Act or one covered by 9(a) of the Act.
- B. Did Respondent violate Section 8(a)(1) and (5) of the Act by the following conduct:
 - 1. Repudiating the terms of its collective-bargaining agreement with the Union.
 - Withdrawing recognition of the Union as the exclusive collective-bargaining representative of the unit em-ployees described hereafter, and since then failing and refusing to recognize and bargain with the Union.
 - Refusing to furnish the Union with requested information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

All dates are 2011, unless otherwise specified.

² At the hearing, counsel for the General Counsel amended par. 5(d) to substitute the date of June 27 for June 29 and the name Progressive Roofing with "Respondent," further amending ensuing complaint paragraphs to comport with that change.

- Delaying in furnishing the Union with requested information, i.e., the names of workers involved in the projects described above.
- Maintaining an overly broad limitation on the use of the information furnished to the Union by requiring the written consent of its attorney to "copy, release, or distribute" the information it furnished to the Union

III. JURISDICTION

At all material times Respondent, a New York corporation, with an office and place of business in Las Vegas, Nevada (Respondent's facility), has been engaged in business as a commercial roofing contractor in the building and construction industry. During the 12-month period ending May 10, Respondent, in conducting its business operations, performed services valued in excess of \$50,000 in States other than the State of Nevada. Respondent admits, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

IV. STATEMENT OF FACTS

On the entire record,³ including my observation of the demeanor of witnesses, and after considering the briefs filed by the General Counsel and Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings. Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

The following individuals in the following positions are Respondent's supervisors/managers germane to the issues herein:

William Farrell (Farrell) Owner
Wade Landrum (Landrum) Branch Manager

On about June 25, 2007, Respondent purchased assets of Progressive Roofing, Inc. (Progressive Roofing), a company performing construction work in Las Vegas, Nevada, and thereafter operated the business in basically unchanged form, employing as a majority of its employees, individuals who were previously employees of Progressive Roofing. On June 27, 2007, Farrell, on behalf of Respondent, entered into a collective-bargaining agreement with the Union to cover a unit of those employees who had formerly been employed by Progressive Roofing. The collective-bargaining agreement had a term of August 1, 2005, through July 31, 2007, only a few days of which remained when Farrell signed the agreement (the 2005–2007 agreement). The 2005–2007 agreement covered the following employees of Respondent, which employees constituted, and continue to constitute, a unit appropriate for the purpos-

es of collective-bargaining within the meaning of Section 9(b) of the Act (the unit):

All regular full-time and part-time skilled roofer and damp and waterproof workers, including apprentices, preapprentices, allied workers, other classifications of workers and any person performing the duties of all safety monitoring of work, excluding managers, guards and supervisors as defined in the Act.

The recognition clause of the 2005–2007 agreement (the 2005–2007 recognition clause) read in pertinent part as follows:

A.W. FARRELL & SON...hereby voluntarily recognizes [the Union] as the majority collective bargaining representative of all employees employed by said Contractor performing work covered by this agreement and agrees that the Union has demonstrated or it has offered to demonstrate that it is the majority representative of such employees in an appropriate collective bargaining unit after having made such a demand. By executing this agreement A.W. FARRELL & SON specifically agrees that it is establishing a collective bargaining relationship within the meaning of Section 9(a) of the National Labor Relations Act of 1947, as amended based upon its majority representation status as described above.

Later in 2007, Farrell, on behalf of Respondent, entered into a collective-bargaining agreement with the Union to succeed the 2005–2007 agreement. The successor agreement had a term of August 1, 2007, through July 31, 2010 (the 2007–2010 agreement). The recognition clause of the 2007–2010 agreement (the 2007–2010 recognition clause) was essentially identical to that of the 2005–2007 recognition clause. Following Farrell's execution of the 2007–2010 agreement, Respondent implemented and adhered to its terms and conditions as to all unit employees.

In 2010, Respondent, for bargaining convenience, met jointly with the Union and several other contractors to negotiate the terms of a collective-bargaining contract to succeed the 2007–2010 agreement (the convenience bargaining). Paul McKellar (McKellar), a representative of one of the contractors served as spokesperson for the group. Each contractor had the option of deciding on an individual basis whether to execute any agreement resulting from the convenience bargaining. Landrum attended all negotiating sessions as Respondent's bargaining representative.

Landrum told union representatives that Farrell had to approve any final agreement. By email dated August 4, 2010, Landrum informed McKellar:

Please be aware that no signatory contractor speaks on behalf of AW Farrell and that...I have no authority to sign a new contract. Once the proposed contract is presented for review it will go to the corporate office for consideration.

On August 17, 2010, the convenience bargaining resulted in a successor agreement to the 2007–2010 agreement, the terms of the successor agreement were to run September 1, 2010, through July 31, 2012 (the 2010–2012 agreement). Each of the convenience bargaining contractors except Respondent thereafter executed the 2010–2012 agreement. Landrum told union

³ Posthearing, the parties jointly sought to supplement the evidentiary record with a letter from counsel for the Charging Party to counsel for Respondent, dated September 29, 2011, which responds to Respondent's September 14, 2011 letter previously marked for identification as Jt. Exh. 11. The letter from counsel for the Charging Party to counsel for Respondent dated September 29, 2011, was added to the record as Jt. Exh. 13.

representatives he would forward the terms of the proposed successor agreement to Farrell, and, if Farrell approved it, Landrum would sign it. Farrell did not approve the successor agreement.

In the following months, Union Business Manager Modesto Gaxiola (Gaxiola) contacted Farrell about signing the 2010–2012 agreement. Farrell told Gaxiola Respondent was having "issues" with the Sheet Metal Workers but once those issues were resolved, he would have Landrum contact Gaxiola. Respondent continued to operate under the terms of the expired 2007–2010 agreement.

Beginning in April, the following letter exchange, in pertinent part, took place between the parties:

Respondent to the Union, April 28: Respondent withdrew recognition of the Union as the exclusive collective bargaining representative of the Unit, stating: "[Respondent] has elected not to renew its collective bargaining agreement with [the Union] pursuant to Section 8(f)... and will terminate its relationship with [the Union]." Since then, Respondent has failed and refused to recognize and/or bargain with the Union.

The Union to Respondent, July 29: the Union requested Respondent to furnish the Union with the following information (July 29 information request):

(1) . . . up-to date list of all projects which your company has performed for the period July 1, 2009 to present, giving the location, the names of the workers involved and the dates of the project.

. .

(3) ... a list of all employees who work for your company within the bargaining unit for the period July 1, 2010 to present. For each employee give the dates of employment, rates of pay, classifications, last known addresses and phone numbers.

Respondent to the Union, August 10:

With respect to the [July 29 information request], we do not see its relevance to collective bargaining and you did not explain the union's purported need for this information...Nevertheless, Farrell will entertain the request if you wish to set forth your rationale for the relevance of the information to collective bargaining.

The Union to Respondent, August 18: the Union asserted the information asked for in the July 29 information request was presumptively relevant, as it affected bargaining unit employees

Respondent to the Union, September 14:

Although you have declined to share information with us regarding the reasons and relevance of [the July 29 information request], we understand that the issue is that Local 162 believes that non-union labor may have been used to perform work. Although the Company has no duty to respond to Local 162's request for information because Local 162 no longer represents AW Farrell employees after the termination of the 8(f) agreement and there was never a 9(a) bargaining relationship, we are

cooperating with Local 162 and enclosing a list of all non-supervisory employees who worked on projects for AW Farrell from July 1, 2009 to the present.

Respondent included a spreadsheet setting out the names, hire and termination dates, addresses, classifications, and rates of pay of employees who had worked for Respondent since July 1, 2009, i.e., some of the information the Union requested in item 1 of its July 29 information request and the information requested in item 3, excepting phone numbers. The spreadsheet contained the following restriction:

CONFIDENTIAL

Do not Copy, Release or Distribute Without Written Consent of [Respondent's attorney]

The Union to Respondent, September 29:

The Union needs to know the names of the projects and other information regarding the projects in order to determine whether the contract has been complied with. This will give us some idea as to where workers worked, how long they worked and whether appropriate pay and contributions were made.

Respondent failed to furnish the rest of the information requested in item 1 of the July 29 information request or retract the restrictions set forth on the September 14 spreadsheet.

V. DISCUSSION

A. The Union's Representational Status

Section 8(f) permits unions and employers in the construction industry to enter into collective-bargaining agreements without a union having to establish that it has the support of a majority of the employees in the covered unit.⁴ Section 8(f) creates an exception to Section 9(a)'s general rule requiring a showing of majority employee support for the union.⁵ An 8(f) collective-bargaining agreement is enforceable throughout its term,⁶ and an employer violates Section 8(a)(5) and (1) of the Act by failing to adhere to, or by repudiating an 8(f) agreement during its term.⁷

⁴ Sec. 8(f) of the Act provides, in pertinent part: "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of [Sec.] 9 prior to the making of such agreement."

⁵ Sec. 9(a) states, in pertinent 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"

⁶ John Deklewa & Sons, 282 NLRB 1375 fn. 62 (1987), enfd. sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988).

⁷ Horizon Group of New England, 347 795 (2006); see also Madison Industries, 349 NLRB 1306 (2007). The same principles apply to a

While an 8(f) relationship between an employer and a union may be terminated by either party upon the expiration of their collective-bargaining agreement, a 9(a) relationship (and the concomitant obligation to bargain) continues after contract expiration, unless and until the union is shown to have lost majority support.

Representation status under Section 9(a) may be achieved either through a Section 9 certification proceeding or "from voluntary recognition . . . where that recognition is based on a clear showing of majority support among the unit employees, e.g., a valid card majority." A 9(a) relationship is established where "(1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support." In order to establish voluntary recognition, there must be evidence that "the union unequivocally demanded recognition as the employees' 9(a) representative" and that "the employer unequivocally accepted it as such." 12

To establish voluntary recognition, the majority showing need not adhere to formal standards. See *Saylor's Inc.*, 338 NLRB 330, 334 (2002)¹³ (9(a) relationship established by contract provision stating the employer recognized the union as the 9(a) representative based on the union's having shown evidence of majority support).

The Board has placed the burden of proving that a construction-industry relationship falls under Section 9(a) rather than under 8(f) on the party making that assertion. 14 In this case, Respondent contends that the 2005-2007 and 2007-2010 agreements were entered into under the auspices of Section 8(f). The General Counsel's position is that since 2007. Respondent has had a 9(a) relationship with the Union. The General Counsel, therefore, bears the burden of showing the existence of a 9(a) relationship between Respondent and the Union. In addressing its burden, the General Counsel adduced evidence of successive agreements—the 2005-2007 agreement and the 2007-2010 agreement—between Respondent and the Union. Each agreement contained language stating that Respondent "voluntarily recognize[d]" the Union as the collectivebargaining representative of the unit pursuant to the Union's demonstration or offer to demonstrate that it was the majority representative of such employees. Both agreements specifically noted that Respondent had thereby established a 9(a) collec-

supplemental agreement in which an employer consents to be bound to a master agreement. *Cedar Valley Corp.*, 302 NLRB 823, 830 (1991).

tive-bargaining relationship with the Union "based upon its majority representation status."

In Saylor's Inc., supra, the employer and the union had entered into seriatim collective bargaining agreements, the recognition language of which stated the employer was satisfied that the union represented a majority of its unit employees and therefore voluntarily agreed to recognize the union as the unit's exclusive bargaining representative. The employer specifically acknowledged its 9(a) relationship with the union. The Board concluded the contractual language established a 9(a) relationship between the contracting parties, and challenge to the union's 9(a) status occurring more than 6 months after the employer's grant of 9(a) status was untimely.

The clear intent of the 2005–2007 and 2007–2010 recognition clauses is no different than that evidenced by the contractual language in *Saylor's*. Under the *Saylor's* ruling, the General Counsel has met his burden of showing that commencing July 2007, the Union enjoyed a 9(a) relationship with Respondent as to unit employees. No evidence was presented that the Union at any time after July 2007 lost its majority employee support. Accordingly, since 2007, Respondent has had a 9(a) obligation to bargain with the Union, which obligation survived the expiration of the 2007–2010 agreement.

B. Repudiation of the Collective-Bargaining Agreement and Withdrawal of Recognition

1. Repudiation

The General Counsel contends Respondent unlawfully repudiated the terms of its collective-bargaining agreement upon withdrawing recognition from the Union. It is not entirely clear whether the General Counsel is referring to the 2007–2010 agreement, the 2010–2012 agreement, or both. The complaint alleges Respondent repudiated the terms of the 2010–2012 agreement. The General Counsel's posthearing statement of issues asks: "Did Respondent violate Section 8(a)(1) and (5) by . . . refusing to follow the terms of the 2007 Collective-Bargaining Agreement," while the General Counsel's posthearing sample notice refers to repudiation of the 2010–2012 agreement. I address both agreements.

The evidence, although cursory, is that Respondent continued to follow the terms of the 2007–2010 agreement even after withdrawing recognition from the Union. Insofar as Respondent's 2011 withdrawal of recognition can be said to repudiate the continuing bargaining obligations of the 2007–2010 agreement, then Respondent did repudiate those terms, but that issue is adequately covered in the withdrawal of recognition discussion and conclusion and need not be addressed here.

As to the 2010–2012 agreement reached in the course of convenience bargaining, it appears Landrum clearly and unambiguously notified the Union that only Farrell could agree to the final terms of the 2010–2012 agreement. Refusing to sign the 2010–2012 agreement or to abide by its terms is not, therefore, unlawful. See *Mid-Wilshire Health Care Center*, 337 NLRB 72, 80 (2001).

2. Withdrawal of recognition

On April 28, Respondent withdrew recognition of the Union as the exclusive collective-bargaining representative of the unit,

⁸ *Deklewa*, supra at 1386–1387

⁹ Levitz Furniture Co., 333 NLRB 717 (2001).

¹⁰ Deklewa, supra at 1387 fn. 53.

¹¹ Staunton Fuel & Material, 335 NLRB 717, 720 (2001).

¹² J&R Tile, 291 NLRB 1034, 1036 (1988).

¹³ Citing Central Illinois Construction, 335 NLRB 717 (2001); Pontiac Ceiling & Partition Co., 337 NLRB 120 (2001); Reichenbach Ceiling & Partition Co., 337 NLRB 125 (2001); and Verkler, Inc., 337 NLRB 128 (2001).

¹⁴ Donaldson Traditional Interiors, 345 NLRB 1298 (2005); Deklewa, supra at 1385 fn. 41; see also Madison Industries, supra.

basing its entitlement to do so upon the parties' alleged 8(f) relationship. Since then, Respondent failed and refused to recognize and bargain with the Union. Having found the Union and Respondent at all material times enjoyed a 9(a) collective-bargaining relationship, Respondent's withdrawal of recognition was unlawful and violated Section 8(a)(5) and (1).

C. Refusal to Furnish Information

An employer has a duty to furnish to a union, on request, information that is relevant and necessary to perform its role as exclusive bargaining representative of unit employees. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). Respondent has stipulated that if Respondent and the Union are found to have had a 9(a) bargaining relationship, the list of projects sought by the Union in its July 29 information request is relevant. It follows that the concomitant information sought—project locations and dates and information about the workers involved in such projects—is also relevant. Respondent's failure to furnish all information requested in the July 29 information request violated Respondent's duty to bargain with the Union as enunciated in Section 8(a)(5).

An employer's unreasonable delay in furnishing relevant information also violates Section 8(a)(5). The Board considers the totality of circumstances surrounding a delay in furnishing information, assessing whether a reasonable good-faith effort to respond to the request as promptly as circumstances allow by taking into account the complexity and extent of information sought, its availability and the difficulty in retrieving the information. West Penn Power Co., 339 NLRB 585, 587 (2003), enfd. in pertinent part 349 F.3d 233 (4th Cir. 2005). Here, no evidence justifies Respondent's delay—from July 29 to September 14—in furnishing relevant information that must have been readily available. Rather, the delay appears related to Respondent's unlawful withdrawal of recognition. In these circumstances, the delay in furnishing all relevant information violates Section 8(a)(5) and (1).

D. Restrictions on Disclosure of Requested Information

The General Counsel argues the limitations Respondent imposed on the Union's use of the furnished information are unreasonable and overly broad. Respondent does not address this issue, resting its defense on the assertion that only a 8(f) relationship existed between the parties, precluding any obligation to furnish the requested information.

As required under *Detroit Edison v. NLRB*, 440 U.S. 301 (1979), the Board balances a union's need for the information against any "legitimate and substantial" confidentiality interest. The Board established a determinant test in *Pennsylvania Power Co.*, 301 NLRB 1104, 1105–1106 (1991):

The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims will be upheld, but blanket claims of confidentiality will not. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus, when a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation be-

tween the union's information needs and the employer's justified interests [footnotes omitted].

Here, Respondent neither proved a need for confidentiality nor offered to bargain with the Union over restrictions. Thus, Respondent's restrictions on use of the provided information violated Section 8(a)(5) and (1) of the Act as alleged.

CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. United Union of Roofers, Waterproofers, and Allied Workers, Local 162 is a labor organization within the meaning of Section 2(5) of the Act.
- 3. Since June 27, 2007, the Union has been the Section 9(a) collective-bargaining representative of Respondent's Las Vegas, Nevada employees in the following appropriate unit:

All regular full-time and part-time skilled roofer and damp and waterproof workers, including apprentices, preapprentices, allied workers, other classifications of workers and any person performing the duties of all safety monitoring of work, excluding managers, guards and supervisors as defined in the Act.

4. Respondent has violated Section 8(a)(5) and (1) of the Act as set forth.

THE REMEDY

Having found Respondent has violated and is violating Section 8(a)(5) and (1) of the Act, I recommend it be required to cease and desist from that conduct and to cease and desist from interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act in any other like or related manner. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix." ¹⁵

ORDER

The Respondent, A. W. Farrell & Son, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Refusing to recognize and bargain with United Union of Roofers, Waterproofers, and Allied Workers, Local 162 as the collective bargaining representative of its Las Vegas, Nevada employees in the following appropriate unit:

All regular full-time and part-time skilled roofer and damp and waterproof workers, including apprentices, preapprentices, allied workers, other classifications of workers and any person performing the duties of all safety monitoring of work, excluding managers, guards and supervisors as defined in the Act.

(b) Failing and refusing to provide United Union of Roofers, Waterproofers, and Allied Workers, Local 162 with the rele-

¹⁵ 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.

vant information described in its June 29, 2011 written request for information.

- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Upon request of United Union of Roofers, Waterproofers, and Allied Workers, Local 162 bargain lawfully with that Union over the terms and conditions of a collective-bargaining agreement to cover employees in the appropriate unit described above.
- (b) Within 21 days after receipt of this decision, furnish United Union of Roofers, Waterproofers, and Allied Workers, Local 162 with the information requested by it in its July 29, 2011 information request.
- (c) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent 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 ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means.¹⁷ In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since April 28, 2011.
- (d) Within 21 days after service by the Regional Office, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: Washington, D.C. December 28, 2011

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 activiies.

WE WILL NOT refuse to give relevant, requested information to United Union of Roofers, Waterproofers, and Allied Workers, Local 162 (the Union) concerning our employees in the unit the Union represents.

WE WILL NOT unreasonably delay in furnishing relevant, requested information to the Union.

WE WILL NOT set unreasonable limitations on the Union's use of the information we furnish.

WE WILL NOT refuse to recognize and to bargain lawfully with the Union over the terms and conditions of a collective-bargaining agreement to cover our employees in the unit the Union represents.

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

WE WILL, upon request, bargain lawfully with the Union over the terms and conditions of a collective-bargaining agreement to cover our employees in the unit the Union represents.

WE WILL promptly furnish to the Union the information requested by it on June 29, 2011, and we will not set unreasonable limitations on its use.

A. W. FARRELL & SON, INC.

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

National Labor Relations Board."

17 The question of whether Respondent electronically communicates with employees is left to the compliance stage of these proceedings.