

**Diponio Construction Company, Inc. and Local 9,  
International Union of Bricklayers and Allied  
Craftworkers, AFL-CIO.** Case 07-CA-052281

September 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER  
AND HAYES

On September 17, 2010, Administrative Law Judge Margaret G. Brakebusch issued the attached decision, and on September 27, 2010, she issued an Errata. The Respondent filed exceptions and a supporting brief, the General Counsel and Union filed answering briefs, and the Respondent filed a reply brief. The Union also filed exceptions and a supporting brief, and the Respondent filed a response.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs<sup>1</sup> and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order as modified.<sup>4</sup>

<sup>1</sup> The Respondent requests that the Board reject the Union's answering brief because it was untimely. This request is denied because the brief was timely filed.

The Union filed a motion to strike the Respondent's exceptions, arguing that the Respondent waived its right to file exceptions by voluntarily posting the judge's recommended notice. The Respondent opposes the Union's motion, asserting that posting the notice does not constitute a waiver of its right to file exceptions. We agree with the Respondent and deny the Union's motion to strike.

The General Counsel filed a motion to strike portions of the Respondent's reply brief, asserting that they improperly include arguments not previously raised to the Board. See Sec. 102.46(g) of the Board's Rules & Regulations. Because we have not relied on those portions of the Respondent's reply brief, we find it unnecessary to pass on the General Counsel's motion.

Finally, we deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup> In sec. II, A, paragraph 1 of the judge's decision, she describes *Levitz Furniture Co.*, 333 NLRB 717 (2001), as requiring that the Respondent demonstrate that it held a "reasonable good faith belief" that the Union lacked majority support at the time it withdrew recognition from the Union. As the judge correctly states elsewhere in her decision, the *Levitz Furniture* test requires an employer to demonstrate actual loss of majority support to legally withdraw recognition from a union.

Chairman Pearce and Member Becker agree with the judge that "very clear recognition language" in all three of the parties' collective-bargaining agreements supports the finding that the parties entered into 9(a) relationship. In *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 521, 537

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below and orders that the Respondent, DiPonio Construction Company, Inc., Trenton, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c).

"(c) Within 14 days after service by the Region, post at its Trenton, Michigan facility, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 7, 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 an internet site, and/or other electronic means, if the Respondent customarily communicates with its 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of

(D.C. Cir. 2003), the court held that "contract language and intent cannot be dispositive at least where, as here, the record contains strong indications that the parties had only a section 8(f) relationship." As the judge here observed, "In *Nova*, there was substantial extrinsic evidence concerning . . . the employees' opposition and resistance to the [parties'] contractual relationship." In the present case, by contrast, the record is devoid of any indication that the parties had only an 8(f) relationship or that the Union lacked majority support at any time during the parties' years long relationship. Thus, Chairman Pearce and Member Becker would reach the same result in this case even applying *Nova Plumbing*.

Member Hayes would apply the holding of *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 534 (D.C. Cir. 2003), that contract language alone is insufficient to establish a 9(a) bargaining relationship in the construction industry. Contrary to his colleagues, he does not view this holding as limited to circumstances in which there is affirmative extrinsic evidence that the parties had only an 8(f) relationship. He would therefore reverse the judge's decision and dismiss the complaint. However, he agrees that the judge correctly applied extant Board law in *Staunton Fuel & Material*, 335 NLRB 717, 719-720 (2001), to find that the Respondent unlawfully withdrew recognition from the Union upon expiration of the parties' contract.

<sup>4</sup> We agree with the judge's denial of the Union's request that the Respondent be ordered to reimburse the Union's litigation costs. Although the Respondent's 8(f) defense lacks merit, we find that it does not warrant the extraordinary remedy requested. See, e.g., *Waterbury Hotel Management LLC*, 333 NLRB 482 fn. 4 (2001).

We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 2009.”

*Ingrid L. Kock, Esq.* and *Robert G. Walkowiak, Esq.*, for the General Counsel.

*Steve Wright, Esq.* and *Kelly Kammer, Esq.*, for the Respondent.

*John Adam, Esq.*, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Detroit, Michigan, on June 9, 2010. The charge was filed by Local 9, International Union of Bricklayers and Allied Craftworkers, AFL–CIO (Local 9<sup>1</sup>) on July 31, 2009. Based upon the allegations contained in the charge, the Regional Director for Region 7 of the National Labor Relations Board (the Board), issued a complaint and notice of hearing on February 16, 2010.

The complaint alleges that since July 14, 2009, and since August 5, 2009, DiPonio Construction Company, Inc. (the Respondent) has failed and refused to provide Local 9 with requested information in violation of Section 8(a)(1) and (5). The complaint also alleges that on July 31, 2009, the Respondent withdrew its recognition of Local 9 as the exclusive bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act. Finally, the complaint alleges that on about July 29, 2009, Respondent informed Local 9, in writing, that it was not required to bargain a new contract and would not do so. The complaint alleges that in doing so, Respondent further violated Section 8(a)(1) and (5) of the Act.

On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after considering the briefs<sup>3</sup> filed by the General Counsel and Respondent, I make the following:

<sup>1</sup> Local 9 may also be designated as the Union in certain portions of this decision.

<sup>2</sup> During the hearing, Respondent sought to introduce correspondence that was generated by the parties in May and June 2010 and just prior to the unfair labor practice proceeding. Respondent submits that the documents related to the parties’ settlement discussions and correspondence concerning the negotiation of a new contract. Respondent asserts that the documents are relevant. Prior to the opening of this hearing, the parties took the opportunity to discuss settlement and the possible resolution of this matter. Despite their discussions, the parties were unable to reach a resolution and the hearing continued. Inasmuch as there was no resolution of this matter prior to the hearing, I found the May and June 2010 correspondence offered by the Respondent to be irrelevant to the matters before me. Accordingly, R. Exhs. 26 through 33 were not received into evidence and are attached to the record as rejected exhibits.

<sup>3</sup> A timely brief was also filed by the Charging Party.

## FINDINGS OF FACT

### I. JURISDICTION

Respondent, a Michigan corporation, with an office and facility in Trenton, Michigan, has been engaged as a masonry contractor in the construction industry doing commercial construction. During the calendar year of 2009, Respondent derived gross revenues in excess of \$1 million and purchased and received at its Trenton facility goods and materials valued in excess of \$50,000 directly from points outside the State of Michigan. By written stipulation, Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7). Respondent further admits, and I find that Local 9 has been a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. Issues

Section 9(a) of the National Labor Relations Act (the Act) provides that a labor organization designated or selected for the purposes of collective bargaining by a majority of the employees in an appropriate unit is the exclusive collective-bargaining representative of all of the unit employees. 29 U.S.C. § 159 (a). In the usual employer-union relationship, the employer is bound to bargain with the exclusive representative even after a collective-bargaining agreement has expired. Additionally, recognition of the union can only be withdrawn if the employer has a reasonable, good-faith belief that the union does not represent a majority of the employees. *Levitz Furniture Co.*, 333 NLRB 717 (2001). Section 8(f) of the Act, however, provides that an employer engaged primarily in the building and construction industry may enter into an agreement with a labor organization covering its employees without the union’s demonstrating that it represents a majority of the employees as established under Section 9(a). 29 U.S.C. § 158 (f). Unlike a bargaining relationship within the meaning of Section 9(a) of the Act, an 8(f) relationship may be terminated by either the labor organization or the employer at the expiration of a collective-bargaining agreement. *John Deklewa & Sons*, 282 NLRB 1375, 1386–1387 (1987), *enfd.* 843 F.2d 770 (3d Cir. 1988), *cert. denied* 488 U.S. 889 (1988). The ultimate issue in this case is whether the Respondent is an 8(f) contractor or a 9(a) contractor within the meaning of the Act. Respondent asserts that it had an 8(f) relationship with Local 9 and the General Counsel asserts that Respondent had a 9(a) relationship with Local 9. If it is established that the Respondent and the Union have a 9(a) bargaining relationship, the issue then becomes whether the Respondent unlawfully (1) failed to provide information to the Union, (2) withdrew recognition of the Union, and (3) refused to bargain for a new contract with the Union.

#### B. Factual Evidence Presented

##### 1. Background

Local 9 is a labor organization that represents construction masons, including bricklayers and cement masons and its geographical jurisdiction covers all of the State of Michigan except for the five counties comprising the Detroit metropolitan area.

Local 1, International Union of Bricklayers and Allied Craftworkers, AFL–CIO (Local 1) generally covers the Detroit metropolitan area. Nelson McMath is Local 9’s current president and also serves as a trustee for the Union’s fringe benefit funds. The parties stipulated that the Mason Contractors’ Association (MCA) has been at all material times an organization composed of employers engaged in the construction industry, one purpose of which is to represent employer-members in negotiating and administering collective-bargaining agreements with various labor organization. Local 9 is one of those labor organizations.

## 2. Bargaining history

Louis DiPonio, Jr. is Respondent’s owner and has served as the corporation’s president since 1999. Mathew DiPonio is Louis DiPonio’s brother and he has been Respondent’s vice president since 1999. There is no dispute that Respondent has had a collective-bargaining relationship with Local 9 since the 1970’s. Although there is no record testimony concerning the date or circumstances of the initial collective-bargaining agreement, the record reflects that Louis DiPonio’s deceased father signed the initial collective-bargaining agreement. Louis DiPonio also confirmed that for the past 20 years, Respondent has employed only bricklayers who were either members of Local 9 or Local 1. There is no dispute that despite the bargaining relationship between Local 9 and Respondent, Local 9 was never certified by the Board as the exclusive collective-bargaining representative of Respondent’s employees.

On August 2, 2001, Respondent’s vice president, Mathew DiPonio, signed a power of attorney authorizing the MCA to negotiate a wage agreement with Local 9 on the Respondent’s behalf. The document provides that Respondent “ratifies, confirms, and approves all prior acts of the Mason Contractor’s Association, Inc., in the negotiating and signing of collective bargaining agreements” with Local 9. The power of attorney also provides that the authorization granted to the MCA would remain in full force and effect until revocation by written notice or by the termination of Respondent’s membership from the MCA. On December 14, 2001, Mathew DiPonio, signed another, identically worded power of attorney authorizing the MCA to negotiate a wage agreement with the Union on the Respondent’s behalf. Respondent does not dispute that as an employer-member of the MCA, Respondent authorized the MCA to represent it in negotiating and administering collective-bargaining agreements with the Union.

The collective-bargaining agreement between the Union and the MCA that was in effect from June 22, 2000, through August 1, 2003, provides the following in Article VI, Section D, subsection 1:

The Union has submitted to the Employer evidence of majority support, and the Employer is satisfied that the Union represents a majority of the Employer’s Employees in the bargaining unit described in the current collective bargaining agreement between the Union and the Employer.

Subsection 2 of section D provides:

The Employer therefore voluntarily agrees to recognize the Union as the exclusive bargaining representative of all Employees in the contractually described bargaining unit on all

present and future jobsites within the jurisdiction of the Union, unless and until such time the Union loses its status as the Employer’s Exclusive representative as a result of an NLRB election requested by the Employees.

Subsection 3 further provides:

The Employer and the Union acknowledge that they have a 9(a) relationship as defined under the National Labor Relations Act and that this Recognition Agreement confirms the on-going obligation of both parties to engage in collective bargaining in good faith.

The bargaining unit identified in the collective-bargaining agreement (CBA) includes all full-time and regular part-time journeymen, apprentices, and support employees who historically or traditionally perform work assigned to bricklayers and cement masons within Local 9’s territorial jurisdiction.

Since the negotiation of the agreement that was reached in 2000, Local 9 and the MCA have negotiated two additional CBA’s for the relevant time period. On August 1, 2003, Local 9 and the MCA negotiated a successor CBA, effective from August 1, 2003, to August 1, 2006. This CBA was followed by a successor agreement, effective from August 1, 2006, to July 31, 2009. Both of the successor agreements contain the same language identified above in subsections 1, 2, and 3 of Section D in Article VI. Respondent remained a member of the MCA during the time period when the CBA’s were negotiated and executed.

McMath was a member of Local 9’s negotiating committee for the negotiation of the 2000 to 2003 CBA. McMath could not recall when the negotiations were completed. He agreed on cross-examination that it was not unreasonable that the negotiations could have been completed by July 1, 2000. McMath confirmed that he did not personally submit any evidence of majority support as referenced in Article VI of the contract and he was unaware of anyone else with the Union who did so. Respondent’s president Louis DiPonio testified that at no time did he have any discussions with anyone in the Union about the majority status 9(a) language in the contract and at no time did the Union ever show him or offer to show him that the Union gained majority status. Louis DiPonio also acknowledged that during the existence of the labor agreements between 2000 and 2009, he was unaware that the Respondent ever told the Union that the agreements were wrong and that the Union was not a 9(a) representative.

## 3. Correspondence between the parties in May through August 2009

On May 21, 2009, McMath sent a letter to Respondent, confirming the Union’s desire and intent to “change, alter, and amend” the current collective-bargaining agreement (CBA) involving a number of issues including wages, pension, health care, working conditions, apprenticeship, and training. McMath explained in the letter that he was hopeful that this would be accomplished prior to July 31, 2009. McMath identified the letter as the cover letter accompanying the mediation notice that is normally sent prior to the termination of a CBA. The attached notification to the Mediation Agency was dated

May 27, 2009. McMath does not dispute that the May 21 letter and the attachment were not sent until after May 27, 2009.

On June 1, 2009, McMath received a letter from Respondent's legal counsel Steven A. Wright (Wright) and Kelly M. Kammer (Kammer), informing the Union of Respondent's legal representation and attaching a letter from Louis DiPonio dated May 26, 2009. McMath could not recall whether or not he also received a faxed copy of the May 26, 2009 letter on May 26. McMath does not dispute that the Union's office manager signed for the receipt of the letter by certified mail on May 27, 2009. In his letter, Louis DiPonio confirmed that Respondent would not renew its contract with the Union upon the expiration of the contract term on July 31, 2009, and that Respondent was terminating its union contract effective July 31, 2009. Louis DiPonio further stated in the letter that the termination was timely and in accordance with the agreement between the Union and the MCA and that Respondent would no longer be a signatory with the Union effective July 31, 2009.

On July 14, 2009, the Union's counsel, John Adam (Adam), sent a letter to Respondent's counsel requesting information. Specifically in his letter, Adam listed 10 separate items of information for which he requested a response. Adam also included in the letter: "We represent BAC Local 9. Your June 1 letter to Nelson McMath states that in view of DiPonio's May 26 letter that McMath's 'letter of May 21, 2009 [is] irrelevant.' Please explain why it is 'irrelevant' that Mr. McMath seeks to meet and bargain."

By letter dated July 15, 2009, Respondent's counsel responded to Adam's July 14, 2009 letter. In the letter signed by Kammer, Respondent's counsel explained: "Mr. McMath's request to bargain is irrelevant because DiPonio Construction Co., Inc. (DiPonio) clearly set forth in its May 26, 2009 letter that it is terminating its union contract effective July 31, 2009. Accordingly, nothing in this letter shall be construed as an assent to bargain or a waiver of the termination contained in the May 26, 2009 letter." Kammer further explained that while Respondent would not bargain with respect to a new agreement, Respondent was willing to sit down with representatives of Local 9 and the MCA to discuss the best manner of winding down the projects on which Respondent was currently performing work and any other relevant issues.

In an email dated July 24, 2009, Adam responded to Kammer and Wright's letter and informed them that their letter of July 15, 2009, had not answered any of the requests for information included in his July 14, 2009 letter. Adam stated that the July 15, 2009 response constituted a refusal to bargain. Additionally, Adam inquired as to Respondent's current projects and what Respondent intended to do after July 31, 2009, with respect to terms and conditions of employment if Respondent would not bargain with Local 9.

In an email on July 27, 2009, Kammer reiterated that Respondent was willing to sit down and discuss specific jobs that would be affected by Respondent's withdrawal and how to handle them after July 31, 2009. Kammer explained: "The information that you are requesting will be provided at that meeting and any pertinent issues will be addressed at that time. Accordingly, please provide your availability along with that of

BAC Local 9 and Masons Contractors Association representatives', and we will schedule the meeting immediately."

The following day, Adam sent an email to Kammer stating: "BAC wants to bargain for a new CBA and has requested information in my July 14 letter. DiPonio says it will not bargain and will not provide the information I requested. You 'offer' to meet about withdrawing from the union but will not tell me what projects DiPonio is working on. What 'pertinent issues' are to be discussed? And why now involve the MCA."

On the following day, Kammer responded by email:

DiPonio has withdrawn from the MCA and has terminated its contract. DiPonio is not required to bargain for a new contract and will not do so. However, as of July 31, 2009, DiPonio will still be on jobs that it had started while a signatory. For the sake of the union men, DiPonio believes that arrangements should be made to finish these projects pursuant to some type of project labor agreement. DiPonio will not sign a new contract and is no way by the afore-mentioned suggestion in any way agreeing to enter into negotiations for or to sign a new contract. If you don't believe that it is in the best interest of the union employees to sit down with us, then so be it. That is your call. It would seem to us that given the state of the economy, that the union employees would think that such a meeting may be beneficial to them.

Further, we will not waste time providing information that the union already has. The union knows which projects DiPonio is working on and we will not waste time. The ball is in your court. We either meet or not. At that meeting, we will discuss specific projects and how they should be completed. It is your call. We await your decision about a meeting. We will also leave it in your hands as to whether the MCA should be involved. Finally, please note that we will take seriously any interference with DiPonio's on-going contracts.

Adam testified that despite Kammer's assertions to the contrary, he did not know the projects that Respondent was working on at that time. He said that Local 9 had "a good idea," but needed some verification from Respondent. On August 3, 2009, Adam notified Kammer by email that he had filed an unfair labor practice charge against Respondent on July 31, 2009. Adam informed Kammer that Respondent should maintain the terms and conditions of the expired contract and its failure to do so would be viewed as an unlawful unilateral change and subject to a claim for damages. Adam explained in the correspondence that he was not aware of all the projects that Respondent was working on, the number of employees, or the status of the projects and that Respondent should provide the information as previously requested in his correspondence of July 14, 2009.

In his correspondence of August 3, 2009, Adam also referenced Kammer's comment about "interference" and "on-going contracts" in her email of July 29, 2009. He asked the type of interference to which she was referring and he also asked what she had meant by "on-going contracts." Finally, he asked the status of Respondent's collective-bargaining agreement with Local 1 and asked for a copy of the agreement and copies of any letters sent by Respondent terminating the agreement with Local 1.

When Wright responded to Adam later that same day, he confirmed that he had received a copy of the charge. He asserted that there is no duty to bargain with respect to an 8(f) company and that Respondent's termination of the contract can be "100% unilateral." Wright added that while Respondent is willing to finish current projects using union labor and paying fringes, Respondent wanted to do so without the risk of anyone claiming that it had waived the termination of the contract to which it was entitled under the contract. Wright suggested that if the parties could sit down together they might be able to figure out how to finish the projects without anyone waiving their respective arguments. Wright included: "We will not be providing you information so that you can harass DiPonio, but we will certainly agree to sit down and work out an appropriate arrangement, at which time we will provide the information requested. Whether we meet, whether you get the information, and whether Local 9 will benefit from finishing current DiPonio projects will depend on you." Wright reminded Adam that while Respondent was a signatory, it met all reporting obligations to the union. Wright added: "Finally, so that it is clear, DiPonio is no longer a signatory to a Local 9 contract."

When Adam responded to Wright on August 5, 2009, Adam contended that Wright's legal analysis was wrong and that Local 9's request for information was not harassment. Adam reiterated that Respondent had a legal duty to maintain the terms and conditions of the collective-bargaining agreement and listed six requests for information that were described under the heading "Additional Requests."

Wright responded to Adam on August 5 and identified the positions taken by both parties. Wright proposed that Respondent would be willing to perform to completion all current projects on its books which are in Local 9's jurisdiction under the terms of the expired collective-bargaining agreement, on the condition that both Local 9 and the Funds acknowledge that Respondent was not waiving its termination by such action and further agrees to never argue that such action constituted such a waiver. In a response on August 24, 2009, Adam confirmed that Local 9 agreed that by honoring the terms of the collective-bargaining agreement (CBA), Respondent was not waiving any of its defenses or arguments. Adam opined that by following the CBA on the current or other projects, Respondent would reduce its exposure to claims for damages. Adam also noted that as far as the Fund was concerned, Local 9 was a separate and distinct entity from the fringe benefit funds.

Adam testified that despite the various email exchanges, Local 9 never received any of the requested information.

### C. Legal and Factual Conclusions

#### 1. Whether the Respondent unlawfully withdrew recognition and unlawfully failed and refused to bargain with Local 9

##### a. Distinguishing the 8(f) and 9(a) agreements

Under Sections 9(a) and 8(a)(5) of the Act, employers are obligated to bargain only with unions that have been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." 29 U.S.C. § 159 (a). There is, however, an exception to this majority support requirement for the construction indus-

try. Under this exception, an employer may sign a "pre-hire" agreement with a union regardless of whether a majority of the employees supported the union's representation. 29 U.S.C. § 158(f). This exception adapts the law to conform to the unique nature of the construction industry. In the construction industry, employers need to draw from a pool of skilled workers and to know their labor costs up front in order to generate accurate bids. Additionally, union organizing campaigns in the construction industry are complicated by the fact that employees frequently work for multiple companies over short, sporadic periods. *Iron Workers v. NLRB (Deklewa)*, 434 U.S. 335, 348-349 (1978). *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 534 (D.C. Cir. 2003).

Because an 8(f) prehire agreement is not based on a showing of majority support, there is no presumption of majority status for the signatory union. *J & R Tile*, 291 NLRB 1034, 1036 (1988). In its decision in *Deklewa & Sons*, 282 NLRB 1375, 1385 fn. 31 (1987), enfd. sub nom. *Iron Workers v. NLRB*, 843 F.2d 770 (3d Cir. 1988), the Board adopted a rebuttable presumption that a bargaining relationship in the construction industry was established under Section 8(f) and placed the burden of proving that the relationship falls under Section 9(a) on the party making that assertion. *Id.* at 1385 fn. 41. The Board in *Deklewa* did not, however, bar an 8(f) representative from attaining 9(a) status. The 9(a) status could be attained either through a Section 9 certification proceeding or through a voluntary recognition where the recognition is based on a clear showing of majority support among the unit employees, e.g., a valid card majority. *Id.* at 1387 fn. 53.

##### b. The contractual language

In asserting that Respondent is a 9(a) contractor, the General Counsel relies upon the language in the successive CBA's that were in effect between 2000 and 2009. The General Counsel submits that this case is governed by the Board's holding in *Staunton Fuel & Material, Inc.*, 335 NLRB 717 (2001). In that case, the Board identified the minimum requirements in a written recognition agreement that would allow a union to be recognized as a 9(a) representative without looking to extrinsic evidence. The Board specifically held that "a written agreement will establish a 9(a) relationship if its language unequivocally indicates that the union requested recognition as majority representative, the employer recognized the union as majority representative, and the employer's recognition was based on the union's having shown or having offered to show, an evidentiary basis of its majority support." *Ibid.*

Counsel for the General Counsel argues that the recognition language of the parties' 2000-2003, 2003-2006, and 2006-2009 agreements each satisfies *Staunton Fuel's* three requirements. The General Counsel asserts that "the union's required request for recognition can be fairly implied from the contract language stating that the employer grants the required recognition." 335 *supra* at 720. Secondly, the General Counsel contends that each agreement states that Respondent voluntarily recognized Local 9 as the exclusive collective bargaining representative of all employees in the bargaining unit and that the parties "have a 9(a) relationship." Thirdly, the General Counsel submits that each agreement states that the Union has submitted

to the Employer evidence of majority support.<sup>4</sup> Accordingly, the General Counsel maintains that the language in the three agreements is “independently sufficient” to establish Local 9’s Section 9(a) status.

Citing the court’s decision in *Iron Workers (Deklewa)*, 843 F.2d 770, 778–779 (3d Cir. 1988), the Respondent argues that whether a CBA is governed by Section 8(f) or 9(a) of the Act “is a question answered by the provisions of the Act, not by the language in a contract.” The Respondent argues that more than unsupported language is required to support a 9(a) relationship. The Respondent does not dispute the fact that the recognition language embodied within the three agreements contains the requirements outlined in *Staunton Fuel*. Respondent contends, however, that simple language reciting the necessary conditions is not enough to overcome the 8(f) presumption; the conditions must have actually occurred. Respondent further argues that the case law specifically provides that the record must show that these conditions were met and Respondent contends that no case provides that the 8(f) presumption may be overcome by simply inserting it into CBA. Respondent further argues that in the instant case, neither the General Counsel nor the Charging Party provided any evidence that the Union offered to show majority support.

Just as the General Counsel relies upon the Board’s ruling in *Staunton Fuel*, Respondent asserts that the General Counsel’s position on 9(a) status must fail under *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 534 (D.C. Cir. 2003). In *Nova Plumbing*, the Board applied the *Staunton Fuel* criteria and found that the parties’ relationship was governed by Section 9(a). The Board specifically found that the CBA language clearly and unambiguously set out the parties’ intent to create a 9(a) relationship. The United States Court of Appeals for the District of Columbia Circuit denied enforcement of the Board’s order, finding that contract language alone cannot establish the existence of a 9(a) relationship.

The Respondent contends that the circumstances in *Nova Plumbing* were “substantially similar” to the circumstances here. A comparison of the circumstances, however, reveals significant differences. In *Nova Plumbing*, a previous plumbing company was operated by the employer’s father and the employer served as vice president of the prior company. The previous company had a contract with the union and recognized the union as the representative of its employees. The prior company ceased operations about the time that Nova commenced business and Nova hired employees who had worked for the prior company. Although the union sought recognition from Nova and bargained with Nova for a contract, there was substantial disagreement. The union’s contractual fringe benefit trusts threatened litigation against Nova and Nova filed an RM petition with the Board. The matter was ultimately settled with the signing of a CBA, the withdrawal of the RM petition,

and the withdrawal of the union’s threat to file trust litigation. Nova’s president and owner, who had been a vice-president in the previous company, signed various contractual documents in resolution of this matter. When he met with unit employees and informed them of the employer’s arrangements with the union, the employees expressed dissatisfaction with both the employer and the union for entering into the contract. The contract was put into effect by agreement of the parties on a job by job basis. During the life of the contract, employees voiced continuing dissatisfaction to the employer’s agents both with the terms of the agreement and with Nova’s recognizing the union as the employees’ representative. The administrative law judge noted in his decision that the employer offered essentially unchallenged evidence that employees made it clear at that time and on an ongoing basis thereafter that they did not desire to be represented by the union. At the end of the contract term, the employer notified the union of its intent to terminate the contract and declined to negotiate a successor agreement. The employer defended its actions by asserting that the union did not have majority support of its employees and that the parties had not intended to enter into a 9(a) relationship. In the initial decision in this case, the administrative law judge found that while the parties had a 9(a) relationship, the employer had a good-faith doubt that the union represented a majority of employees, and thus the employer was privileged to withdraw recognition and cease bargaining with the union upon expiration of the contract. The Board, however, applied the *Staunton Fuel* test and found that the collective-bargaining agreement unequivocally established that the union attained the status of majority bargaining representative under 9(a) and therefore the employer violated the Act when it withdrew recognition and refused to meet with the union.

In its rejection of the Board’s underlying decision, the court noted: “In reaching this conclusion, we do not mean to suggest that contract language and intent are irrelevant. To the contrary, they are perfectly legitimate *factors* (emphasis added in the decision) that the Board may consider in determining whether the *Deklewa* presumption has been overcome.”<sup>5</sup> The court went on to note: “Standing alone, however, contract language and intent cannot be dispositive at least where, as here, the record contains strong indications that the parties had only an 8(f) relationship.” In its analysis, the court referenced the uncontradicted testimony concerning the employees’ opposition and resistance to the union’s representation. In its analysis of whether the employer had a good-faith doubt of the union’s majority status, the court also noted the employer’s filing of the election petition and the employer’s assertions during negotiations with the union.

Thus, while the court did not find that the union could prove 9(a) status solely on contractual language, the circumstances of the case were totally different than those involved in this case. In *Nova*, there was substantial extrinsic evidence concerning the bargaining relationship between *Nova* and the union as well as the employees’ opposition and resistance to the contractual relationship. Therefore, while the court in *Nova* did not apply the Board’s *Staunton Fuel* analysis in finding a 9(a) relation-

<sup>4</sup> Interestingly, the Board did not find 9(a) status in *Staunton Fuel* because the contract language did not specifically state that the Union’s recognition was based upon a contemporaneous showing or an offer by the union to show majority support. In the instant case, however, the recognition language specifically states that Local 9 has submitted evidence of majority support. 335 supra at 720.

<sup>5</sup> Citing *J&R Tile, Inc.*, 291 NLRB 1034, 1037 (1988).

ship, the circumstances were contrary to those in the instant case.

Overall, it is apparent that in determining whether the presumption of 8(f) status has been rebutted, the Board first considers whether the agreement, examined in its entirety, “conclusively notifies the parties that a 9(a) relationship is intended.” *Madison Industries, Inc.*, 349 NLRB 1306, 1308 (2007); *Oklahoma Installation Co.*, 219 F.3d 1160, 1165 (10th Cir. 2000), denying enf. 325 NLRB 741 (1998). Where the agreement does so, the presumption of an 8(f) status has been rebutted. *Supra* at 1308; 1335, *supra* at 720.

The recognition language in the three agreements is without ambiguity. There is no other language in the agreement that contradicts or obfuscates the clear intent of the recognition language. In its decision in *Madison Industries, Inc.*, the Board majority found that the parties’ relationship was governed by Section 8(f) of the Act even though the recognition clause showed that the union demanded recognition as the employees’ majority representative and that the employer voluntarily granted such recognition. In doing so, the majority found it significant that the agreement contained a provision waiving the employer’s right to file a petition for an election with the Board during that term of the agreement. The Board noted that if the agreement were a 9(a) agreement, there would be no need for such a provision because a 9(a) agreement bars an employer from filing a petition for an election during its term. The Board concluded that the parties’ contemplated an 8(f) contract, and yet wished to waive the employer’s right to file a petition during the term of the agreement. The Board found that absent extrinsic evidence to clarify the ambiguity of the contract language, the 8(f) presumption was not rebutted. 349 *supra* at 1309. In the instant case, there is no ambiguity in the recognition language and Respondent has asserted no other contract language that contradicts or is at odds with the recognition language in issue.

Additionally, there was no record testimony to explain how the recognition language came to be a part of the CBA that was negotiated between the Union and the MCA. Respondent presented no representative from the MCA or anyone else to testify concerning the origin or the intent of the recognition language. In its posthearing brief, Respondent argues that while Respondent entered into an 8(f) agreement, the Union at some point “apparently inserted language into a contract renewal that purported to change the agreement” to a 9(a) agreement. It is illogical, however, that the Union simply added this very precise 9(a) language to the agreement without the approval or assent of the MCA bargaining representatives. For the Union to have done so in not one, but in three, successive collective-bargaining agreements seems rather unlikely. Respondent presented no MCA representative to testify that the Union surreptitiously inserted the recognition language without a valid basis or a demonstration of majority support. Moreover, the record reflects that as of April 30, 2003, Respondent was one of 26 employers that were members of the MCA and in July 2006, Respondent was one of 29 companies that comprised the MCA. Had the Union covertly inserted the recognition language into the MCA agreements as Respondent suggests, it would seem likely that one or more of the other MCA employer/members

would have challenged the 9(a) language. The record, however, contains no evidence of any such challenges.

Overall, none of the parties presented any evidence concerning the MCA/Local 9 bargaining in which this recognition language was created or even discussed. Although McMath confirmed that he had been a member of the bargaining committee in 2000, he provided no details of the bargaining. He did not address the number of sessions that he attended or how significant a role he played in the negotiations. The record only reflects that he was not president of the Union at the time of the negotiations. Upon cross examination by Respondent’s counsel, McMath acknowledged that he had not personally demonstrated the Union’s majority status to the MCA and he was unaware of anyone else in the Union who did so. Thus, while there was only one witness who attended the 2000 negotiations, none of the parties seemed interested in probing any further into the details of the bargaining as it relates to the recognition language. Louis DiPonio testified that he did not personally witness a demonstration of majority support, however, he did not attend the bargaining sessions and he did not sign the powers of attorney. Mathew DiPonio signed both the August 2001 and the December 2001 power of attorney for the MCA. Although Mathew DiPonio was present at the hearing and identified the August 2, 2001 power of attorney for the record, Respondent did not elicit any testimony from him regarding his knowledge of the Union’s demonstration of majority support. Thus, based upon the silence of the record, there is no extrinsic evidence that contradicts or rebuts the very clear recognition language contained in all three collective-bargaining agreements.

*c. Whether Respondent is time-barred from challenging 9(a) status*

The General Counsel additionally argues that the Respondent is time-barred from challenging the 9(a) status. There is no dispute that at the time that Respondent withdrew recognition from Local 9, approximately 8 years had passed since Respondent signed the August 2001 power of attorney. In signing the power of attorney, Respondent ratified, approved, and confirmed all prior acts of the MCA in negotiating and signing CBA’s with the Union. Additionally, by signing the power of attorney, Respondent agreed to be bound by the contracts “in the same manner it would be bound in any contract executed by its duly authorized agent.” Thus in signing the powers of attorney in August and in December 2001, Respondent accepted and endorsed the 2001–2003 agreement. Thereafter, two more agreements were negotiated by the MCA and by virtue of the powers of attorney, were also endorsed and accepted by Respondent. During that 8-year period, no representation petition or unfair labor practice charge was filed, challenging the Union’s majority status or the recognition language in any of the three agreements. The Board has long held that a challenge to majority status must be made within a reasonable period of time after Section 9 recognition is granted. *Casale Industries*, 311 NLRB 951, 953 (1993). The General Counsel points out that although *Casale Industries* was a representation case, the rationale and holding of the case has been extended to unfair labor practice cases. In *New Brunswick General Sheet Metal*

*Works*, 326 NLRB 915, 919–920 (1998), the employer signed an agreement binding it to the terms and conditions of an agreement negotiated by the union and a multiemployer association. The agreement provided that the union had submitted proof and that the employer was satisfied that the union represented a majority of the employees in the bargaining unit. In asserting that there was an 8(f) relationship rather than a 9(a) relationship, the employer maintained that there must be evidence that the union unequivocally demanded recognition as the 9(a) representative and that the employer unequivocally accepted it as such, before a 9(a) relationship is established. The employer, however, challenged the union's majority status after 6 years and three successive contracts. The Board affirmed the judge in finding that the employer was time barred from challenging the union's majority status and found that the union was the exclusive collective-bargaining representative pursuant to 9(a) of the Act.

When Mathew DiPonio signed the power of attorney on August 2, 2001, and again on December 14, 2001, his authorization ratified, confirmed, and approved "all prior acts" of the MCA in the negotiating and signing of collective-bargaining agreements with Local 9. At the time that Mathew DiPonio signed the powers of attorney, there was a collective-bargaining agreement in place that was effective by its terms from June 22, 2000, until August 1, 2003. Although there was no record evidence that confirmed when the agreement was actually reached, McMath testified that it would not be unreasonable that the negotiations concluded by July 1, 2000. There is no dispute therefore that at the time that Mathew DiPonio first signed the power of attorney in 2001, there was an agreement in place. The agreement contained an addendum that included the negotiated wage rates for the various unit positions. Other than the wage rate addendum, the contract included an additional 17 pages covering such things as working conditions, working hours, overtime, subcontracting, grievance procedure, and numerous other work-related issues. The 9(a) recognition language is included on page 5 of the 2000/2003 agreement. The identical recognition language is also found on page 5 of the 2003/2006 agreement and on page 4 of the 2006/2009 agreement. Because Mathew DiPonio did not testify other than to identify the August 2, 2001 power of attorney that he signed, there is no record evidence to indicate when he first obtained a copy of the 2000/2003 agreement and when he subsequently received copies of the successive agreements. There is nothing in the record to indicate that Respondent did not pay the negotiated wage rates included in the agreements or that Respondent failed to follow any other terms of the three agreements. Thus, it is reasonable to conclude that at the time that the power of attorney was initially signed in August 2001, Respondent had seen the negotiated collective-bargaining agreement and was aware of the terms to which Respondent would be bound. Even assuming that he would have signed the power of attorney without having seen the terms of the contract to which he would be bound, it is reasonable that he would have certainly received a copy of the contract upon signing the power of attorney or shortly thereafter.

Louis DiPonio testified that while he knew that the three agreements existed, he was not familiar with the terms of the

agreement. He also acknowledged that he never attended any of the negotiation sessions in 2000, 2003, or 2006. Although Respondent suggests that the Union somehow surreptitiously inserted the 9(a) language into the contract without Respondent's awareness, there is no dispute that the language was included in each of the agreements between 2000 and 2009. It is inconceivable that Louis DiPonio, as president of the company, would have been unfamiliar with the contents of documents binding him to pay specific wages to his employees and to follow other guidelines and rules concerning their terms and conditions of employment. Furthermore, the lack of involvement in the bargaining process has not been held to be a valid defense when the employer has indicated an unequivocal intention to be bound by a multiemployer bargaining group. *Harris Glass Industries, Inc.*, 317 NLRB 595, 598 (1995).

*d. The parties' arguments concerning the issue of majority status*

Respondent asserts that by relying solely upon the argument that the CBA contains 9(a) language, the Union "concedes" the fact that it has never enjoyed majority support among Respondent's employees. Respondent further argues that the Union failed to present any evidence that it showed or offered to show the Respondent evidence of majority support.

As discussed above, the record is silent with respect to the bargaining between Local 9 and the MCA that brought about the 9(a) language in the collective-bargaining agreements. As also discussed above, none of the parties presented any witnesses to demonstrate how the language came to be in the agreements or to contradict the apparent intent of the language. Although Respondent makes no claim that either Louis DiPonio or Mathew DiPonio was present during the contract negotiations, Respondent presented no MCA representatives to contradict the contract language itself or the factual assertions underlying the language. There is no dispute that each of the three agreements contain the following: "The Union has submitted to the Employer evidence of majority support, and the Employer is satisfied that the Union represents a majority of the Employer's employees in the bargaining unit described in the current collective bargaining agreement between the Union and the Employer."

The Respondent attempts to invalidate the language by arguing that the Union has not had majority support of its employees since 2005. Although he referenced no documentation upon which he relied, Louis DiPonio testified that at no time during the last 5 years had a majority of its employees been members of the Union. Based upon benefit fund records, Respondent also asserts that at all relevant times, its work force consisted more of Local 1 workers than Local 9 workers. Louis DiPonio acknowledged however, that for the past 20 years, while working in Local 9's jurisdiction, Respondent has "100%" employed Bricklayers that were either members of Local 1 or 9.

The General Counsel points out however, that even if Respondent employed members of Local 1 to perform work within Local 9's jurisdiction, the traveling members of Local 1 worked under the terms of Local 9's 2006–2009 agreement. General Counsel submits that the 2006/2009 agreement (art. II,

sec. B) provides that any employee “represented by BAC” would be assigned work under the Agreement and not only those employees with Local 9 as their home local. I also note that similar language is found in both the 2000/2003 and the 2003/2006 agreements. Respondent introduced into evidence a September 20, 2007 letter from the president of the BAC International that was addressed to both McMath and to the president of Local 1. In the letter, the BAC president explained that the BAC International has a strong policy favoring mobility of members and that members are encouraged to travel for work. Accordingly, the president urged that local hiring preferences and residency requirements should not be applied to limit members of the two locals from traveling and working in the jurisdiction of either local. The General Counsel submits, therefore, that the BAC International would certainly not encourage such jurisdictional interchange if members from a sister local would defeat a union’s majority. Furthermore, the General Counsel argues that the record is devoid of evidence that any Local 1 member, much less a majority of unit employees, manifested nonsupport of the Union. I find merit to the General Counsel’s argument. Admittedly, Respondent has employed Local 9 and Local 1 members to perform 100 percent of the unit work for the last 20 years. To assert that the Union does not have a majority of support because Respondent has assigned unit work to traveling Local 1 BAC members is not sufficient to demonstrate that the Union has, in fact, actually lost majority support. *Levitz Furniture Co.*, 333 NLRB 717, 717 (2001). Furthermore, I note that for over 40 years, the Board has held that “there is no necessary correlation between membership and the number of union supporters since no one could know how many employees who favor union bargaining do not become or remain members thereof.” *Terrell Machine Co.*, 173 NLRB 1480, 1481(1969).

Finally, I find that Respondent’s defense that Local 9 does not have majority status is also time barred. In withdrawing recognition from the Union, Respondent did not rely upon a good faith doubt or in fact any doubt of the Union’s majority status. There is no evidence that at any time since 2001 has Respondent raised any question or concern about the Union’s majority status. Therefore, Respondent’s question concerning majority status in response to the Board’s complaint is not persuasive.

Accordingly, the total record evidence supports a finding that Respondent unlawfully withdrew recognition of the Union’s 9(a) status and failed and refused to bargain with the Union as the exclusive collective representative of its employees in violation of Section 8(a)(5) and (1).

2. Whether Respondent unlawfully failed and refused to provide information

The General Counsel alleges that on July 14, 2009, July 24, 2009, August 3, 2009, and August 5, 2009, Local 9 requested information from Respondent that was necessary for, and relevant to, the Union’s performance of its duties as the exclusive collective-bargaining representative of the bargaining unit employees. The General Counsel further asserts that since July 14, 2009, and August 5, 2009, Respondent has failed and re-

fused to provide the information in violation of Section 8(a)(5) and (1) of the Act.

There is a general obligation for an employer to provide information needed by its employees’ bargaining representative for the proper performance of its duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). This duty to provide information includes information relevant to contract administration and negotiations. *Barnard Engineering Co.*, 282 NLRB 617, 619 (1987). Where the requested information concerns items and conditions of employment relating to employees in the bargain unit represented by the union, the information is presumptively relevant to the union’s representation function. *George Koch & Sons, Inc.*, 295 NLRB 695, 698 (1989). Where the information sought pertains to matters occurring outside the bargaining unit, relevance is required to be more precise. See *Curtis-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965). Under Board law, it is sufficient in such requests that the requesting union simply indicate the reason for the request. *Carson & Gruman Co.*, 278 NLRB 329, 334 (1986); *Bohemia Inc.*, 272 NLRB 1128 (1984). In determining relevancy of requested information, the Board uses a liberal discovery-type standard to determine whether the information is relevant, or potentially relevant, to require its production. *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994); *W.L. Molding Co.*, 272 NLRB 1239 (1984).

In his July 14, 2009 letter to Respondent’s counsel, Adam included 10 enumerated requests for information in addition to a preliminary inquiry as to why Respondent believed that McMath’s request to meet and bargain was irrelevant. A summary of the enumerated items reflects the following kinds of information: (1) the reasons that Respondent did not want to be a party to the MCA-Local 9 CBA; (2) information concerning Respondent’s membership with the MCA; (3) a list of the names and addresses of employees who had been in the bargaining unit since January 2008; (4) current projects on which the Respondent was performing work, including the names of the employees working on the project, the names of the general contractors, and locations of the projects; (5) copies of all collective-bargaining agreements for which Respondent is a party other than the agreement between the MCA and Local 9; (6) projects for which Respondent had currently submitted bids, including the location of the potential projects and expected start date; (7) whether the Respondent is or was a member of the Construction Association of Michigan and information concerning the cessation of the membership if applicable; (8) the identification of any work or projects since January 1, 2008 where the Respondent subcontracted or assigned work to that third party and the details of such; (9) Respondent’s current projects subject to federal, state, or local prevailing wage/benefit law; and (10) copies of sworn or certified payroll records submitted on federal, state, or local projects, subject to a prevailing wage and benefit law, since January 1, 2008.

In a July 24, 2009 email to Respondent’s counsel, Adam again requested information concerning the projects on which Respondent was currently performing work and information as to whether Respondent was current in its payment of wages and benefits to bargaining unit employees. Adam also asked what Respondent intended to do after July 31, 2009,<sup>5</sup> with respect to

terms and conditions of employment if Respondent would not bargain with Local 9.

In the August 3, 2009 request for information, Adam requested information concerning the status of Respondent's CBA with Local 1. Adam also asked for a copy of that agreement and copies of any letters sent by Respondent terminating the agreement with Local 1. Adam reminded Respondent that the information requested on July 14, 2009, had not been provided.

On August 5, Adam requested the following:

1. Is DiPonio going to apply the terms of the BAC-MCA to the current projects? If no, what changes have or will be made?
2. What "current projects" is DiPonio working on and how long is it expected that the projects will last?
3. Which BCA represented workers are employed on these "current projects?"
4. Has DiPonio laid-off any BAC-represented workers since July 30, 2009?
5. Has DiPonio changed any terms and conditions of employment related to the BAC-bargaining unit since July 30, 2009.

In the various responses to Local 9's requests for information, Respondent does not address the relevancy of the requests with any specificity. Generally, in the written responses, Respondent reiterated its withdrawal of recognition and its position that it did not have a duty to bargain with the Union. Respondent's only response to a specific information item request was included in Kammer's July 29, 2009 email confirming that Respondent would not "waste time providing information that the union already has." Kammer further added that the Union "knows the projects that DiPonio is working on and we will not waste time."

The General Counsel submits that some of the information requested by the Union was presumptively relevant to the Union's statutory duties and identifies the request for the names and addresses of the employees as an example. The General Counsel further argues that with respect to other requests for information, Respondent sought no clarification of the requests and raised no challenges of relevancy. In its decision in *Pet Dairy*, 345 NLRB 1222, 1223 (2005), the Board confirmed that it was incumbent upon the employer to seek clarification rather than ignore a request for information. The Board explained that an employer "may not simply refuse to comply with an ambiguous or over broad information request, but must request clarification and/or comply with the request to the extent that it encompasses necessary and relevant information." 345 supra at 1223.

The General Counsel additionally asserts that the Union demonstrated the relevance of the other requested information through the testimony of Adam during the hearing. Upon questioning by counsel for the General Counsel, Adam testified in detail his reasons for requesting the requested information concerning matters that would arguably not be presumptively relevant. The General Counsel cites the Board's decision in *H&R Industrial Services*, 351 NLRB 1222, 1224 (2007), for authority that a union may inform an employer at the unfair labor prac-

tice hearing of its reasons for requesting information that is not presumptively relevant. In *H&R Industrial*, the Board unanimously adopted the judge's decision finding that the employer unlawfully failed and refused to provide requested information in violation of Section 8(a)(5) and (1) of the Act.

In the rationale for her decision, the judge discussed the adequacy of the reasons given by the union for its information request to the employer. The judge found that the reasons given by the union had clearly satisfied the Board's standard. The judge then noted that "in any event," the facts underlying the request for the information and the reasons supporting the information request were communicated in great detail at the hearing. The judge went on to note that whether the employer's duty to respond to the union's information request ran from the date initially alleged or from the date of the hearing, the remedy would be the same and in either case the employer would be ordered to provide the requested information. The Board affirmed the judge's decision without discussion. By footnote, the Board noted that in adopting the information request violation found by the judge, Member Schaumber found that a telephone conversation between the parties, as well as the union's written request, sufficiently demonstrated to the employer that the union had an objective basis for believing that the requested information was necessary for, and relevant to, the proper performance of its statutory duties. The Board did not address the judge's comment. While the Board did not specifically affirm or reject the judge's reasoning on this point, the judge's comment was not a significant part of the decision because the written request to the employer was found by the judge and noted by Member Schaumber to independently satisfy the Board's standard. I note however, that in a decision footnote in *Dodger Theatricals Holdings, Inc.*, 347 NLRB 953 (2006), Member Schaumber stated that he did not necessarily agree with the Board's precedent that a union can simply state a reason for its request for information without giving any actual basis for the same. He stated that he would, however, find a violation where the union apprises the employer of its factual basis at the unfair labor practice hearing, the union's disclosure supports the relevancy of the information, and the employer continues to withhold it. Member Schaumber noted that the date of the violation would then be changed to reflect the date when the union provided the factual basis for the request. While the judge's dicta and Member Schaumber's decision footnote would indicate that a union may still be able to provide the necessary reasons and underlying facts in support of an information request as late as the unfair labor practice hearing, the record evidence in this case does not support a finding of a violation despite any additional clarification given by the Union during the unfair labor practice hearing.

Overall, the Respondent does not contest the nature of Local 9's various requests for information that were made on July 14 and 24, and August 3 and 5, 2009. In its posthearing brief, Respondent asserts, however, that the information requested was for time periods occurring after Respondent terminated the agreement. Respondent contends that because it only had an 8(f) relationship with the Union, Respondent was under no obligation to furnish information for any period after July 31, 2009.

Furthermore Respondent asserts that even though it had no duty to furnish the requested information, Respondent nevertheless offered to do so on multiple occasions. I find merit to Respondent's argument. As described above, there were a number of email exchanges between Adam, Kammer, and Wright from July 14, 2009, through September 3, 2009, concerning the Respondent's withdrawal of recognition and the Union's requests for information. When Kammer initially responded to Adam in her letter of July 15, 2009, she reaffirmed Respondent's termination of the contract and Respondent's position that it would not bargain with respect to a new agreement. Although Kammer did not specifically address the Union's information request, she confirmed that Respondent was willing to sit down with Local 9's representatives to discuss the best manner of winding down the projects on which Respondent was currently working and "any other relevant issues."

In his July 24, 2009 email to Kammer, Adam asked Kammer to identify the current projects on which Respondent was performing work in addition to asking whether Respondent was current on paying wages and benefits to unit employees and the intentions of Respondent for terms and conditions of employment if Respondent would not bargain with the Union. In her email response of July 27, 2009, Kammer confirmed that Respondent would provide the requested information when Respondent met with the Union to discuss the jobs that would be affected by the Respondent's recognition withdrawal. In a July 29, 2009 response, Kammer stated that Respondent would not provide information that the Union already had about the current projects, but said nothing about whether Respondent would provide the other requested information. She reiterated that Respondent would meet with Local 9 to discuss Respondent's specific projects and to discuss how they should be completed. In an August 3, 2009 email to Adam, Wright stated:

"We will not be providing you information so that you can harass DiPonio, but we will certainly agree to sit down and work out an appropriate arrangement, *at which time we will provide the information requested.* (Emphasis added.)

When Adam responded on August 3, 2009, he informed Wright that his legal analysis was wrong and that such would be demonstrated by a Board complaint. While Adam asserted that a union's request for information was not harassment, he did not address Respondent's offer to meet and to provide the information. The subsequent email exchanges between the parties dealt with the Union's charge that had been filed on July 31, 2009, and a discussion of a proposed agreement by which the terms of the previous CBA could be applied to current projects without Respondent's waiving its position on the terminated contract.

Thus, the entirety of the email and letter exchange reflects that Respondent did not refuse to provide the requested information. In fact, on both July 27, 2009 and again on August 3, 2009, Respondent confirmed that it would provide the information when counsel met with Adam. Adam asserted that no meeting was ever held with Respondent. Adam explained that it was "blatant and obvious" that Respondent was not going to bargain for a new contract. He testified "And a meeting that she was suggesting, the idea of sitting down to discuss winding

down the projects, was not adequate for purposes of collective bargaining, so I filed the charge." Adam acknowledged that Respondent included the offer to meet and to provide the information in its correspondence to him. He asserted, however, that he did not believe that Respondent intended to provide the information. He did not clarify why he believed that the information would not be provided. He also asserted in his testimony that he did not have to meet with Respondent in order for Respondent to have provided the requested information.

Counsel for the General Counsel asserts that even though Respondent offered to meet with Local 9 in nonbargaining discussions, Respondent also made it clear that any such meeting would not involve bargaining. Citing the Board's decision in *American Meat Packing Corp.*, 301 NLRB 835, 835 fn. 3 (1991), the General Counsel submits that Respondent was not free to conditionally offer to furnish the requested information only if the Union would agree to sit down, but not bargain, about winding down current projects. In *American Meat Packing*, the employer claimed dire financial circumstances in bargaining and the Board found that the employer unlawfully failed to provide the financial information requested by the union. While the employer admitted an obligation to supply the information, the employer conditioned the providing of information on the union's conducting an extensive and costly audit covering a period of 5 years. The Board affirmed the judge in finding that the conditional nature of this proffer of supporting information was unlawful. I don't find the facts in *American Meat Packing* to be significantly similar to the circumstances of this case.

The Respondent agreed to meet and to discuss the winding down of its projects and in the course of doing so offered to provide the requested information. Although it was not the offer to bargain as Local 9 wanted, it was nevertheless an offer to work out an arrangement to provide information that had been requested. In both the July 14, 2009 request for information and the July 24, 2009 request for information, Adam specifically asked Respondent to identify its current projects. In the July 14, 2009 request, Adam asked for not only the identity of the project, but also the names and addresses of the employees working on the project, the names of the general contractors, and the locations of the projects. In the August 3, 2009 email to Adam, Wright confirmed that although Respondent was not waiving its position to terminate the contract, Respondent was willing to finish current projects using union labor and paying fringe benefits. In the same email, Wright confirmed that although Respondent would not provide the information so that the Union could harass Respondent, the Respondent would agree to sit down and work out an appropriate arrangement, at which time Respondent would provide the requested information. Based upon the wording of the offer, it is apparent that in such a meeting Respondent would provide the information about the projects that had been requested by Adam.

Because the Respondent was not agreeing to bargain for a new contract, Local 9 never pursued Respondent's offer to meet and to provide the requested information. In his response, Wright did not qualify that he would provide only a portion of the requested information. Wright offered that when they met,

Respondent would “provide the requested information.” Unlike the circumstances of *American Meat Packing*, Respondent was not requiring the Local to take on an unnecessary expense or do anything other than to meet with Respondent to receive the requested information. An overview of the Wright and Kammer’s responses reflect that they continually offered to meet with Adam to discuss Respondent’s ongoing projects and how they would be affected by Respondent’s withdrawal of recognition. Although Adam repeatedly asked Respondent to provide information about the work that Respondent was currently performing, he did not respond to Respondent’s offer to meet and discuss these projects.

In response to questions from Wright on cross-examination, Adams asserted that Respondent could have mailed the information, dropped it off, or made other arrangements to provide it to the Union. Clearly, the Union wanted the information provided in a form other than in a personal meeting. In *United Aircraft Corp.*, 192 NLRB 382, 389 (1071), the Board noted that if an employer is to fulfill its bargaining obligation under Section 8(a)(5) of the Act, the employer is required to furnish relevant information requested by the employee representative. The Board added, however, “But it does not follow that the union is entitled to such information in the exact form or on the exact terms requested.” Citing *Lasko Metal Products*, 148 NLRB 976, 979 (1964), enfd. 363 F.2d 529 (6th Cir. 1966), the Board noted that good-faith bargaining requires only that such information be made available at a reasonable time and in a reasonable place and with an opportunity for the union to make a copy of such information if it so desires. While the circumstances in *Lasko* are not identical, there are some interesting similarities to the facts in the instant case. In *Lasko*, the union requested information concerning the employer’s newly hired employees during negotiations. The employer’s attorney informed the union representative that the information would be made available, providing that the union was interested in negotiating a contract that would fully recognize the rights of these newly hired employees. The union representative repeated his request and protested the attorney’s attempt to impose conditions upon the request. The employer apparently abandoned its condition and the attorney subsequently notified the union representative that the requested information was available and that the union could see it in the attorney’s office at any reasonable time and the union could make a copy. The union representative, however, requested that the information be made available by mail. The union representative made no additional request for the information and the employer’s attorney made no additional offer to produce the information. Because the information was readily available in the employer’s records and not produced, the trial examiner found that the employer violated Section 8(a)(5). The Board, however, did not agree. The Board explained that while the employer was obligated to make the requested information available to the union, it does not follow that the union has a right to such information under the terms and conditions that it imposed. The Board found that the employer met its obligation by making the requested information available at a reasonable time and at a reasonable place. Id.

In the instant case, Respondent offered to meet with the Union and confirmed that it would provide the requested information at that time. It appears likely that had the Union responded to the offer, a reasonable time and place could have been arranged for the information to be provided. Although the offer of the meeting did not encompass an offer to bargain for a new contract, the offer was nevertheless sufficient to meet the Respondent’s obligation to provide the requested information. Accordingly, I do not find that Respondent failed or refused to provide information to Local 9 in violation of Section 8(a)(5) and (1).

#### CONCLUSIONS OF LAW

1. Respondent DiPonio Construction Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 9, International Union of Bricklayers and Allied Craftworkers, AFL-CIO is a labor organization within the meaning of 2(5) of the Act.
3. By withdrawing recognition of, and refusing to bargain with, Local 9 as the exclusive collective-bargaining representative of its employees, Respondent violated Section 8(a)(5) and (1) of the Act.
4. I do not find that Respondent violated the Act in any other manner.

#### REMEDY<sup>6</sup>

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

#### ORDER

The Respondent, DiPonio Construction Company, Inc., Trenton, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Refusing to recognize and bargain with Local 9 as the exclusive representative of its employees in the appropriate unit with respect to wages, hours, working conditions, and other terms and conditions of employment.
  - (b) 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) On request by Local 9, retroactively apply the terms of the 2006–2009 collective-bargaining agreement with Local 9, to the extent that any changes in terms and conditions of employment were implemented, and as appropriate, make whole

<sup>6</sup> The Charging Party’s request for litigation costs is denied.

<sup>7</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

any employees of Respondent employed in the appropriate unit for any loss of pay or benefits incurred as a result of Respondent's unfair labor practices, with interest.<sup>8</sup>

(b) Recognize and, upon request, bargain collectively and in good faith with Local 9 as the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate unit, and upon request, embody in a signed agreement any understanding reached. The appropriate unit is:

All full-time and regular part-time journeymen, apprentices, and support employees who historically or traditionally perform work assigned within Local 9's territorial jurisdiction, that involves all work including but not limited to all forms of masonry construction, including all brick, aerated autoclaved concrete masonry units, cement finishing, stone, concrete block, marble, plaster, mosaic, tile, terrazzo, terra cotta, glass block, refractory materials, and pointing-cleaning-caulking work, the complete installation of all forms of masonry panels including the off and/or on-site fabrication, all integral elements of masonry construction, all application of thin stone and thin stone panels, forming of slabs up to one foot (1') high, and all forms of substitute masonry materials or building systems thereto utilized, employed by Respondent at its Trenton, facility, but excluding guards and supervisors as defined in the Act.

(c) Within 14 days after service by the Region, post at its Trenton, Michigan facility, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 2009.

<sup>8</sup> The General Counsel seeks an award of quarterly compound interest. While I am mindful that the Board at one time referenced its consideration of modifying its interest calculation procedures, there is no existing Board authority to deviate from the past practice of ordering the award of simple interest. *Rogers Corp.*, 344 NLRB 504, 504 (2005). Accordingly, I do not recommend the award of compound interest as requested by the General Counsel.

<sup>9</sup> 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."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT withdraw recognition from or refuse to meet and bargain collectively with Local 9, International Union of Bricklayers and Allied Craftworkers, AFL-CIO, as the exclusive bargaining representative of our employees in the appropriate bargaining unit set forth below.

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

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time journeymen, apprentices, and support employees who historically or traditionally perform work assigned within the Local 9's territorial jurisdiction, that involves all work including but not limited to all forms of masonry construction, including all brick, aerated autoclaved concrete masonry units, cement finishing, stone, concrete block, marble, plaster, mosaic, tile, terrazzo, terra cotta, glass block, refractory materials, and pointing-cleaning-caulking work; the complete installation of all forms of masonry panels including the off and/or on-site fabrication, all integral elements of masonry construction, all application of thin stone and thin stone panels, forming of slabs up to one foot (1') high, and all forms of substitute masonry materials or building systems thereto utilized, employed by DiPonio Construction Company, Inc. at or out of its Trenton, Michigan facility, but excluding guards and supervisors as defined in the National Labor Relations Act.

DIPONIO CONSTRUCTION CO.