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MSR Industrial Services, LLC and Local 25, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO. Cases 07-CA-106032 and 07-CA-106627

August 31, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

On April 9, 2014, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs, the Respondent filed answering briefs, and the General Counsel filed a reply brief. The Union also filed a motion to withdraw certain of its exceptions, which was granted on July 23, 2014.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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

The primary issue in this case concerns the lawfulness of unilateral changes to terms and conditions of employment made by the Respondent, a construction industry employer, after the Respondent lawfully terminated its agreement with the Union. Contrary to the judge, we find that the changes did not violate Section 8(a)(5) and (1) of the Act.

I. FACTS

The Respondent is a construction contractor that removes and replaces smokestacks and wastewater treatment equipment. On June 1, 2011, the Respondent, by signing a "me-too" agreement, agreed to be bound by the terms of a collective-bargaining agreement (CBA) between the Union and the Great Lakes Fabricators and Erectors Association (the Association). The Association CBA was effective from June 1, 2010, to May 31, 2013.²

¹ We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

² The "me-too" agreement provided that, absent termination, the Respondent would be bound to any successor contracts signed by the Association and the Union. On March 21, 2013, the Association and the Union signed a successor contract, effective from that date until May 31, 2019. Initially this case involved an allegation that the Re-

Respondent had not given sufficient and timely notice to the Union to terminate the "me-too" agreement and that the Respondent was therefore bound to the 2013-2019 Association CBA. The judge found that the Respondent had given sufficient notice and was therefore not bound to the successor agreement. The General Counsel did not except to the judge's finding. The Union did except, but has since withdrawn the relevant portion of its exceptions and supporting brief. As a result, no party now contends that the Respondent was bound to the successor agreement.

Four members of the Union began working for the Respondent at a wastewater site in Dexter, Michigan, in mid-May 2013.³ Employees were supervised by Clint Goettl and were paid according to the 2010-2013 Association CBA. On May 31, the expiration date of that agreement, Goettl told the four employees that the Respondent no longer had a contract with the Union, but that they could continue to work at Dexter at the "prevailing wage" without the fringe benefits called for by the union contract.⁴

Union members stopped working at the Dexter site from June 1 until June 27, when the Union gave its members permission to work for the prevailing wage, pursuant to the Respondent's offer. Three members of the Union worked at the Dexter site from June 27 until August 15 and were paid the prevailing wage without the fringe benefits called for in the Association CBA.

On May 31, the Respondent's counsel sent a letter to the Federal Mediation and Conciliation Service (FMCS) stating that the Union had refused to negotiate with the Respondent and was threatening to strike on June 3. The Respondent did not notify the Michigan Employment Relations Commission (MERC), the state mediation and conciliation agency, of its dispute with the Union.

II. THE JUDGE'S DECISION

The judge found that the changes to terms and conditions made by the Respondent when the contract expired on May 31 were unlawful, not because the Respondent was bound to the successor agreement or because the Respondent made the changes without bargaining with the Union, but only because the Respondent failed to fully comply with the notice requirements of Section 8(d) of the Act. Specifically, because the Respondent did not notify FMCS of the dispute until May 31, the day the contract expired, the judge found that the Act prevented

The Union disclaimed interest in representing the Respondent's employees in early July 2014, after the judge's decision had issued and exceptions were submitted.

³ All dates are in 2013 unless otherwise indicated.

⁴ The Union's business manager testified that the difference between the "prevailing wage" and the Union's total wage and benefit package was under \$2 per hour. There is no suggestion in the record that the "prevailing wage" referred to was the equivalent of the "prevailing wage" within the meaning of the Davis-Bacon Act, 40 U.S.C. §§ 3141 et seq.

the Respondent from making changes to any terms and conditions until the 60-day period mandated by Section 8(d) had expired (i.e., July 30, 2013).⁵

The judge dismissed allegations that the Respondent either locked out or constructively discharged employees between May 31 and June 27, finding instead that employees went on strike. The judge made no findings on the complaint allegation that the Respondent unlawfully assigned bargaining-unit work to a nonbargaining-unit supervisor on about June 5.⁶

III. ARGUMENTS ON EXCEPTIONS

The General Counsel and the Union both filed exceptions to aspects of the judge's findings concerning the changes made by the Respondent when the contract expired.⁷ The General Counsel argues that the Respondent could not alter terms and conditions of employment because, in addition to failing to notify FMCS of the dispute in advance of contract expiration, the Respondent also did not provide notice to MERC.⁸ The Union argues that the judge should have found that the changes continue to violate the Act because the Respondent still has not given notice of the labor dispute to MERC. The Union further argues that the Board should order the Respondent to restore the 2010–2013 contract terms until 60 days after it gives notice to MERC.

IV. ANALYSIS

A. Nature of the Relationship Between the Respondent and the Union

The complaint alleges, and the judge found, that the Respondent is an employer in the construction industry. The judge, however, made no finding on whether the parties' relationship was governed by Section 9(a) or by Section 8(f) of the Act. Although no party excepted to this aspect of the judge's decision, we find that the judge erred in failing to make such a finding.

When relationships in the construction industry are governed by Section 9(a), the employer cannot change terms and conditions of employment unilaterally upon contract expiration, and it must continue to recognize and

⁵ The judge did not discuss the Respondent's failure to notify MERC of the dispute.

⁶ The judge found that the Respondent violated Sec. 8(a)(5) and (1) of the Act by (1) bypassing the Union and dealing directly with bargaining-unit employees on May 31, 2013 (2) failing to provide the Union some of the information it requested on March 18, 2013, and (3) failing to provide the Union the remainder of the information it requested on March 18, 2013, in a timely manner. There are no exceptions to these findings.

⁷ The Respondent did not except to any of the judge's findings.

⁸ The General Counsel also excepted to the judge's failure to find that the Respondent unlawfully locked out and/or constructively discharged employees and assigned bargaining-unit work to a nonbargaining-unit supervisor after the contract expired.

bargain with the union after the contract expires. See *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). In an 8(f) relationship, by contrast, either party may repudiate the contract and terminate the parties' bargaining relationship when the contract expires. See *John Deklewa & Sons*, 282 NLRB 1375, 1386–1387 (1987), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), *cert. denied* 488 U.S. 889 (1988). The employer has no duty to meet or bargain about renewing the contract or negotiating a successor agreement. See *id.* at 1386–1387. See *Sheet Metal Workers Local 9 (Concord Metal)*, 301 NLRB 140, 145 (1991).

The complaint alleges violations based on changes that the Respondent made in terms and conditions of employment and other actions that it took after its contract with the Union expired. Because the Respondent had different rights and obligations post-contract depending on whether its relationship with the Union was governed by Section 8(f) or 9(a), it is necessary to resolve that question in order to determine whether the Respondent's actions were lawful.

We find on the record before us that the parties' relationship was governed by Section 8(f). First, the complaint implicitly alleges an 8(f) relationship. It alleges that the Respondent is in the construction industry and that it recognized the Union as the exclusive collective-bargaining representative of the unit "without regard to whether the Union's majority status had ever been established under Section 9(a) of the Act." The complaint also alleges that the Union has been the "limited exclusive collective-bargaining representative" of the unit "based on Section 9(a)" since June 1, 2011. Those are the standard phrases used by the General Counsel when alleging a Section 8(f) relationship. See, e.g., *Bemboom Heating & Cooling LLC*, 360 NLRB No. 139, slip op. at 2 & fn. 2 (2014).

Second, under *Deklewa*, the Board presumes that construction industry bargaining relationships such as the one at issue here are governed by Section 8(f). See *H.Y. Floors & Gameline Painting*, 331 NLRB 304, 304 (2000); *Casale Industries*, 311 NLRB 951, 952 (1993). This presumption can be rebutted, and the burden of proving the existence of a Section 9(a) relationship is on the party asserting that such a relationship exists. See *Casale Industries*, 311 NLRB at 952; *Deklewa*, 282 NLRB at 1385 fn. 41.⁹ No party here has argued that the relationship was based on Section 9(a) or presented any evidence proving the existence of such a relationship.

⁹ A 9(a) relationship may be established either through a Board-certified election or through an employer's voluntary grant of 9(a) recognition. *J & R Tile*, 291 NLRB 1034, 1036 fn. 11 (1988).

Thus, the presumption of 8(f) status stands, and we find that the parties' relationship was governed by that section. See, e.g., *A. S. B. Cloture, Ltd.*, 313 NLRB 1012, 1012 fn. 2 (1994) (finding Section 8(f) based on commerce data and unit description and in the absence of any allegation that the bargaining relationship was actually based on 9(a) support).

B. Whether the Respondent's Unilateral Changes Violated the Act as Alleged

The next issue to be decided is whether an employer in an 8(f) relationship may lawfully make unilateral changes upon contract expiration without giving advance notice to FMCS as required by Section 8(d). We find that it may.

Section 8(d) imposes certain obligations on parties wishing to terminate or modify a collective-bargaining agreement. These include notifying FMCS and the appropriate state mediation agency of the existence of a dispute within 30 days of notifying the other party to the contract of its desire to modify or terminate the contract.¹⁰ A failure to comply with these notice requirements precludes an employer from making changes to existing terms and conditions of employment. See *Geo. C. Christopher & Son*, 290 NLRB 472, 474 (1988). A party in a 9(a) relationship that wishes to modify or terminate its CBA is indisputably required to follow the notice requirements of Section 8(d). See, e.g., *Weathercraft Co. of Topeka*, 276 NLRB 452, 453 (1985). Contrary to the implicit position of the judge and the General Counsel, however, we find that the notice requirements of Section 8(d) do not apply when the rela-

tionship between the parties is governed by Section 8(f).¹¹

As explained in *Deklewa*, a union that is party to a Section 8(f) relationship does not gain the "full panoply of Section 9 rights and obligations." 282 NLRB at 1385. Although a union in an 8(f) relationship operates as the exclusive bargaining representative of employees during the term of a collective-bargaining agreement, the union enjoys no presumption of majority support on the contract's expiration and gains no Section 9(a) rights or privileges "[b]eyond the operative term of the contract." *Id.* at 1387. Concomitantly, the obligations imposed on a Section 8(f) employer through application of Section 8(a)(5) to 8(f) agreements are "limited to prohibiting the unilateral repudiation of the agreement until it expires" ¹² *Id.* On expiration, the employer may unilaterally terminate its relationship with the union, change existing terms and conditions of employment without bargaining, and refuse to meet or bargain about renewing the contract or negotiating a successor agreement. See *id.* at 1386–1387; see also *Concord Metal*, 301 NLRB at 145.

The 8(d) notice requirements are a component of the duty to bargain collectively, and are designed to give the parties assistance in settling their labor disputes peacefully and to minimize the interruption of commerce resulting from strikes. See *Douglas Autotech Corp.*, 357 NLRB No. 111, slip op. at 3 (2011); *Boghosian Raisin Packing Co.*, 342 NLRB 383, 384 (2004). Such requirements are essential in Section 9(a) bargaining relationships, where the parties' collective-bargaining relationship continues after contract expiration.

By contrast, there is no compelling rationale for imposing those notice requirements when an employer (or union) terminates an 8(f) agreement. In those circumstances, termination of the 8(f) agreement effectively terminates the parties' bargaining relationship as well. There is no ongoing obligation, on either side, to meet and bargain about renewing the contract or negotiating a successor agreement. As a result, a key purpose of the 8(d) notice requirements—to assist the parties in settling their differences—is no longer served, and it makes little sense to require the parties to go through the formality of notifying government mediation agencies that they notify government mediation agencies that they intend to terminate their contract.

For these reasons, having found that the parties' relationship was governed by Section 8(f), we conclude that

¹⁰ Sec. 8(d) provides, in relevant part:

[W]here there is in effect a collective-bargaining contract . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

¹¹ Because the notice requirements do not apply to the parties' relationship here, the Respondent's failure to notify MERC of the dispute has no bearing on the outcome.

¹² Or until the employer's unit employees vote to reject or change their representative. *Id.*

the Respondent's failure to comply with the notice requirements of Section 8(d) is not a basis for finding that the Respondent violated Section 8(a)(5) and (1) of the Act when it changed employees' terms and conditions of employment. Accordingly, we dismiss that allegation.

C. *The Remaining Complaint Allegations*

Because the Respondent had no further bargaining obligation toward the Union after the contract expired, was privileged to change terms and conditions of employment unilaterally, and had no ongoing obligation to assign bargaining-unit work to unit members, we find no merit to the General Counsel's allegations that the changes resulted in an unlawful lockout or that the Respondent unlawfully assigned bargaining-unit work to a nonbargaining-unit supervisor after the contract expired. We further reject as unsupported the General Counsel's contentions that the employees were constructively discharged.¹³ As a result, we dismiss all of the complaint allegations except for the allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by (1) bypassing the Union and dealing directly with bargaining-unit employees on May 31, 2013 (2) failing to provide the Union some of the information it requested on March 18, 2013, and (3) failing to provide the Union the remainder of the information it requested on March 18, 2013, in a timely manner. As noted, those violations occurred prior to contract expiration, and there are no relevant exceptions.

ORDER

The National Labor Relations Board orders that the Respondent, MSR Industrial Services, LLC, Burton, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing the Union and dealing directly with bargaining-unit employees with regard to their terms and conditions of employment when employees are represented by an exclusive bargaining representative, such as the Union.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish or failing to timely furnish

¹³ In finding that employees were not constructively discharged, the judge noted that they could have continued working for the Respondent after resigning from the Union. In affirming the judge's finding, we disavow any suggestion that the Respondent could lawfully have *required* the employees to resign from the Union as a condition of returning to work. An employer may not condition an employee's continued employment on the employee's abandonment of rights guaranteed by Sec. 7 of the Act. See *Intercom I (Zercom)*, 333 NLRB 223, 223 fn. 4 (2001) (citing *Hoerner Waldorf Corp.*, 227 NLRB 612, 613 (1976)); see also *Newark Electric Corp.*, 362 NLRB No. 44, slip op. at 13-15 (2015). The Respondent imposed no such requirement here.

it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(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) Furnish to the Union in a timely manner the information requested by the Union on March 18, 2013, as set forth in complaint paragraph 28(a) insofar as the Union requested information from the period June 1, 2011, to May 31, 2013.

(b) Within 14 days after service by the Region, post at its Burton, Michigan facility copies of the attached notice marked "Appendix."¹⁴ 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. If 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 May 31, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 7 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.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted and Mailed by Order of the National Labor Relations Board" shall read "Posted and Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 31, 2015

Mark Gaston Pearce,	Chairman
Philip A. Miscimarra,	Member
Lauren McFerran,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 bypass the Union and deal directly with you with regard to your terms and conditions of employment when you are represented by an exclusive bargaining representative such as the Union.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish or failing to timely furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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 furnish to the Union in a timely manner the information requested by the Union on March 18, 2013,

insofar as the Union requested information from the period June 1, 2011, to May 31, 2013.

MSR INDUSTRIAL SERVICES, LLC

The Board's decision can be found at www.nlr.gov/case/07-CA-106032 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Kelly A. Temple, Esq., for the General Counsel.
James J. Parks and Jesse Viau, Esqs. (Jaffe, Raitt, Heuer & Weiss, P.C.) of Southfield, Michigan (*at trial*); *David M. Cessante and Kurt M. Graham, Esqs. (Clark Hill)*, of Detroit, Michigan (on brief), for the Respondent.
David R. Radtke, Esq. (McKnight, McClow, Canzano, Smith & Radtke, P.C.) of Southfield, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Detroit, Michigan, on January 8 and 9, 2014. Ironworkers Local 25 filed the charges in this case on May 29, and June 6, 2013, and the General Counsel issued the complaint on September 30, 2013.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, MSR Industrial Services, LLC, is a limited liability company based in Burton, Michigan. It is owned by a company named Source Capital. MSR Industrial Services is a construction contractor which performs work such as the demolition, removal and replacement of smokestacks and wastewater treatment equipment. At its facility in Burton, Michigan, during the calendar year 2012, Respondent purchased and received goods valued in excess of \$50,000 directly from points outside the State of Michigan. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Ironworkers Local 25, is a labor organization within the meaning of Section 2(5) of the Act.

The issues in the case are as follows: (1) whether Respondent became a party to the 2013–2019 collective-bargaining agreement between Local 25 and the Great Lakes Fabricators and Erectors Association (GLFEA). The General Counsel and Union allege this is the case because Respondent failed to timely notify the Union by certified mail that it no longer wished to be party to a contract with Local 25 after the expiration of the 2010–2013 agreement; (2) did Respondent illegally lock-out and/or constructively discharge four Local 25 members between May 31 and June 27, 2013; (3) did Respondent illegally bypass the Union and deal directly with the four employees by offering them employment under conditions different than those specified in the 2013–2019 collective-bargaining agreement; (4) did Respondent violate the Act by failing to adhere to the terms of the 2013–2019 collective-bargaining agreement with regard to wages and fringe benefits; (5) What are the consequences of Respondent’s delay in notifying the Federal Mediation and Conciliation Service as required by Section 8(d) of the Act; and (6) did Respondent violate the Act by failing to adequately and timely respond to the Union’s information request of March 18, 2013.

II. ALLEGED UNFAIR LABOR PRACTICES

In 2010 Ironworkers Local 25 signed a collective-bargaining agreement (CBA) with the Great Lakes Fabricators and Erectors Association (GLFEA or “the Association”). The term of this agreement was from June 1, 2010, to May 31, 2013, G.C. Exh. 2.

Section XXVI of the CBA contains the following Termination Clause:

This Agreement shall remain in full force and effect until May 31, 2013, and shall renew itself from year to year unless either party shall notify the other party, in writing by certified mail, at least ninety (90) days prior to any anniversary date of this Agreement of its desire to change the Agreement in any way or to terminate the Agreement. In the event of notice by either party to change and/or terminate, and no agreement of such changes and/or termination is reached prior to May 31, 2013, this Agreement shall be deemed to have terminated midnight May 31, 2013 (emphasis added).

On June 1, 2011, Respondent, which is not a member of the Great Lakes Fabricators and Erectors Association, agreed to be bound by the terms of the collective-bargaining agreement between the Association and Local 25. It did so by signing a “me-too” agreement, i.e., a sheet placed at the end of the contract (GC Exh. 4). That page contains the following language:

We, the undersigned, hereby agree to be bound by all the terms and conditions set forth in the forgoing Agreement and to become a party thereto. It is also agreed by the undersigned Employer that any notice given by the Union to the Association pursuant to Section XXVI of the Agreement shall be notice to the Employer and shall have the same legal force and effect as though it were served upon the Employer personally. ***Finally, the Employer agrees that, unless he notifies the Union to the contrary at least ninety (90) days prior to the termination date of this Agreement or any subsequent agreement, the Employer will be bound by and adopt any***

agreement reached by the Union and the Association during negotiations following the notice by the Union referred to in the preceding sentence (emphasis added).

On March 21, 2013, the Association and Local 25 signed a successor contract, effective on that date. The terms of the 2010–2013 Agreement remained unchanged except for those specified in a 2 page term sheet (GC Exh. 3). The successor agreement contains the following new termination clause:

SECTION XXVI Termination Clause

This Agreement is effective March 21, 2013 through May 31, 2019. This Agreement will remain in full force and effect through May 31, 2019, and thereafter for successive periods of one year, unless either party serves written notice upon the other party of its desire to terminate this Agreement ***at least 60 days prior to the expiration date of this Agreement. A timely written notice of desire to terminate this Agreement will terminate this entire Agreement . . .*** (emphasis added).

The February 14 email from Respondent to the Union

On February 14, 2013, Gerald Webb, the acting chief executive officer of Respondent and Mid-State Rigging sent an email to two union officials, John O’Donnell and David Gonzalez. This email was received by the Union.¹ The email attached a letter to O’Donnell stating that Respondent wanted to change the terms of the 2010–2013 collective-bargaining agreement. Webb characterized the letter as “our 90 days notice per the requirements of the agreement,” (Exhs. R-2 and 3).

Subsequent discussions between Respondent and the Union

On February 21, 2013, Gerald Webb emailed union business agents O’Donnell and Gonzalez suggesting a meeting to discuss “the working relationship” between Respondent and the Union. The three men met on February 28.

Webb testified that the three discussed changes Respondent wanted to the collective-bargaining agreement. Specifically he recalled some discussion as to whether Respondent needed an account at a Detroit area bank and whether it could pay employees by electronic direct deposit, as opposed to by paper check. Webb also testified that they discussed the qualifications of Local 25 members to do certain kinds of work.

CEO Webb also testified that at the February 28 meeting, the union representatives asked for information regarding who owned MSR, what other companies were owned by the same individuals or organizations and what work these other companies were doing.

During this discussion Webb informed the union officials that MSR or a related company was moving machinery at the ACII Sheldon Road Detroit Thermal facility with using some nonunion labor (GC Exh. 6, Tr. 211–216).

At the end of the meeting, O’Donnell told Webb that “an email wasn’t good enough,” (Tr. 188, 244).² I infer that what

¹ O’Donnell testified that he never saw the email until early 2014. Gonzalez did not testify in this proceeding.

² O’Donnell does not recall whether or not he made such a statement at the February meeting, Tr. 244.

O'Donnell was communicating to Webb was that he could not prevent the 2010–2013 collective-bargaining agreement from rolling over simply by emailing the Union. At this point, Respondent still had a day to send the Union a certified letter within the 90-day window for opting out of the successor contract.

On March 1, Webb emailed O'Donnell and Gonzalez identifying other companies owned in whole or in part by Source Capital. One of these was MS Industrial Services in Burton, Michigan. At the hearing, Webb testified that MS Industrial Services was a “dormant entity,” (Tr. 211–212).

The Union's grievance and information request

Based on its conversation with Gerald Webb on February 28, the Union filed a grievance with the Joint Grievance Board of the Great Lakes Fabricators and Erectors Association on March 12. The grievance alleges that Mid-States Industrial Services, a sister company of MSR, was performing rigging work with non-union labor at the Detroit Thermal project.

On March 18, the Union submitted an extensive information request to Respondent, which probed the relationship between Respondent MSR, Mid-States Industrial Services and Source Capital.

Respondent has not provided the Union with the following information that it requested on March 18:

- A list of all of MSR's accounts receivable since January 1, 2008;
- A list of all of MSR's accounts payable since January 1, 2008;
- The names and addresses of all suppliers of materials, services or equipment for MSR since January 1, 2008;
- Copies of all invoices submitted to MSR for supplies, materials, services or equipment since January 1, 2008;
- The names and addresses of all attorneys providing legal services to MSR since January 1, 2008;
- MSR's check registers since January 1, 2008;
- All MSR's corporate records;
- All Source Capital's corporate records;
- All organizational charts for Source Capital;
- All documents relating to the wages and benefits provided to hourly employees, including iron workers, by MSR since January 1, 2008;
- All documents that relate to the project for Detroit Thermo at the AC II Sheldon Road Plant.

On July 17, 2017, Respondent via its attorney provided much of the other information requested by the Union on March 18. He stated that there is not and was never any such entity called Mid-States Industrial Services. Respondent asserted that some of the information requested was confidential and that some of the requests were vague, overly broad, and unduly burdensome. Respondent did not offer to make any accommodation with the Union to balance the parties' competing interests.

Labor performed by Local 25 members for Respondent MSR

For several days in late April and early May 2013 several Local 25 members worked for MSR demolishing and scrapping 2 steel smokestacks at a site in Flint, Michigan. Respondent's management representatives, Clint Goettl and Mazen Banat

offered these employees work at a wastewater treatment site in Dexter, Michigan, which was to start later in May.

Four Local 25 ironworkers began work at the Dexter site, which is near Ann Arbor, Michigan, in mid-May.³ The project involved removing two digesters (or tanks)⁴ from a huge circular concrete structure and cutting up the digesters with torches so that the pieces could be transported to a scrap yard. The job also entailed building two new digesters and installing them inside the concrete structure. The digesters look like a large steel hut. They have sides and a roof, but no floor (GC Exhs. 8–12). The sides of the digester have gaps between the metal components; thus it appears that liquids could not be held inside a digester. When operational, the digesters float on liquid waste inside the concrete structure.

The four Local 25 members worked through Friday, May 31, 2013, and were paid during this period according to the 2010–2013 collective-bargaining agreement. On May 31, Respondent's representative, Clint Goettl, told the four ironworkers that MSR no longer had a contract with their union and that they would have to leave the site.

However, Goettl also told the four at some point on May 31, that they could continue to work at Dexter at the prevailing wage without the fringe benefits called for by the Union contract, e.g. (Tr. 105–109). He did not contact the Union before making this offer to the four employees. The employees left the jobsite.

Goettl's offer to employees of work at the prevailing wage was repeated in a letter signed by Acting CEO Webb and delivered to the employees (GC Exh. 7). Although this letter is dated May 31, the record does not reflect when employees received it.

In late June Respondent notified a Board agent that its offer of employment at the prevailing wage at the Dexter project was still open. The Board agent transmitted this information to the Union which then gave its members permission to work under this arrangement. Three union members began working at Dexter again on June 27. A considerable amount of work had been performed on the digesters between May 31 and June 27 by other persons.

One of the employees who began working at Dexter on June 27, Erin Early, had worked at Dexter in May. Roger Shultz, another of the three, worked at Dexter from June 27 to July 19. Between July 20 and August 15, 2013, the work on digesters was performed by Early, Local 25 member Michael Steele and Respondent's project superintendent Clint Goettl. Most of this work entailed welding and grinding the metal components of the digester. The Local 25 members' work at Dexter ended on August 15 when it became apparent that the digester would not fit inside the concrete structure as it was supposed to.

³ Three of the four appear to have started working at Dexter on May 13; Erin Early apparently worked 12 hours during the prior week, Jt. Exh. 1.

⁴ Respondent argues that the digesters are not tanks. The collective-bargaining agreement specifies that Local 25 has jurisdiction over all processing tanks.

Notice to the FMCS

On May 31, 2013, James Parks, then representing Respondent, sent a letter to the Federal Conciliation and Mediation Service stating that the Union had refused to negotiate with Respondent and was threatening to strike on June 3 (GC Exh. 20). Respondent did not so notify the Michigan conciliation and mediation agency of its dispute with the Union.

Analysis

Respondent is not bound to the terms of the 2013–2019 collective-bargaining agreement

In deciding whether Respondent is bound by the terms of the Union's 2013–2019 collective-bargaining agreement with the GLFEA, I apply the contract law rule that ambiguous terms will be construed against the drafter of the contract when the nondrafter's interpretation is reasonable, e.g., *Hills Materials Co., v. Rice*, 982 F. 2d, 516 (Fed. Cir. 1992). The Board has applied this principle in interpreting employers' rules which are ambiguous as to their application to protected activity, e.g., *Norris/O'Bannon*, 307 NLB 1236, 1245 (1992). I conclude that Respondent is not bound by the terms of the new contract because the ambiguity as to which provision of the 2010–2013 agreement governs inures to the detriment of the Union.

In this vein, I conclude that Respondent's interpretation of the 2010–2013 collective-bargaining agreement, is reasonable and the tension between Section XXVI and the "me-too" signature page, must be resolved against the Union, since it participated in the drafting of the 2010–2013 agreement and Respondent did not.

Moreover, I find that Respondent's interpretation of Section XXVI is also reasonable. Thus, even if Section XXVI takes precedence over the signature page, the collective-bargaining agreement was only renewed by 1 year, not 6, if Respondent is bound by its failure to send the Union a certified letter. Finally, the equities in this case clearly dictate that Respondent is not bound by the 2013–2019 agreement. The purpose of the certified letter requirement must be to avoid any dispute as to whether one party communicated to another its desire to change or terminate the 2010–2013 agreement. Here that purpose was clearly served in that the Union had actual notice that Respondent desired a change to terms of the agreement more than 90 days before its expiration. See *The Oakland Press*, 229 NLRB 476, 478–479 (1977); *Champaign County Contractors Assn.*, 210 NLRB 467, 470 (1974) [Actual notice of intent to modify or terminate a collective bargaining agreement is sufficient even when not technically adequate].

Lock-out, constructive discharge, and direct dealing

The allegations of lock-out, direct dealing, and constructive discharge are all linked together, factually and legally. These allegations all stem from the fact that Respondent informed unit employees on May 31, the day the 2010–2013 contract expired, that if they continued working for it the next week, they would do so under the prevailing wage and not under the terms of the new or old collective-bargaining agreement.

Constructive Discharge

The Board has held that an employee is constructively discharged when it is shown that (1) the employer established burdensome working conditions sufficient to cause the employee to resign and (2) the burden was imposed because of the employee's union activities, *KRI Constructors*, 290 NLRB 802, 813–814 (1988). First of all, I find that requiring employees to work at \$58 per hour (the prevailing wage) instead of for the Union wage and benefit package of approximately \$60 per hour, does not constitute sufficiently burdensome working conditions to cause employees to quit.

Moreover, this is not a case like *White-Evans Service Co.*, 285 NLRB 81 (1987), cited by the General Counsel. Here employees were not faced with the choice of relinquishing their right to bargain collectively or quit. Employees could have, after consulting with the Union, gone on strike, continued working with the union's permission or possibly continued working after resigning from the Union.

Lockout

The record reflects that before these employees left work on May 31, they were told that they could continue working at the Dexter Treatment Plant for the prevailing wage, e.g., testimony of Darryl Karpuk at Tr. 105–109. Thus, I find that Respondent did not lockout these employees; they went on strike.

Respondent's failure to comply with Section 8(d) of the Act and consequently with Section 8(a)(5) and (1)

Section 8(d) requires prohibits a party to a collective-bargaining agreement from terminating or modifying the contract unless it complies with 4 requirements:

- (1) Serve written notice upon the other party to the contract of the proposed termination or modification sixty days prior to expiration date of the contract. Respondent complied with this requirement.
- (2) Offer to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing such modifications. I find that Respondent complied with this requirement.
- (3) Notify the Federal Mediation and Conciliation Service (FMCS) within thirty day of the existence of a dispute and simultaneously notify any state mediation and conciliation agency. It is undisputed that Respondent did not comply with this requirement.
- (4) Continue in full force without a strike or lockout all terms and conditions of the existing contract for sixty days after notice is given or the expiration of the contract whichever is later. It is undisputed that Respondent did not continue the terms of the 2010-13 contract for 60 days after giving notice to the FMCS.

A failure to comply with Section 8(d) is by definition a violation of Section 8(a)(5) and (1). It is clear that a Union's failure to timely notify the FMCS of a dispute may render a strike unprotected, *Boghosain Raisin Packing Co.*, 342 NLRB 383 (2004). This consequence is specifically set forth in Section 8(d). The consequences of an employer's failure to comply with the requirement to timely notify the FMCS is not explicit-

ly set forth in the statute. However, it stands to reason that there are consequences, one of which would be that such an employer is precluded from making unilateral changes in the terms and conditions of bargaining unit employees, *Nabors Trailers*, 294 NLRB 1115(1989).

Respondent argues at page 12 of its brief that its violation of this requirement was essentially de minimis since the Union made it clear that MSR had a choice of accepting the GLFEA contract or nothing. In *Boghosian Raisin*, supra, the Board majority by rejected the dissent's plea to apply "equitable principles." Consistent with the majority in that case, I find therefore that Respondent was not privileged to unilaterally change the terms of unit employees' compensation. Therefore, I find that Respondent was required to maintain the terms of the 2010–2013 collective-bargaining agreement for 60 days following its May 31, 2013 notification to the FMCS.

Given the fact that Respondent was obligated to maintain the contractual terms for 60 days following its May 31 notice to the FMCS, I find that unit employees engaged in an unfair labor practice strike between June 3 and 27, 2013.

However, by allowing unit employees to return to work on June 27, 2013, under conditions different than those specified in the 2010–2013 contract, the Union waived any objections it had to those changes after that date. Therefore, I find that the consequences of Respondent's failure to comply with Section 8(d) (and therefore Section 8(a)(5) and (1)) is that it must make the unit employees who worked for it on May 31 whole for the period June 3–27, 2013. It must also compensate Erin Early and Michael Steele for the difference between the prevailing wage and the collective-bargaining agreements for the period from June 27 to the expiration of 60-day period mandated by Section 8(d), i.e., July 30, 2013. Respondent must compensate Roger Schultz for this difference for the period June 27 to July 19, when his employment terminated.

Direct Dealing

It is undisputed that Respondent dealt directly with unit employees on May 31, 2013, with respect to their compensation instead of going through their exclusive collective-bargaining representative. It violated Section 8(a)(5) and (1) in doing so, *Obie Pacific, Inc.*, 196 NLRB 458 (1972).

Respondent's assertion that the Dexter work was not covered by the 2010–2013 collective-bargaining agreement.

Respondent asserts that digesters are not tanks and therefore the work at Dexter was not covered by the 2010–2013 contract between the Union and GLFEA. I conclude that by employing union members at Dexter and compensating them pursuant to the 2010–2013 contract, Respondent has waived any such argument. In this regard, it is noteworthy that Respondent's agents, Goettl and Mazen Banat recruited the union ironworkers for the Dexter project, while they were working in Flint several weeks before the Dexter project started. By doing so Respondent gave the Union every reason to believe that the work at Dexter was within the Union's jurisdiction. Therefore, I conclude Respondent waived or is estopped from arguing that the Dexter work was not covered by the collective-bargaining agreement, see *Dixie Sand & Gravel Co.*, 231 NLRB 6, 8 (1977).

The Information Requests

Section 8(a)(5) provides that it is an unfair labor practice for an employer to refuse to bargain with the representative of its employees. An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative for contract negotiations or administration, *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956). Information pertaining to employees in the bargaining unit is presumptively relevant, *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). In this matter, I conclude the presumption of relevance dates from June 1, 2011, when Respondent became party to the GLFEA contract. Thus, I find that the General Counsel has not established the relevance of the information the Union requested pertaining to dates prior to June 1, 2011. Respondent therefore violated the Act only with regard to documents dated June 1, 2011, to May 31, 2013.

An employer must respond to an information request in a timely manner. An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all, *American Signature Inc.*, 334 NLRB 880, 885 (2001).⁵

If an employer has a claim that some of the information requested is confidential or unduly burdensome to produce, such claims must be made in a timely fashion, *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995). The reason a confidentiality claim must be timely raised is so that the parties can attempt to seek an accommodation of the employer's confidentiality concerns, *Tritac Corp.*, 286 NLRB 522 (1987). The same is true with respect to a claim that satisfying the request would be unduly burdensome, *Honda of Hollywood*, 314 NLRB 443, 450–451 (1994); *Pet Dairy*, 345 NLRB 1222, 1223 (2005).⁶

If an employer declines to supply relevant information on the grounds that it would be unduly burdensome to do so, the employer must not only timely raise this objection with the union, but also must substantiate its defense. Respondent has done neither. Respondent did not advise the Union that its request was unduly burdensome until July 17. It never sought clarification from the union in order to narrow the request, *Pulaski Construction Co.*, 345 NLRB 931, 937 (2005). There is no doubt that production of the information may impose strains on an employer, but that consideration does not outweigh the union's right to the information requested. *H.J. Scheirich Co.*, 300 NLRB 687, 689 (1990).

Respondent has not advanced a sufficient excuse for either its delay in providing the requested information or failing to provide the information withheld. I find that it violated the Act in both respects.

Conclusions of Law

Respondent violated Section 8(a)(5) and (1) in the following respects:

1. Failing to adhere to the terms of the 2010–2013 collective-bargaining agreement for 60 days after notifying the Fed-

⁵ This case has also been cited under the name of *Amersig Graphics, Inc.*

⁶ Also cited as *Land-O-Sun Dairies*.

eral Mediation and Conciliation Service of its dispute with the Union.

2. Dealing directly with bargaining unit employees on May 31, 2013, instead of dealing with them via their exclusive collective bargaining representative.

3. Failing to provide the Union the documents specified in complaint paragraph 28(a) insofar as it requests information from June 1, 2011, to May 31, 2013.

4. Failing to provide the information specified in complaint paragraph 28(b) in a timely manner insofar as it requests information from June 1, 2011, to May 31, 2013.

The Remedy

The Respondent, having illegally changed the terms and conditions of employment of unit employees must make these employees whole. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Respondent shall reimburse the discriminatees in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatees' backpay to the proper quarters on their Social Security earnings records.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, MSR Industrial Services, LLC, Burton, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employee's wages, hours, and/or other terms and conditions of employment during a period when it is obligated to maintain the terms and conditions of an expired collective-bargaining agreement.

(b) Dealing directly with employees who are represented by an exclusive collective-bargaining agent.

(c) Failing to provide or unreasonably delaying providing to the Union any information that is or was requested by the Union and is or was relevant to its duties as collective-bargaining representative of Respondent's employees.

(d) 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) Make Erin Early, Darryl Karpuk, Tony Pena, and Jamie Johnson whole for any loss of earnings and other benefits suffered as a result of Respondent's illegal unilateral change in the terms of their compensation, i.e., whatever they would have

earned had they not gone on strike due to Respondent's failure to maintain in effect the terms of the 2010–2013 collective-bargaining agreement through July 30, 2013, in the manner set forth in the remedy section of the decision.

(b) Make Erin Early, Michael Steele and Roger Schultz hole for any loss of earnings and other benefits suffered as a result of Respondent's illegal unilateral change in the terms of their compensation, i.e., whatever they would have earned had Respondent maintained in effect the terms of the 2010–2013 collective-bargaining agreement through July 30, 2013, in the manner set forth in the remedy section of the decision.

(c) Provide the Union with the documents set forth in complaint paragraph 28(a) insofar as the Union requests information from the period June 1, 2011, to May 31, 2013.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Burton, Michigan facility copies of the attached notice marked "Appendix."⁸ 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, the 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 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 May 31, 2013.

(f) 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.

Dated, Washington, D.C., April 9, 2014.

⁸ 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."

⁷ 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.

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 implement changes to your wages, hours, and other terms and conditions of employment during a period when we are required to maintain the terms and conditions of

an expired collective-bargaining agreement.

WE WILL NOT deal directly with you when you are represented by an exclusive bargaining representative, such as Local 25 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO.

WE WILL NOT fail to provide your union or delay in providing to your union information that is relevant to its duties as your exclusive collective-bargaining representative.

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

WE WILL compensate Erin Early, Darryl Karpuk, Tony Pena, and Jamie Johnson for whatever compensation they were due under the terms of our 2010–2013 collective-bargaining agreement with the Great Lakes Fabricators and Erectors Association, through July 30, 2013.

WE WILL compensate Erin Early, Michael Steele, and Roger Schultz for the difference between their compensation from June 27, 2013, to July 30, 2013, and the compensation they would have received had we adhered to the terms and conditions of our collective-bargaining agreement with the Great Lakes Fabricators and Erectors Association.

MSR INDUSTRIAL SERVICES, LLC