Midland Electrical Contracting Corp. *and* United Electrical Workers of America, IUJAT, Local 363. Cases 29–CA–144562 and 29–CA–144584

June 6, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE, AND MCFERRAN

On February 1, 2016, Administrative Law Judge Mindy E. Landow issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

I. BACKGROUND

The relevant facts are fully set forth in the judge's decision. Briefly, the Building Industry Electrical Contractors Association (the Association) executed a collective-bargaining agreement with United Electrical Workers of America, IUJAT, Local 363 (Local 363 or the Union) on behalf of its employer-members, effective from December 1, 2008, through November 30, 2011. On June 30, 2010, Midland Electrical Contracting Corporation (the Employer or the Respondent) became a member of the Association when it executed a document entitled "Membership Application and Designation of Bargaining Representative" (Membership Application), which states in relevant part:

> B. The Employer hereby designates the Association as its bargaining representative in all negotiations with Local 363 for its employees in the bargaining unit described above and agrees to be bound by all the terms of any agreement entered into between the Association and Local 363 covering said employees with the same force and effect as though the Employer had executed the agreement as a party.
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> . . .
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> D. The Employer shall be responsible for payment of dues to the Association for the full period of the Agreement with Local 363. Resignation from the Association must be in writing and served on the Association by certified mail no less than 90 days prior to the date of expiration of the agreement between the Association and Local 363. Timely receipt of such resignation shall relieve the Association from any responsibilities or obligations to bargain on behalf of the Employer for a new collective bargaining agreement.

Thereafter, the Respondent, the Association, and the Union signed a document entitled "Assumption Agreement," which states in relevant part:

> 1. The Employer is bound to all of the terms and conditions as are applicable from time to time by the nature of the work performed for each of the Association Collective Bargaining Agreements which are incorporated herein by reference as if fully set forth in this Agreement.
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> . . .
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> 5. The Employer agrees that the Association shall, on behalf of the Employer, negotiate successor Collective Bargaining Agreements, amendments, renewals and extensions of the Collective Bargaining Agreements and the Employer agrees to be bound by any and all amendments, renewals and/or extensions of the above referenced Association Collective Bargaining Agreements unless and until this Agreement is properly terminated by either the Employer or the Union in accordance with the renewal and/or Termination Provisions of the Association Collective Bargaining Agreement.

The collective-bargaining agreement (CBA) termination provision referenced in the Assumption Agreement states:

> This Agreement shall be effective as of the 1st day of December, 2008 [and] shall remain and continue in full force and effect until Midnight November 30, 2011, and from year to year thereafter, unless either party gives written notice to the other by certified mail, return receipt requested, at least sixty (60) days prior to the date of expiration of this Agreement, that it desires to modify or amend and/or re-negotiate same.

The Association and the Union executed a successor CBA that included the same CBA termination timeline as set forth in the provision above, but with a term of December 1, 2011, through November 30, 2014.

After signing the Membership Application in 2010, the Respondent adhered to the 2008–2011 and 2011–2014

[1] We do not rely on *Carr Finishing Specialties, Inc.*, 358 NLRB 1766 (2012), cited by the judge. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

[2] In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. In addition, we shall modify the judge's recommended Order to reflect this remedial change and to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

CBAs. In August 2014,[3] the Association and the Union began negotiations for a successor CBA and ultimately executed a Memorandum of Agreement effective December 1, 2014, through November 30, 2017. On September 4, less than 90 days (but more than 60 days) prior to the expiration of the 2011–2014 CBA, and after negotiations for the 2014–2017 CBA had begun, the Respondent sent a withdrawal notice to the Association and the Union stating that it would not renew the CBA and would not be bound by any CBA beyond November 30, 2014. The Respondent sent a follow-up notice to the Union on September 16 because it had not received any acknowledgement that its September 4 letter to the Union had been received. Beginning in September 2014, the Respondent ceased making payments to any of the contractually required benefit funds.

II. THE JUDGE'S DECISION

The judge found that the Respondent failed to timely withdraw from the Association and therefore was bound to the terms of the 2014–2017 CBA between the Association and the Union. In so doing, the judge first found that the Membership Application controlled the Respondent's withdrawal from the Association and that the Respondent failed to meet the 90-day withdrawal timeframe set forth therein. Relying on *Rome Electrical Systems*, 349 NLRB 745 (2007), enfd. 286 Fed.Appx. 697 (11th Cir. 2008), she rejected the Respondent's argument that the Assumption Agreement, which incorporated the CBA's 60-day notice of termination provision, superseded the Membership Application. The judge further found that the Respondent's withdrawal notices were independently untimely because the Respondent sent them after the Association and the Union had commenced negotiations for the 2014–2017 CBA. Having found that the Respondent failed to timely withdraw from the Association on two separate bases, the judge concluded that the Respondent violated Section 8(a)(1), (5) and (d) of the National Labor Relations Act (the Act) by failing to adhere to the 2014–2017 CBA and by failing to make contractually-required benefit fund payments.

On exception, the Respondent argues that the judge erroneously failed to find that its withdrawal notices, which complied with the termination provision set forth in the Assumption Agreement, prevented the Respondent from becoming bound to the 2014–2017 CBA. As discussed below, we agree with the judge's findings that the Respondent's withdrawal notices were untimely both because they were sent after the Association and the Union had commenced negotiations for the 2014–2017 CBA and because they did not comply with the terms of the Membership Application. Because the withdrawal notices were untimely, we agree with the judge that the Respondent violated Section 8(a)(1), (5), and (d) of the Act by failing to adhere to the 2014–2017 CBA.

III. DISCUSSION

It is well established that the fundamental purpose of the Act is to foster and maintain stability in bargaining relationships. See *Retail Associates, Inc.*, 120 NLRB 388, 393 (1958). In the context of multiemployer bargaining units, the Board has held that such units "can be accorded the sanction of the Board only insofar as they rest in principle on a relatively stable foundation." Id. "[T]he stability requirement of the Act dictates that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted from an established multiemployer bargaining unit." Id. The Board has thus held that, where an employer is contractually bound to a multiemployer bargaining agency relationship, its withdrawal from that relationship is not "free and uninhibited" and that attempts to withdraw must be timely and unequivocal. Id. The Board will refuse to permit the withdrawal of an employer from a multiemployer bargaining arrangement, except upon adequate written notice given prior to the date set by the contract for modification or to the agreed upon date to begin the multiemployer negotiations. Where actual negotiations have commenced, the Board does not permit, "except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances." Id. at 395. This policy prevents a race for bargaining leverage in which individual parties withdraw "in the hope of obtaining, through separate negotiations, more favorable contract terms than those which are foreshadowed" by group bargaining.[4] *The Carvel Company*, 226 NLRB 111,112 (1976) (quoting *Mor Paskesz*, 171 NLRB 116, 118 (1968)), enfd. 560 F.2d 1030 (1st Cir. 1977), cert. denied 434 U.S. 1065 (1978).

Applying these established principles here, we find, in agreement with the judge, that the Respondent was bound to the 2014–2017 CBA because it failed to withdraw from the Association before the Association and the Union commenced negotiations for the 2014–2017 agreement. Further, even if the Respondent's attempted withdrawal had occurred before the commencement of

[3] All dates hereinafter are in 2014, unless otherwise specified.

[4] Even where negotiations commence prior to the established contractual deadline for an employer to withdraw from a multiemployer bargaining association, the Board will still find that the employer is bound by the resulting contract, absent unusual circumstances. See *D.A. Nolt, Inc.,* 340 NLRB 1279 (2003), enf. denied on other grounds 406 F.3d 200 (3rd Cir. 2005).

negotiations, we would nevertheless find the withdrawal untimely because it was not made within the timeframe set forth in the Membership Application.

A. Withdrawal after the Association and the Union had Commenced Negotiations

The Association and the Union began negotiations for the 2014–2017 CBA in August. The Respondent sent its withdrawal notices on September 4 and 16. Applying Board precedent, the judge found that the Respondent is bound to the 2014–2017 CBA because its withdrawal notices were sent *after* the Association and the Union had commenced negotiations for that CBA. Although the Respondent generally excepted to the judge's findings, it makes no supporting argument in its brief as to why the judge's finding in this regard should be overturned. In these circumstances, it is the Board's well-established practice to adopt the judge's finding, and we do so here. See 29 CFR § 102.46(a)(1)(ii); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006). But even if we were to reach the merits of this issue, we would agree with the judge, for the reasons she states, that the Respondent's attempted withdrawal was untimely because it came after the commencement of negotiations.

Advancing an argument not raised by the Respondent to the judge or the Board, our dissenting colleague asserts that, by signing the Assumption Agreement, the Union provided the requisite mutual consent permitted by our case law for the Respondent to withdraw from the Association at any time prior to 60 days before the expiration of the 2011–2014 CBA. We disagree. The judge correctly found that the record contains no evidence of mutual consent that would authorize the Respondent to withdraw after the commencement of negotiations for the 2014–2017 agreement. Further—even assuming (incorrectly, as we will explain) that the parties intended for the Assumption Agreement to control the Respondent's withdrawal from the Association—nothing in the Assumption Agreement addresses the subject of negotiations, nor can it be read to provide the mutual consent necessary for the Respondent to withdraw from the Association *after* the commencement of negotiations.[5]

Accordingly, we find that the Respondent was bound to the 2014–2017 CBA because it failed to withdraw from the Association prior to commencement of the negotiations between the Association and the Union. Therefore, the Respondent violated Section 8(a)(1), (5), and (d) of the Act by failing to adhere to the CBA.

B. Withdrawal after the Deadline Established in the Membership Application

Even if the Respondent's withdrawal had come before (and not after) negotiations began, it would still have been untimely. The unambiguous terms of the Membership Application barred the Respondent from resigning its membership in the Association during the final 90 days of any CBA between the Association and the Union. The 2011–2014 CBA was scheduled to terminate on November 30, 2014. Accordingly, the Respondent was required to notify the Association of its withdrawal no later than September 1. But the Respondent did not send its withdrawal notices until September 4 and 16. As a result, we agree with the judge that the Respondent's withdrawal from the Association was untimely under the terms of the Membership Application. Consequently the Respondent became bound to the 2014–2017 agreement.

The Respondent does not dispute that its withdrawal was untimely under the Membership Application and, per the terms of that agreement, an untimely withdrawal would bind the Respondent to the 2014–2017 CBA. The Respondent nonetheless contends that it is not bound to 2014–2017 CBA because its withdrawal notices were timely under the 60-day termination procedure described in the *Assumption Agreement*. The Respondent's argument is premised on the contract-merger principle, which states that a subsequent contract (here, the Assumption Agreement) modifies the predecessor contract's (the Membership Application) conflicting terms on the same subject matter. Similarly, our dissenting colleague would find that the Assumption Agreement controls the Respondent's withdrawal of bargaining authority from the Association and that its withdrawal was timely. We disagree.

In *Rome Electrical Systems,* supra, 349 NLRB 745, the Board addressed and rejected a similar argument to that made by the Respondent here. The Board there found that the contract-merger principle was inapplicable because the two agreements at issue did not cover the same subject matter. We find the same to be true here. The Membership Application, wherein the Respondent conferred on the Association exclusive bargaining authority, clearly addresses the procedures for Respondent's withdrawal from the Association, stating that "[r]esignation from the Association must be in writing and served on the Association . . . no less than 90 days prior to the . . .

[5] Our colleague relies on *Acropolis Painting*, 272 NLRB 150 (1984), to support his position that the Assumption Agreement constituted the Union's consent for the Respondent to withdraw after negotiations had commenced. But *Acropolis Painting* is easily distinguishable. There, the Board noted that the relevant agreement provided an agreed-upon means for withdrawing from the agreement itself and the agreement specifically stated that such a withdrawal, "eliminates said party from participation in any negotiations" regarding the agreement. Id. at 150–151. Here, there is no similar contract language that would allow the Respondent to withdraw from negotiations or to withdraw from the Association after negotiations had commenced.

expiration" of the CBA. The Assumption Agreement, however, overwhelmingly focuses on the CBA and the Respondent's and Union's obligations thereunder, and is devoid of any specific references to the Respondent's membership in the Association. The Respondent contends that paragraph 5 of the Assumption Agreement addresses withdrawal from the Association and provides a new, shorter timeframe for doing so. While the provision is not a model of clarity, paragraph 5—read both alone and within the broader context of the Assumption Agreement—does not warrant such a conclusion. As stated above, the Assumption Agreement focuses on the parties' obligations under the CBA. Paragraph 5 merely restates the Respondent's agreement, made in the Membership Application, to have the Association bargain on its behalf and to be bound to any CBAs negotiated by the Association and the Union. The structure of the Assumption Agreement and the context surrounding paragraph 5 support our conclusion that the termination provision only applies to terminating the CBA. It is well established that withdrawal from a multiemployer bargaining association is an action distinct from terminating a CBA. See *Rome Electrical Systems*, supra at 747.

In addition, a finding that paragraph 5 of the Assumption Agreement applies to the Respondent's membership in the Association would lead to an illogical result. Paragraph 5 of the Assumption Agreement states that the Employer is bound to any amendments to the CBA until the Assumption Agreement is, "properly terminated by either the Employer or the Union in accordance with the renewal and/or Termination Provisions of the Association Collective Bargaining Agreement," and the termination procedure in the CBA requires that "either party gives written notice to the other." As a result, if the Assumption Agreement and its reference to the CBA are read to apply to the Respondent's membership in the Association, the Respondent would be permitted to terminate its membership by notifying the Union without requiring any notification to the Association. This procedure is contrary to the Membership Application's requirement that the Respondent's withdrawal notice be in writing and served on the Association by certified mail in a timely manner. Finally, if the Association and the Respondent actually intended to abrogate the 90-day notice requirement of the Membership Application by executing the Assumption Agreement, they likely would have done so in an explicit manner, not by "the insertion of one phrase with no further elaboration." See *Rome Electrical Systems,* supra at 748.

For the reasons discussed above, we find that the Assumption Agreement does not govern the Respondent's membership in the Association.[6] Accordingly, we agree with the judge that the Membership Application controlled the Respondent's withdrawal from the Association and that the Respondent failed to timely withdrawal from the Association at least 90 days prior to the expiration of a CBA. Consequently, the Respondent became bound to the 2014–2017 CBA and violated Section 8(a)(1), (5), and (d) of the Act by failing to adhere to the CBA.

ORDER

The National Labor Relations Board orders that the Respondent, Midland Electrical Contracting Corp., formerly of Staten Island, New York, and currently operating from Keyport, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with the United Electrical Workers of America, IUJAT, Local 363 (the Union), or any other union representing an appropriate unit of its employees, by

(1) Withdrawing authorization from the Building Industry Electrical Contractors Association (the Association) to represent the Respondent in multiemployer bargaining with the Union at a time when the Respondent is obligated to bargain through the Association on a multiemployer basis.

(2) Refusing to abide by and honor collective-bargaining agreements negotiated by the Association with the Union at a time when the Respondent is repre-

[6] In asserting that the Assumption Agreement is the controlling document regarding the Respondent's withdrawal of bargaining authority from the Association, the Respondent and our dissenting colleague note that the Assumption Agreement is the only document signed by the Association, the Respondent, and the Union. As explained above, however, the Assumption Agreement cannot fairly be read to address the Respondent's withdrawal from the Association and thus the Membership Application is the controlling document on this issue. That the Union did not sign the Membership Application does not change this result. A union need not be a party to an employer's agreement to enter into a multiemployer bargaining relationship with an association for that agreement to be binding on the employer.

Further, our dissenting colleague asserts that the Union has no cognizable complaint if the Membership Application is breached because it was not a party to that agreement. We disagree. Rather than a standard contract dispute between two parties, this case involves multiemployer bargaining which is a "consensual, tripartite relationship between the union, the multiemployer bargaining association, and the individual employer-members of the association." *Callier's Custom Kitchens*, 243 NLRB 1114, 1117 fn. 8 (1979), enfd. 630 F.2d 595 (8th Cir. 1980). The Membership Application authorized the Association to bind the Respondent to any CBAs, "as though the Employer had executed the agreement as a party." Accordingly, the Union had the right under Sec. 8(a)(5) and (d) of the Act to enforce the agreement against the Respondent, on behalf of the employees that the Union represented, even though the Union did not sign the Membership Application.

sented by the Association or to which the Respondent has agreed to be bound.

(3) Refusing, since September 2014, to make contractually required fund contributions to the Union's Security Fund, Building Trades' Welfare Benefit Fund, Building Trades' Annuity Fund, Building Trades' Education Fund and the Electricians' Retirement Fund on behalf of unit employees

(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) Notify the Association and the Union, in writing, that the Respondent continues to authorize the Association to represent it in bargaining with the Union, in accordance with the Membership Application and Designation of Bargaining Representative executed on or about June 30, 2010, and that it will continue to authorize the Association to represent it in collective bargaining until such time as that authorization may be withdrawn in accordance with the terms of the Membership Application, or by mutual consent of the parties, or in accordance with the law.

(b) Make whole any employees in the bargaining unit for any loss of earnings and other benefits suffered as a result of the Respondent's failure to adhere to the contracts negotiated by the Association; reimburse those individuals for any expenses resulting from any failure to make contributions to benefit funds required under those contracts; and make all required benefit fund payments or contributions that the Respondent has failed to make since September 2014—all in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(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 facility in Staten Island, New York, if still extant, and at its Keyport, New Jersey facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 29, 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 September 1, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 29 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. June 6, 2017

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting.

Contrary to my colleagues, I believe that the Board must reverse the judge's finding that the Respondent's attempted withdrawal from the Building Industry Electrical Contractors Association (the Association) was untimely under the terms of the Association's membership agreement and that, therefore, the Respondent is bound

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

by the 2014–2017 collective-bargaining agreement (2014–2017 Agreement) negotiated between the Association and the Union. Unlike my colleagues, I further believe that the Board must reverse the judge's finding that, because Respondent's attempted withdrawal from the Association occurred after negotiations for that agreement had commenced, the Respondent was independently bound by the 2014–2017 Agreement. The uncontroverted record evidence reveals, first, that the parties mutually agreed on the manner and timing by which the Respondent could withdraw from the Association and cease being bound by the Association's CBA, and second, that the Respondent provided timely written notice—in complete conformity with the parties' mutual agreement—that precludes any finding that the Respondent remains bound by the Association's CBA.

Facts

On or about June 30, 2010, the Respondent entered into a Membership Application and Designation of Bargaining Representative (Membership Application) with the Association, pursuant to which the Respondent designated the Association as its bargaining representative. Thereafter, the Respondent, the Association, and the Union signed an Assumption Agreement.

According to Paragraph 1 of the Assumption Agreement, the Respondent agreed to be "bound to all of the terms and conditions as are applicable from time to time by the nature of the work performed for each of the Association Collective Bargaining Agreements which are incorporated herein by reference as if fully set forth in this Agreement." Paragraph 5 of the Assumption Agreement stated that:

> The Employer agrees that the Association shall, on behalf of the Employer, negotiate successor Collective Bargaining Agreements, amendments, renewals and extensions of the Collective Bargaining Agreements and the Employer agrees to be bound by any and all amendments, renewals and/or extensions of the above referenced Association Collective Bargaining Agreements *unless and until this Agreement is properly terminated by either the Employer or the Union in accordance with the renewal and/or Termination Provisions of the Association Collective Bargaining Agreement*.[1]

Article 38 of the collective-bargaining agreement, which was incorporated by reference in the Assumption Agreement, contained the following termination language:

> This Agreement shall be effective as of the 1st day of December, 2008 and shall remain and continue in full force and effect until Midnight November 30, 2011 and from year to year thereafter, *unless either party gives written notice to the other . . . at least sixty (60) days prior to the date of expiration of this Agreement, that it desires to modify or amend and/or renegotiate terms*.[2]

Pursuant to the Assumption Agreement, the Respondent became bound to an Association CBA that was effective December 1, 2011, through November 30, 2014[3] (2011–2014 Agreement), which contained the identical termination language set forth in Article 38 of the prior agreement.

The Association and the Union began negotiating a successor CBA in August. However, on September 4, the Respondent sent a "notice of termination" to the Union and the Association. Two things about the September 4 letter cannot be disputed: first, the letter constituted timely notice of termination in conformity with Assumption Agreement paragraph 5 (quoted above); and second, the letter expressly terminated the Association CBA in conformity with Article 38 of that CBA (quoted above). Thus, in pertinent part, the September 4 letter stated:

> Please note that pursuant to Article 38 of the CBA, the CBA "shall remain and continue in full force and effect until Midnight **November 30, 2014**, and from year to year thereafter, unless either party gives written notice to the other by certified mail, return receipt requested, at least sixty (60) days prior to the date of expiration of this Agreement, that it desires to modify or amend and/or renegotiate same.
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> On or about July 1, 2010, Midland and the Union entered into an Assumption Agreement, which was signed by Midland and representatives of the Union and the Association (the "Assumption Agreement"). According to Paragraph 1 of the Assumption Agreement, Midland agreed to be "bound to all of the terms and conditions as are applicable from time-to-time by the nature of the work performed for each of the [CBAs] which are incorporated herein by reference as if fully set forth in this Agreement." Furthermore, according to Paragraph 5 of the Assumption Agreement, Midland agreed "to be bound by any and all amendments, renewals and/or extensions of the [CBA] unless and until this agreement is properly terminated by either [Midland] or the Union in accordance with the renewal and/or Terminations Provisions of the [CBA]." A copy of the Assumption Agreement is enclosed herewith.

[1] Assumption Agreement ¶ 5 (emphasis added).

[2] Association CBA Art. 38 (emphasis added).

[3] All dates are in 2014, unless otherwise noted.

> Accordingly, Midland is a signatory to the CBA and is herein providing written notice sent by certified mail, return receipt requested, at least 60 days prior to the date of the expiration that it desires to amend the CBA. *In accordance with the Termination Provisions in Article 38 of the CBA, Midland is formally advising the Union and the Association that Midland does not wish to renew the CBA. In accordance with the Termination Provisions in Article 38 of the CBA, Midland is also formally advising the Union and the Association that Midland does not wish to renew the Assumption Agreement*. As such, the last day that Midland will be bound by the CBA or the Assumption Agreement will be November 30, 2014.[4]

Discussion

A. The Respondent's Withdrawal was Timely under the Assumption Agreement

It is well established that where an employer is contractually bound to a multiemployer bargaining agency relationship, withdrawal from that relationship must be timely and unequivocal. *Retail Associates, Inc.*, 120 NLRB 388, 393 (1958). Contrary to the judge and my colleagues, I believe the Board must conclude that the Respondent provided timely and unequivocal notice of withdrawal under the terms of the Assumption Agreement.

The Assumption Agreement was a legally binding and enforceable agreement between the Union, the Association, and the Respondent. The plain language of the Assumption Agreement authorized the Association to act as the Respondent's bargaining representative in negotiations with the Union and to bind the Respondent to agreements subsequently negotiated between the Association and the Union, including the 2011–2014 Agreement at issue here. Further, Paragraph 5 of the Assumption Agreement expressly set forth the procedure for withdrawing from multiemployer bargaining. Specifically, in order to properly terminate the agreement, the Respondent was required to comply with the termination provision in Article 38 of the 2011–2014 Agreement, which was incorporated by reference in the Assumption Agreement. Because the Assumption Agreement, the only relevant agreement to which the Respondent was a party, was the source of the Respondent's obligations with regard to the 2011–2014 Agreement, once the Respondent terminated the Assumption Agreement, it was no longer bound to that agreement.

Here, on September 4, the Respondent sent a termination notice to both the Association and the Union, stating that the Respondent would not renew or be bound by the collective-bargaining agreement after November 30 and referencing the Assumption Agreement and the 60-day notice provision of the collective-bargaining agreement. The Respondent's termination notice clearly complied with the 60-day notice requirement to request termination as set forth in the termination provision of Article 38 of the 2011–2014 Agreement. Having done all that was contractually required to withdraw under the terms of the Assumption Agreement, the Respondent was relieved from being bound to "any and all amendments, renewals and/or extensions" of the 2011–2014 Agreement. See *Sheet Metal Workers International Assoc., Local 104 v. Simpson Sheet Metal, Inc*., 954 F.2d 554, 555 (9th Cir. 1992) (because multiemployer bargaining units "are creatures of mutual consent," the ability to withdraw from such a unit is necessarily "limited by the agreement of the parties"; thus, to be effective, "withdrawal must be carried out as specified in the agreement" of the parties). Thus, I believe the record establishes that the Respondent's withdrawal letter was an unequivocal and timely notice of intent to withdraw the Association's authority to bind the Respondent to any successor to the 2011–2014 Agreement.

According to the judge and my colleagues, the Respondent did not provide timely notice of withdrawal under the terms of the Membership Application. However, such a finding cannot be reconciled with the express provisions of the Assumption Agreement. Both the Membership Application and the Assumption Agreement explicitly outline in detail the parameters governing the Association's authority to negotiate collective-bargaining agreements with the Union and how the Respondent can terminate that authority. In this regard, it is important to note that the Assumption Agreement was the *only* agreement signed by all three parties and, obviously, it was executed subsequent to the Membership Application. Accordingly, the Assumption Agreement—and not the Membership Application—is the governing document here.[5]

[4] September 4 letter (bold typeface in original; italics added). Due to a perceived failure of delivery of the first letter, the Respondent sent a follow-up letter reiterating its position on September 16.

[5] Moreover, the judge's finding that the Membership Application was the governing document is inconsistent with basic principles of contract law. Because the Membership Application is a contract between the Respondent and the Association, the Union has no cognizable complaint if the Membership Application is breached. Accordingly, the 90-day notification period in the Membership Application is immaterial unless the Association refused to allow the Respondent's withdrawal from membership pursuant to this provision.

My colleagues rely on *Rome Electrical Systems*, 349 NLRB 745 (2007), to support their contention that the Respondent's ability to withdraw the Association's bargaining authority was governed by the

B. The Respondent's Withdrawal was Consistent with Retail Associates

I also believe my colleagues erroneously find that, because Respondent's notice of withdrawal was served after negotiations for the Association CBA had commenced, this independently binds the Respondent to the 2014–2017 Agreement that was subsequently entered into between the Union and the Association. In this respect, my colleagues and the judge mistakenly rely on *Retail Associates*, *Inc.*, 120 NLRB 388, 395 (1958), where the Board held that, "absent mutual consent or unusual circumstances," a member of a multiemployer association may not withdraw from the multiemployer bargaining unit once negotiations have begun. My colleagues and the judge improperly disregard the fact that, in the instant case, the Union and the Respondent entered into the Assumption Agreement which, together with the 2011–2014 Agreement, clearly express the parties' "mutual consent" regarding the manner and timing by which the Respondent can discontinue the Assumption Agreement and avoid being bound by any successor Association CBA. Specifically, as discussed above, Paragraph 5 of the Assumption Agreement provided an agreed-upon procedure for the Respondent's withdrawal from the Association, which incorporated by reference the renewal and/or termination provisions of the 2011–2014 Agreement. Moreover, the Respondent's September 4 letter expressly provided timely notice of nonrenewal of the Assumption Agreement and timely notice terminating the Association CBA. In fact, the September 4 letter quoted the language in both agreements, relied upon by the Respondent here, that spelled out when and how the Respondent should provide notice to terminate the Assumption Agreement and cease being bound by the Association CBAs. When the parties specify the means for an employer's withdrawal from multiemployer bargaining, as they have done here, this constitutes the "mutual consent" element set forth under *Retail Associates*. For this reason, the requirement in *Retail Associates*—that notice must otherwise be provided before the multiemployer negotiations have commenced—has no application in the instant case.

This position is supported by the Board's decision in *Acropolis Painting & Decorating*, 272 NLRB 150 (1984). There, the Board found that, even though negotiations had begun, the employers lawfully withdrew from the multiemployer unit consistent with the agreed-upon procedure set forth in the expiring collective-bargaining agreement. Id. at 150, 156–157. In so finding, the Board adopted the judge's conclusion that the language in the collective-bargaining agreement between the employer association and the union constituted mutual consent to the withdrawal. Id. at 156–157. In the instant case, as in *Acropolis Painting*, the parties expressly agreed to a specific period for withdrawal from any multiemployer negotiations, which constitutes mutual consent for purposes of *Retail Associates*, even though the multiemployer association has already commenced bargaining for a new agreement.[6]

Accordingly, I find that the Respondent timely withdrew from multiemployer bargaining and severed is relationship with the Union and the Association at the termination of the collective-bargaining agreement ending November 30. For these reasons, I respectfully dissent.

Dated, Washington, D.C. June 6, 2017

90-day notification period in the Membership Application. In *Rome*, however, the notice provision governing the respondent's ability to withdraw from multiemployer bargaining was contained in a letter of assent, not in a multiemployer association membership application. 349 NLRB at 745. A notice provision in a letter of assent, unlike one in a multiemployer association membership application, is enforceable by a union against a signatory employer. This is because the letter of assent is a contractual arrangement between the union and the signatory employer whereby the employer agrees to be bound to the current collective-bargaining agreement (and often successor agreements) between the multiemployer association and the union. In *Rome*, the respondent signed the union's letter of assent, authorizing the multiemployer association to be the respondent's "collective-bargaining representative for all matters contained in or pertaining to the current and any subsequently approved contract." 349 NLRB at 745. The Board observed that it "has frequently enforced the withdrawal-of-agency requirements in IBEW letters of assent that were identical . . . to the letter of assent at issue here." Id. at 747 (emphasis added). Here, the Membership Application is not a letter of assent, and there is no support for treating it as such.

My colleagues further assert that my position that the Assumption Agreement governed the Respondent's withdrawal from multiemployer bargaining is illogical. Yet, the Respondent would not have executed the Assumption Agreement if it was already bound to collective-bargaining agreements negotiated between the Association and the Union pursuant to the terms of the Membership Application. I believe it is clear that the Respondent became bound to the 2011–2014 Agreement only because it executed the Assumption Agreement, not because of its membership in the Association.

[6] My colleagues argue that *Acropolis Painting* is distinguishable because the Board relied on the fact that the language in the expiring collective-bargaining agreement permitted the employer to withdraw from "participation in any negotiations regarding [the] agreement." 272 NLRB at 151. Yet, here, par. 5 of the Assumption Agreement provided that once the Respondent properly terminated the Assumption Agreement, the Respondent would no longer be bound to a successor collective-bargaining agreement. Thus, the Assumption Agreement, like the language in the contract in *Acropolis Painting,* set forth a procedure that allowed the Respondent to withdraw from participating in the negotiations for a successor Association CBA.

Philip A. Miscimarra, Chairman

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 withdraw, or attempt to withdraw, authorization from the Building Industry Electrical Contractors Association (the Association) to bargain with the United Electrical Workers of America, IUJAT, Local 363 (the Union) on our behalf until such time as we may, by law or agreement, do so.

WE WILL NOT refuse to abide by collective-bargaining agreements negotiated by the Association with the Union on our behalf while we are represented by the Association.

WE WILL NOT fail and refuse to make required contributions to the Union's Security Fund, Building Trades' Welfare Benefit Fund, Building Trades' Annuity Fund, Building Trades' Education Fund, and the Electricians' Retirement Fund on behalf of 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 bargain through the Association with the Union for collective-bargaining contracts covering our employees, and abide by such contracts, until we are no longer obligated by agreement, or by law, to do so.

WE WILL make whole bargaining unit employees for any loss of earnings and other benefits suffered as a result of our failure to adhere to the collective-bargaining agreements between the BIECA and the Union.

WE WILL make all contractually-required contributions to the Union's Security Fund, Building Trades' Welfare Benefit Fund, Building Trades' Annuity Fund, Building Trades' Education Fund, and the Electricians' Retirement Fund and reimburse unit employees, with interest, for any expense resulting from our failure to make the required payments under the collective-bargaining agreements since September 2014.

WE WILL compensate all unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 29, with 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

MIDLAND ELECTRICAL CONTRACTING CORP.

The Board's decision can be found at www.nlrb.gov/case/29–CA–144562 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.

Marcia E. Adams, Esq., for the General Counsel.
Ronald Steinvurzel, Esq. and *Lindsey E. Haubenreich, Esq. (Steinvurzel & Levy Law Group),* of White Plains, New York, for the Respondent.
Gary P. Rothman, Esq.[1] and *Eric J. Laruffa, Esq. (Law Offices of Richard M. Greenspan, P.C.),* of Ardsley, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. Based upon charges filed by United Electrical Workers of America, IUJAT, Local 363 (Local 363 or the Union) against Midland Electrical Contracting Corp. (Midland or Respondent), a consolidated complaint and notice of hearing (complaint) issued on April 29, 2015, alleging that Respondent violated Section 8(a)(1), (5) and (d) of the Act by failing to make contractually required fund contributions to various union employee benefit funds; failing to timely withdraw from the Building Industry Electrical Con-

[1] "Mr. Rothman has advised the Regional Director that as of January 21, 2016, he is no longer affiliated with the Law Offices of Richard M. Greenspan."

tractors Association (BIECA), and refusing to adhere to the collective-bargaining agreement between BIECA and the Union. Respondent filed an answer and then an amended answer denying the material allegations of the complaint and asserting certain affirmative defenses which will be discussed, as relevant, below. A hearing of this matter was held before me in Brooklyn, New York, on September 17, 2015.

Based upon my consideration of the entire record in this matter,[2] including my evaluation of the witnesses and the briefs filed by the Respondent and counsel for the General Counsel, I make the following

FINDINGS OF FACT

JURISDICTION

Respondent is a domestic corporation and, at material times, maintained a place of business in Staten Island, New York.[3] Respondent is engaged in the business of electrical installation and maintenance. During the 12-month period prior to the issuance of the complaint, a period which is representative of its annual operations generally, Respondent purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of New York. Based upon the record herein, I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

Background

Sometime during the spring of 2010, Respondent, by its President Kevin McGinley, contacted Charles Shimkus, the Union's business manager, to discuss his employees joining the Union and obtaining coverage under the BIECA multi-employer collective-bargaining agreement. BIECA, an association of electrical contractors, had executed a collective-bargaining agreement with the Union in 2008 covering a unit of electricians, electrical maintenance mechanics, helpers, apprentices, and trainees employed by its member employers. This agreement was in effect from December 1, 2008, until November 30, 2011. At their initial meeting, McGinley advised Shimkus that Respondent wanted to obtain Project Labor Agreement (PLA) work for the New York City School Construction Authority, work which historically had been performed by members of another union, Local 3, IBEW. Shimkus informed McGinley that BIECA and the Union were considering filing a lawsuit to allow its members to perform such work; however, no lawsuit had been filed at the time.

Sometime prior to June 30, 2010, Respondent decided to join BIECA and assume the collective-bargaining agreement which has been referenced above. In so doing, Respondent executed three documents: a Membership Application, a Recognition Agreement, and an Assumption Agreement.

[2] Counsel for the General Counsel's motion to amend the record to include GC Exh. 12, which was inadvertently omitted from the exhibits in this matter is hereby granted.

[3] In December 2014, Respondent relocated its offices to New Jersey.

The Membership Application

On or about June 30, 2010, Respondent entered into a Membership Application and Designation of Bargaining Representative with BIECA (the Membership Application) where Respondent designated BIECA as its bargaining representative. This agreement, which was not signed by any representative of the Union, provided in relevant part as follows:

> A. The Employer hereby applies for membership in the Association. The Employer understands that it agrees to be bound by the Constitution and By-Laws of the Association.
>
> B. The Employer hereby designates the Association as its bargaining representative in all negotiations with Local 363 for its employees in the bargaining unit described above[4] and agrees to be bound by all the terms of any agreement entered into between the Association and Local 363 covering said employees with the same force and effect as though the Employer had executed the agreement as a party.
>
> C. The Association hereby agrees to represent the Employer in negotiations with Local 363 and to negotiate a collective bargaining agreement on the Employer's behalf concerning the Employer's employees in the collective bargaining unit described above.
>
> D. The Employer shall be responsible for payment of dues to the Association for the full period of the Agreement with Local 363. Resignation from the Association must be in writing and served on the Association by certified mail no less than 90 days prior the day of the expiration of the agreement between the Association and Local 363. Timely receipt of such resignation shall relieve the Association from any responsibilities or obligations to bargain on behalf of the Employer for a new collective bargaining agreement.

The Recognition Agreement

This agreement, executed by duly authorized representatives of Respondent and the Union, entered into on or about June 30, 2010,[5] provides as follows:

> WHEREAS, the Union has presented to the Employer evidence that it represents a majority of the employees of the Employer in the classification and facility hereinafter set forth;
>
> WHEREAS, the Employer has satisfied itself, as a result of such evidence and other investigation that the Union does represent a majority of such employees, and
>
> THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:
>
> Employer recognizes the Union as the sole and exclusive collective bargaining agent for all employees of the Employer in the following classification:

[4] The unit was described as: "All electricians, electrical maintenance mechanics, helpers, apprentices and trainees excluding office clerical employees, professional employees, guards and supervisors as defined in the Act."

[5] Another version of the Recognition Agreement was executed on July 30, 2010. However, there is no dispute as to the authenticity of this document.

> All electricians, electrical maintenance mechanics, helpers, apprentices and trainees, excluding office clerical employees, professional employees, guard and supervisors as defined in the Act.

The Assumption Agreement

Thereafter, the Union, the Association and Respondent signed an Assumption Agreement.[6] This agreement set forth, in pertinent part, the following:

> 1. The Employer is bound to all of the terms and conditions as are applicable from time to time by the nature of the work performed for each of the Association Collective Bargaining Agreements which are incorporated by reference herein as if fully set forth in this Agreement.
>
> 2. The Union having hereby requested recognition as the majority representative under the Act, the Employer hereby recognizes the Union as the majority Section 9(a) representative under the Act. The Employer also recognizes that the Union has the majority support of the unit employees to be the unit employees' collective bargaining representative and the Employer further recognizes the Union as the majority representative based on the Union having shown, or having offered to show an evidentiary basis of its majority support.
>
> 3. The parties further agree to be bound to all the agreements and declarations of trusts, amendments and regulations, thereto, referenced in the Association Collective Bargaining Agreement and to remit all contributions as set forth under the Association Collective Bargaining Agreement and all amendments, renewals and/or extensions thereto, as adopted by the aforesaid Association and the aforesaid Local Union or their designated trustees.
>
> 4. The Employer agrees to be responsible for the payment of fringe benefit contributions due and owing pursuant to the Association Collective Bargaining agreement. All contributions are due in the fund office by the tenth of each month. . . .
>
> 5. The Employer agrees that the Association shall, on behalf of the Employer, negotiate successor Collective Bargaining Agreements, amendments, renewals and extensions . . . and the Employer agrees to be bound by any and all amendments renewals and/or extensions of the above referenced Association Collective Bargaining Agreements unless and until this Agreement is properly terminated by either the Employer or the Union in accordance with the renewal and/or Termination Provisions of the Association Collective Bargaining Agreement.

The Collective-Bargaining Agreement

As is relevant to the facts of the instant case, the collective-bargaining agreement which is the subject of the above-described Assumption Agreement, as entered into by Respondent, Local 363 and BIECA, provides for mandated contributions to various employee benefit funds: the Security Fund, the Building Trades' Welfare Benefit Fund, the Building Trades' Annuity Fund, the Building Trades' Education Fund and the Electricians' Retirement Fund.

Additionally, Article 38 of the collective-bargaining agreement provides as follows:

> This Agreement shall be effective as of the 1st day of December, 2011 and shall remain and continue in full force and effect until Midnight November 30, 2014 and from year to year thereafter, unless either party gives written notice to the other by certified mail, return receipt requested, at least sixty (60) days prior to the date of expiration of this Agreement, that it desires to modify or amend and/or renegotiate terms.

The identical provision, with dates altered to reflect the appropriate term, was contained in the prior collective-bargaining agreement between the Union and BIECA, which was set effective by its terms from December 1, 2008, to November 30, 2011.

The evidence adduced at trial establishes that by August 1, 2010, Respondent's employees were subject to the collective-bargaining agreement between the Union and BIECA.

The Lawsuit

At some point in 2011, BIECA initiated a lawsuit against the City of New York seeking to obtain PLA work for its members. The lawsuit was dismissed on August 4, 2011. No further substantive detail concerning this matter was adduced on the record.

Respondent's attempts to withdraw from the collective-bargaining agreement:

On January 17, 2013, McGinley sent the following correspondence to Shimkus:

> Due to the PLA Agreement we need to opt out of the Union, IUJAT Local 363. We cannot be competitive in our bidding while being members of Local 363, We hoped as we discussed in our first meeting, that Local 363 would be part of the PLA Agreement. Unfortunately that never came to pass due to losing the court case in Federal Court. Furthermore, this letter is to inform you as of January 31, 2013, Midland Electrical Contracting and all of its employees will no longer be members of IUJAT Local 363 Electrical Union due to the above mentioned reasons.

On January 23, 2013, Gary Rothman, counsel for the Union replied in pertinent part:

> Please be advised that Local 363 will not agree to release Midland Electrical Contracting Corp. from its collective bargaining contract obligations. The current BIECA contract, to which Midland Electric is bound, is effective until November 30, 2014. Until at least that date, and for any additional time that Midland Electric may be bound by any successor agreement, Midland Electric will remain bound to the BIECA collective bargaining agreement with Local 363. In that regard, Midland Electric remains obligated to make all fringe benefit contributions to the BIECA funds and the United Welfare Fund—Security Division, as provided in your contract.

[6] Again, there are two versions of the Assumption Agreement in evidence: one is effective by its terms as of July, 1, 2010; the other is effective as of its terms as of August 1, 2010. Notwithstanding the variation in the dates, the authenticity of the agreement is not disputed.

After this time, Respondent remained in BIECA and continued to abide by the terms of the collective-bargaining agreement. However, McGinley testified that in early 2013, he had several telephone conversations with Shimkus where he stated that he would go out of business because of an inability to obtain PLA work. According to McGinley, Shimkus said that he did not have a problem with Midland leaving the Union, but that the problem fell with BIECA President Patrick Bellantoni.

On March 29, 2013, Respondent Associate Vanessa Perez emailed Bellantoni requesting that he email a copy of the "Building Industry Electrical Contractors Association Agreement." Bellantoni replied that it was in book form and could not be emailed. He then sent a copy of the industry collective-bargaining agreement to Perez. That was the only document provided.

Thereafter, in May 2013, Respondent filed a lawsuit against BIECA and the Union to nullify the collective-bargaining agreement on the basis of breach of contract. As to this claim, the relief sought was as follows:

> Thus, Plaintiff seeks a declaratory judgment declaring the CBA to be null and void, of no force and effect and Midland's performance under the CBA should be excused when Midland performs work pursuant to any Project Labor agreements that require Midland to recognize IBEW Local 3 as the sole and exclusive bargaining representative of its craft employees who are performing work covered by said Agreement.

Respondent additionally claimed fraudulent inducement insofar as it asserted that if the Association and the Union had advised Respondent that its lawsuit seeking PLA work had proven to be unsuccessful, it would have withdrawn from the Association and terminated the 2008 CBA pursuant to the terms of that CBA and would not have agreed to enter into the Association's subsequent CBA with the Union commencing December 1, 2011. In this regard, Respondent sought the following relief:

> 1. For a declaratory judgment declaring the Collective Bargaining Agreement to be null and void, of no force and effect and excusing Midland's performance under said Agreement when Midland performs work pursuant to Project Labor Agreements that require Midland to recognize IBEW Local 3 as the sole and exclusive bargaining representative of its craft employees who are performing work covered by said Agreement.
> 2. For a declaratory judgment declaring the Collective Bargaining Agreement to be null and void, of no force and effect as to Midland on the grounds that the December 1, 2011 Collective Bargaining agreement was procured through fraud due to the material omission of the dismissal of the Complaint in BIECA v. The City matter; and
> 3. For such other relief including an award of attorneys' fees, costs and disbursements as to this Court may seem just and proper.

It does not appear from the record that this matter proceeded to a hearing, and on October 13, 2013, the Respondent, the Union and BIECA entered into a stipulation of dismissal of the foregoing lawsuit providing that it would be dismissed as to all parties with prejudice and without costs or fees awarded to any party.

Subsequent events

In August 2014, BIECA and the Union began negotiations for a successor agreement. On November 30, 2014, the parties executed a Memorandum of Agreement (MOA) effective December 1, 2014, through November 30, 2017.

On September 4, 2014, Respondent sent a "notice of termination" to BIECA and the Union providing in pertinent part as follows:

> Please note that pursuant to Article 38 of the CBA, the CBA "shall remain and continue in full force and effect until Midnight **November 30, 2014**, and from year to year thereafter, unless either party gives written notice to the other by certified mail, return receipt requested, at least sixty (60) days prior to the date of expiration of this Agreement, that it desires to modify or amend and/or renegotiate same.
>
> On or about July 1, 2010, Midland and the Union entered into an Assumption Agreement, which was signed by Midland and representatives of the Union and the Association (the "Assumption Agreement"). According to Paragraph 1 of the Assumption Agreement, Midland agreed to be "bound to all of the terms and conditions as are applicable from time-to-time by the nature of the work performed for each of the [CBAs] which are incorporated herein by reference as if fully set forth in this Agreement." Furthermore, according to Paragraph 5 of the Assumption Agreement, Midland agreed "to be bound by any and all amendments, renewals and/or extensions of the [CBA] unless and until this agreement is properly terminated by either [Midland] or the Union in accordance with the renewal and/or Terminations Provisions of the [CBA]." A copy of the Assumption Agreement is enclosed herewith.
>
> Accordingly, Midland is a signatory to the CBA and is herein providing written notice sent by certified mail, return receipt requested, at least 60 days prior to the date of the expiration that it desires to amend the CBA. In accordance with the Termination Provisions in Article 38 of the CBA, Midland is formally advising the Union and the Association that Midland does not wish to renew the CBA. In accordance with the Termination Provisions in Article 38 of the CBA, Midland is also formally advising the Union and the Association that Midland does not wish to renew the Assumption Agreement. As such, the last day that Midland will be bound by the CBA or the Assumption Agreement will be November 30, 2014.

Respondent sent a follow-up letter dated September 16, 2014, reiterating its contention that it had, in accordance with the provisions of the CBA, timely notified the Union and the Association that it did not wish to renew the CBA or the Assumption Agreement, and that the last day it will be bound by either would be November 30, 2014.

The parties stipulated that as of September 2014, no payments to any of the contractually required benefit funds noted above had been made.[7]

ANALYSIS AND CONCLUSIONS

An employer who signs an agreement to name a multiemployer association to be its bargaining agent and to be bound by the collective-bargaining agreement in effect between a union and that multiemployer association and "any modification, extensions or renewals" of that collective-bargaining agreement is on notice that the bargaining relationship will be governed by subsequent agreements if the employer fails to provide proper notice to the contrary. Absent such notice, that employer is bound by the new agreement negotiated between the union and the association. See *Ted Hicks and Associates, Inc*., 232 NLRB 712, 713 (1977).

In *Retail Associates*, Inc., 120 NLRB 388, 395 (1958), the Board found that to effectively withdraw from such a multiemployer relationship, the withdrawal must be both unequivocal and timely. Moreover, in *The Carvel Co.*, 226 NLRB 111 (1976), the Board found that in order to be timely, the employer's withdrawal must be made prior to the commencement of multi-employer bargaining over a new contract:

In *Retail Associates*, supra, the Board set forth the rules governing the withdrawal of an employer from multiemployer bargaining. An employer may withdraw without the union's consent prior to the start of bargaining by giving unequivocal notice of the intent to abandon the multiemployer unit and to pursue negotiations on an individual basis. However, once negotiations have actually begun, withdrawal can only be effectuated on the basis of "mutual consent" or "unusual circumstances."

As is of particular relevance to the instant case, Board precedent has also made clear that the action of withdrawal of negotiating authority from a multiemployer association is an action distinct from terminating a contract. *Rome Electrical Systems, Inc.,* 349 NLRB 745, 747 (2007), enfd. 286 Fed. Appx. 697 (11th Cir. 2008).[8]

Applying the foregoing principles here, I conclude that the Respondent continues to be bound to BIECA and the terms of the 2014–2017 collective-bargaining agreement between BIECA and the Union.

While the collective-bargaining agreement at issue had a 60-day notice requirement for the parties to request modification or termination, the terms of the Membership Application clearly provide that:

> Resignation from the Association must be in writing and served on the Association by certified mail no less than 90 days prior [to] the day of the expiration of the agreement between the Association and Local 363. Timely receipt of such resignation shall relieve the Association form any responsibilities or obligations to bargain on behalf of the Employer for a new collective-bargaining agreement.

There is also no dispute that Respondent agreed to be bound to the Membership Application which unambiguously provided that:

> The Employer hereby designates the Association as its bargaining representative in all negotiations with Local 363 for its employees in the bargaining unit described above and agrees to be bound by all the terms of any agreement entered into between the Association and Local 363 covering said employees with the same force and effect as though the Employer had executed the agreement as a party.

In the present case, the agreement in effect expired on November 30, 2014. Thus, Respondent was required to notify BIECA of its withdrawal, in writing by certified mail no later than 90 days prior to that date, which it failed to do. Respondent's September notices were beyond that time frame. There is also no evidence of mutual consent or unusual circumstances which would authorize an untimely withdrawal.

Respondent has argued that the contractual termination provisions in the collective-bargaining agreement, which were incorporated by reference in the Assumption Agreement, superseded the termination language in the Membership Agreement. The substance of that argument has been rejected by the Board. See *Rome Electrical Systems*, supra at 747–748 (rejecting employer's argument that termination language in a particular collective-bargaining agreement superseded termination language in a previously executed letter of assent to be bound by the association-union agreements). To the contrary, I conclude that Respondent conferred actual authority on BEICA to bind it to subsequent agreements, absent a timely withdrawal according to the terms of the Membership Application.

As the General Counsel has noted, the September notices of withdrawal were further untimely inasmuch as they were sent subsequent to the commencement of negotiations for the 2014–2017 agreement. See *The Carvel Company*, supra. As the Board has stated:

> The right of withdrawal by either a union or employer from a multiemployer unit has never been held, for Board purposes, to be free and uninhibited, or exercisable at whim. For the Board to tolerate such inconsistency and uncertainty in the scope of collective-bargaining units would be to neglect its function in delineating appropriate units under Section 9, and to ignore the fundamental purpose of the Act by fostering and maintaining stability in bargaining relationships. Necessarily under the Act, multiemployer bargaining units can be accorded the sanction of the Board only insofar as they rest in principle on a relatively stable foundation.

Retail Associates, supra at 395.

I further find that Respondent's reliance upon its unsuccessful attempts to rid itself of its commitments to the 2011–2014

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[7] Respondent agreed to this stipulation with the caveat that it did not acknowledge that any such payments were due.

[8] In their posthearing briefs, both the General Counsel and Respondent have cited to *Carr Finishing Specialties*, *Inc.,* 358 NLRB 1766 (2012), in support of their respective positions. That case was issued by a Board panel that the Supreme Court found was not properly constituted. *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). The General Counsel urges that I rely upon the reasoning set forth by the Board in that matter. While I do not officially rely upon that case, I do agree with the general analytical framework as set forth therein, as it is supported by other Board precedent as discussed above.

collective-bargaining agreement is unavailing. Respondent's January 2013 letter to the Union, which did not reference BIECA, failed to constitute a legitimate withdrawal from BIECA, as it did not comport with the clear requirements set forth in the Membership Application. In addition, Respondent requested immediate withdrawal during the second year of a 3-year contract instead of at the end of the agreement in effect at the time. Respondent was further notified by the Union that its attempt to withdraw from the CBA would not be agreed to.

In a similar vein, I find that Respondent's 2013 lawsuit failed to meet the Membership Application's requirements. Here, Respondent unsuccessfully attempted to have the District Court nullify the CBA; not its membership in BIECA. In any event, the lawsuit proved ineffective and did not provide BIECA with termination notice consistent with the terms of the Membership Application.

In Respondent's answer to the complaint, Respondent alludes to the issue of fraudulent inducement, which echoes claims brought in the lawsuit referenced above. I find these assertions to be unconvincing. There is no evidence that membership in BIECA was premised upon a contingency or the Union's guarantee that it would be able to obtain PLA work. Moreover, there is no evidence that Respondent failed to receive a copy of the Membership Application, which it, in fact, executed and then forwarded to BIECA. In short, there is simply no evidence to support the insinuation that Respondent was unaware of what it had agreed to.

CONCLUSIONS OF LAW

1. By failing and refusing to adhere to the collective-bargaining agreement effective December 1, 2014, to November 30, 2017, between United Electrical Workers of America, IUJAT, Local 363 (the Union) and The Building Industry Electrical Contractors association (BIECA), and by refusing, since September 2014, to make contractually required fund contributions to the Union's Security Fund, Building Trades' Welfare Benefit Fund, Building Trades' Annuity Fund, Building Trades' Education Fund and the Electricians Retirement Fund on behalf of unit[9] employees, Respondent has violated Section 8(a)(1), (5), and (d) of the Act.

2. The above labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent should be ordered to recognize and, on request, bargain with the Union as the collective-bargaining representative of all unit employees, as described above. The Respondent should also be required to adhere to the 2014–2017 collective-bargaining agreement between the Union and BIECA and make whole the unit employees for any loss of earnings and other benefits suffered as a result of the Respondent's failure to apply the 2014–2017 collective-bargaining agreement between BIECA and the Union as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In the event backpay is owed, Respondent should be ordered to compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *Don Chavas LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

Additionally, Respondent should be ordered to make all required benefit fund contributions from September 2014, to the present, including any additional amounts applicable to such funds as set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). In addition, Respondent should be ordered to reimburse unit employees for any expenses resulting from the Respondent's failure to make the required contributions to the funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent Midland Electrical Contracting, formerly of Staten Island New York, and currently operating from New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize the United Electrical Workers of America, IUJAT, Local 363 (the Union), as the collective-bargaining representative of unit employees as has been defined herein and in the Recognition Agreement, as set forth above.

(b) Failing and refusing to apply to unit employees the 2014–2017 collective-bargaining agreement between the Building Industry Electrical Contractors Association (BIECA) and the Union.

(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) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

(b) Make whole all bargaining unit employees and all benefit funds for any loss of income, contributions or benefits, and for any expenses incurred in connection with those benefit fund

[9] All electricians, electrical maintenance mechanics, helpers, apprentices and trainees excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

[10] 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.

losses by those employees, in the manner set forth in the remedy section of this decision.

(c) 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 decision.

(d) Within 14 days after service by the Region, post at its facility in Staten Island, if still extant, and in its New Jersey facility, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 29, 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 the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or by 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 September 1, 2014.

(e) 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. February 1, 2016

[11] 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."

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 fail or refuse to recognize the United Electrical Workers of America, IUJAT, Local 363 (Union) as the exclusive collective-bargaining representative of all employees performing work in the following unit:

> All electricians, electrical maintenance mechanics, helpers, apprentices and trainees excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to apply to unit employees the existing collective-bargaining agreement between the Building Industry Electrical Contractors Association (BIECA) and the Union.

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 recognize the Union as the exclusive collective-bargaining representative of employees in the bargaining unit and will adhere to all provisions in our existing collective-bargaining agreement with the Union.

WE WILL make whole our bargaining unit employees, and all benefit funds, for any loss of income, contributions, or benefits suffered as a result of the failure to apply to those employees the collective-bargaining agreement between the BIECA and the Union and for any expenses incurred in connection with those benefit fund losses, with interest.

MIDLAND ELECTRICAL CONTRACTING CORP.