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Staunton Fuel & Material, Inc., and Marilyn Mengelkamp d/b/a Central Illinois Construction, Alter Egos or Single Employer *and* International Union of Operating Engineers, Local 520, AFL-CIO. Cases 14–CA–24132, 14–CA–24311, and 14–CA–24595

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On December 17, 1998, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to adopt the judge's rulings, findings, and conclusions except as discussed below[1] and adopt the recommended order as modified.[2]

This case raises a familiar issue in the construction industry: how may a union whose status as a bargaining representative is governed by Section 8(f) of the Act acquire, through agreement with the employer, the status of majority bargaining representative under Section 9(a)? Although this question has been implicated in a number of our cases that have followed *John Deklewa & Sons,* 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988), to date we have not fully resolved it.

We take this occasion to do so, by adopting the approach taken by the United States Court of Appeals for the Tenth Circuit in *NLRB v. Triple C Maintenance, Inc.,* 219 F.3d 1147 (10th Cir. 2000), and *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000). We hold that a written agreement will establish a Section 9(a) relationship if its language unequivocally indicates that the union requested recognition as majority representative, the employer recognized the union as majority representative, and the employer's recognition was based on the union's having shown, or having offered to show, an evidentiary basis of its majority support. Applying this test to the present case, we find that the contract at issue did not establish a Section 9(a) relationship and that the Respondent accordingly did not violate Section 8(a)(5) by withdrawing recognition from the Union after the contract expired.

I. BACKGROUND

At all material times, the Respondent "Central Illinois" was engaged in business as a highway construction contractor. The Union and Central Illinois were parties to a series of 3-year collective-bargaining agreements effective between 1987 and 1996. In Article 1 of each of these agreements, Central Illinois "recognize[d] the Union as the sole and exclusive collective bargaining agent" for all employees in the defined unit.[3] For the period of August 1, 1990, to July 31, 1993, there were two similar agreements, one covering heavy construction and one covering highway construction.

On August 1, 1993, Central Illinois President Robert Mengelkamp signed a collective-bargaining agreement proposed by the Union to succeed both of the agreements that had just expired, to be effective from August 1, 1993, to July 31, 1996. This proposal included the same recognition language as in the preceding contracts, but also contained a new Article 43, which read as follows:

MAJORITY REPRESENTATIVE

> The Contractors Party hereto recognize [the Union] as the Majority Representative of all employees in Operating Engineers classifications employed by them and the sole and exclusive bargaining agent of such employees.

On May 1, 1996, the Union gave Central Illinois written notice of intent to negotiate a successor agreement for

[1] The Respondent did not file exceptions to the judge's conclusions that it violated Sec. 8(a)(1) by threatening to discharge or not hire employees because of their affiliation with the Union; Sec. 8(a)(3) by discharging, laying off, failing to refer, and failing to recall Union members; and Sec. 8(a)(5) by making unilateral changes in terms of employment prior to contract expiration without bargaining with the Union. We therefore adopt these conclusions pro forma. The Respondent has excepted, however, to the judge's reliance on a previous settlement agreement as giving notice that the Union was claiming recognition as majority bargaining representative. We agree with the Respondent that using the agreement as evidence on that point went beyond the limited purpose for which the agreement was admitted. In view of our disposition of this case, however, the error was harmless. We also deny the Respondent's exception to the judge's purported failure to give adequate weight to the Regional Director's decision not to contest the Respondent's withdrawal of recognition. That decision was overturned by the General Counsel on appeal.

[2] We will modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.,* 335 NLRB No. 15 (Aug. 24, 2001).

[3] The defined unit was comprised of "Operating Engineer Equipment Operators, Operating Engineers Apprentices, Operating Engineer Foremen, Master Mechanics, Assistant Master Mechanics, Operating Engineer Mechanics, Operating Engineer Mechanic Trainees, Operating Engineer Engine Men, Operating Engineer Greasers and Operating Engineer Oilers and Fireman employed by the Employer within the territorial jurisdiction of the Union."

the one about to expire. Central Illinois responded with written notice of intent "to terminate any and all Collective Bargaining Agreements as of July 31, 1996." On the contract's expiration, Central Illinois made a number of unilateral changes in terms and working conditions. The Union filed several charges against Central Illinois alleging, among other misconduct, a refusal to recognize and bargain with the Union and unilateral imposition of new terms of employment in violation of Section 8(a)(5).

Based on a thorough review of applicable Board precedents and the record evidence, the judge found that the language in Article 43 of the parties' 1993–1996 contract established a Section 9(a) bargaining relationship, and that the relationship thus continued after the contract's expiration. The judge also found that the Respondent was time-barred under Section 10(b) of the Act from challenging the Union's Section 9(a) status on the basis of alleged misrepresentation by the Union at the time the contract was signed.[4] Accordingly, she concluded that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union and by unilaterally altering the unit's terms of employment without bargaining.

II. ANALYSIS

Before addressing the issue posed in the case, we place it in the context of the Act's requirements and our earlier decisions in this area.

A. Legal Background

Section 8(f) permits unions and employers in the construction industry to enter into collective-bargaining agreements without the union's having established that it has the support of a majority of the employees in the covered unit.[5] The provision therefore creates an exception to Section 9(a)'s general rule requiring a showing of majority support. Section 8(f) also creates an exception to the general rule of Section 8(a)(2) and Section 8(b)(1)(A) that an employer and a union lacking majority support of unit employees may not enter into a bargaining relationship with respect to those employees.

The distinction between a union's representative status under Section 8(f) and under Section 9(a) is significant because an 8(f) relationship may be terminated by either the union or the employer on the expiration of their collective-bargaining agreement. *Deklewa*, supra at 1386–1387. By contrast, a 9(a) relationship (and the employer's associated obligation to bargain) continues after contract expiration, unless and until the union is shown to have lost majority support. *Levitz Furniture Co.*, 333 NLRB No. 105 (2001). Moreover, an 8(f) contract does not bar a representation petition under Section 9. A contract made with a Section 9(a) representative does bar such a petition. 29 U.S.C. § 158(f); *Deklewa*, supra at 1387.

Deklewa revised our framework for implementing Section 8(f) in several important ways. Most relevant here, *Deklewa* discarded the Board's former "conversion doctrine," under which an 8(f) relationship could be converted to a 9(a) relationship without an election, on the basis of any of several criteria that did not necessarily reflect employee majority support for the union. Since the conversion doctrine had permitted employees to be "locked in" to Section 9(a) representation beyond the term of one contract by a union lacking majority support, abandoning the doctrine served the interest of protecting employees' right to determine their own representation status. Id. at 1386–1387 and fn. 47. *Deklewa* also adopted a rebuttable presumption that a bargaining relationship in the construction industry was established under Section 8(f), with the burden of proving that the relationship instead falls under Section 9(a) placed on the party so asserting. H.Y. Floors and Gameline Painting, Inc., 331 NLRB No. 44 (2000); *Deklewa*, supra at 1385 fn. 41.[6]

However, *Deklewa* did not foreclose a Section 8(f) representative from achieving 9(a) status. Rather, *Deklewa* emphasized that "nothing in this opinion is meant to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry." 282 NLRB at 1387 fn. 53. Accordingly, a construction union holding an 8(f) bargaining relationship with an employer could (like a non-construction union) achieve

[4] The Respondent contends that the Union obtained Mengelkamp's signature on the new contract through misrepresentation, and that Sec. 10(b) of the Act is therefore not a bar to contesting its Sec. 9(a) obligation to continue recognizing the Union after the contract expired. Because we find (for the reasons discussed below) that the language in the contract did not establish a Sec. 9(a) bargaining relationship, we need not address those issues.

[5] Sec. 8(f) provides, in pertinent part: "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of Sec. 9 prior to the making of such agreement . . . *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Sec. 9(c) or 9(e)."

[6] In *Deklewa* the Board also held that an 8(f) contract would be enforceable for its duration rather than terminable at will by either party; that a single-employer unit will normally be the appropriate unit for a Section 9 petition filed by employees covered under an 8(f) agreement; and that an 8(f) relationship could be terminated by the union or the employer upon contract expiration. 282 NLRB at 1385–1386.

9(a) status either through a Section 9 certification proceeding or "from voluntary recognition accorded . . . by the employer of a stable work force where that recognition is based on a clear showing of majority support among the union employees, e.g., a valid card majority." Id.

Guided by this principle, we have held in post-*Deklewa* cases that a construction union can overcome the presumption of 8(f) status by showing that it made an unequivocal demand for, and that the employer unequivocally granted, majority recognition based on a showing of majority support in the unit. E.g., *Western Pipeline, Inc.*, 328 NLRB No. 138 (1999); *James Julian, Inc.*, 310 NLRB 1247 (1993); *Golden West Electric*, 307 NLRB 1494 (1992). However, the Board and the courts have continued to address questions concerning what constitutes voluntary "recognition" by an employer "based on a clear showing of majority support among the union employees" within the meaning of *Deklewa*, particularly with respect to contract language purporting to establish such recognition. The Board's decisions in this area have not always been enforced.[7]

Recently, in *Goodless Electric Co.,* 332 NLRB No. 96 (2000), on remand from 124 F.3d 322 (1st Cir. 1977), we found that where the parties' contract language commits the employer to recognizing the union's majority representative status in the future if the union demonstrates that it has majority support, 9(a) recognition will be established if and when the union subsequently meets that condition within the term of the agreement.[8] We have also held that once 9(a) bargaining status is created, a preexisting 8(f) prehire agreement between the parties is from that point forward a 9(a) agreement, sufficient to bar a rival union petition, even if the parties do not negotiate a new contract subsequent to the 9(a) recognition agreement. *VFL Technology Corp.,* 329 NLRB No. 49 (1999).

B. The issue in this case

We have not, however, clearly defined the minimum requirements for what must be stated in a written recognition agreement or contract clause in order for a union to attain 9(a) status solely on the basis of such an agreement.[9] We believe the approach taken on this issue by the Tenth Circuit in two recent cases issued on the same day, *NLRB v. Triple C Maintenance, Inc.* and *NLRB v. Oklahoma Installation Co.,* establishes a legally sound and eminently practical set of standards for self-sufficient majority recognition agreements.

In both cases, the court confirmed that written contract language, standing alone, could independently establish 9(a) bargaining status. 219 F.3d at 1155; 219 F.3d at 1164. The court found that to be sufficient, such language must unequivocally show (1) that the union requested recognition as the majority representative of the unit employees; (2) that the employer granted such recognition; and (3) that the employer's recognition was based on the union's showing, or offer to show, substantiation of its majority support. 219 F.3d at 1155–1156; 219 F.3d at 1164–1165.[10]

This approach properly balances Section 9(a)'s emphasis on employee choice with Section 8(f)'s recognition of the practical realities of the construction industry. Such a balance was one of the Board's primary goals in *Deklewa*, 282 NLRB 1375, 1382. The Tenth Circuit's approach also has the advantage of establishing bright-line requirements. Construction unions and employers will be able to establish 9(a) bargaining relationships easily and unmistakably where they seek to do so. These requirements should accordingly reduce the number of

[7] See, *H.Y. Floors*, supra; *Western Pipeline, Inc.,* supra; *Triple C Maintenance, Inc.*, 327 NLRB 42 (1998), enfd. 219 F.3d 1147 (10th Cir. 2000); *District Council of Painters No. 8*, 326 NLRB 1074 (1998); *Oklahoma Installation Co*., 325 NLRB 741 (1998), enf. denied 219 F.3d 1160 (10th Cir. 2000); *American Automatic Sprinkler Systems, Inc*., 323 NLRB 920 (1997), enf. denied 163 F.3d 209 (4th Cir. 1998); *MFP Fire Protection, Inc.*, 318 NLRB 840 (1995), enfd. 101 F.3d 1341 (10th Cir. 1996); *Decorative Floors, Inc.*, 315 NLRB 188 (1994).

[8] We have referred to this procedure as the "third option" for a union to obtain 9(a) status, in addition to the earlier recognized options of (1) winning a Board-certified election, and (2) obtaining the employer's immediate voluntary recognition. *Goodless Electric Co*., 332 NLRB No. 96, slip op. at 5 fn.10. *See also NLRB v. Goodless Electric Co. Inc.*, 124 F.3d at 328–329.

[9] We have reviewed the terms of particular recognition clauses or agreements on a number of occasions. In addition to the cases cited above and in fn. 7, see *Hovey Electric, Inc*., 328 NLRB No. 35 (1999); *J&R Tile, Inc.,* 291 NLRB 1034 (1988).

[10] The requirement that the union show or offer to show that it has majority support is consistent with established law outside the construction industry. Where a union requests 9(a) recognition from a nonconstruction employer, the employer may either demand a showing of majority support or choose to accept the union's claim of majority support on its face and recognize the union. *Oklahoma Installation*, 325 NLRB 741, 742 (1998); *Glaziers and Glassworkers, Local 767*, 228 NLRB 35, 40–41 (1977), enfd. 577 F.2d 100 (9th Cir. 1978); *Morse Shoe, Inc.,* 227 NLRB 391, 392–395 (1976), enfd. 591 F.2d 542 (9th Cir. 1979). If the employer recognizes the union and then discovers that the union did not in fact have majority support, it may challenge the union's 9(a) status at any time within the 6-month limitations period after wrongfully extending recognition, pursuant to Section 10(b) of the Act. *Oklahoma Installation*, 325 NLRB 741, 742. If the employer fails to act within the 10(b) period, it may terminate its bargaining obligation only by affirmatively showing that the union has lost majority support. The burden of making such a showing rests on the employer. *Levitz Furniture Co.,* supra at 8.

cases arising in this area and facilitate the Board's disposition of those disputes that do occur.[11]

We therefore adopt the requirements stated by the Tenth Circuit in *Triple C Maintenance, Inc.* and *Oklahoma Installation Co.*[12] A recognition agreement or contract provision will be independently sufficient to establish a union's 9(a) representation status where the language unequivocally indicates that (1) the union requested recognition as the majority or Section 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or Section 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support.[13] As the Tenth Circuit discussed in *Triple C*, although it would not be necessary for a contract provision to refer explicitly to Sec. 9(a) in order to establish that the union has requested and been given 9(a) recognition, such a reference would indicate that the parties intended to establish a majority rather than an 8(f) relationship. 219 F.3d at 1155–1156.[14] To the extent that any of our post-*Deklewa* decisions can be read to conflict with this holding, those decisions are overruled.[15]

To provide further guidance, we offer some additional observations. First, in many cases the union's required request for recognition can be fairly implied from the contract language stating that the employer grants the required recognition. Second, the employer's grant of recognition must be express and unconditional. For example, a recognition provision stating that the employer "will" recognize the union as the majority or 9(a) bargaining representative "if" the union presents evidence that a majority of its employees have authorized the union to represent them in collective bargaining, would not be independently sufficient to establish a 9(a) relationship, due to its conditional nature.[16] Third, with respect to the union's claim of majority support, there is a significant difference between a contractual statement that the union "represents" a majority of unit employees—which would be accurate under either an 8(f) or a 9(a) agreement—and a statement to the effect that, for example, the union "has the support" or "has the authorization" of a majority to represent them. See *NLRB v. Oklahoma Installation*, supra at 1164–1165. Similarly, a provision stating only that a majority of unit employees "are members" of the union would be consistent with a union security obligation under either an 8(f) or a 9(a) relationship and is therefore insufficient to confirm 9(a) status. *James Julian*, 310 NLRB 1247, 1254. To the extent that any of our post-*Deklewa* cases may be read to imply that an agreement indicating that the union "represents a majority" or has a majority of "members" in the unit, without more, is independently sufficient to establish 9(a) status, those cases are overruled.

III. APPLICATION TO THIS CASE

Here, the Union's only basis for claiming 9(a) status is the contract language in the 1993–1996 agreement quoted above. Although the new recognition provision in the contract's Article 43 states that the Respondent "recognize[s] [the Union] as the Majority Representative," it does not state that the Respondent's recognition was based on a contemporaneous showing, or offer by the Union to show, that the Union had majority support.[17]

[11] By way of convenient illustration, in *Triple C Maintenance* the recognition language at issue clearly met these requirements. 219 F.3d 1155–1156. In *Oklahoma Installation*, by contrast, the recognition language was not sufficient to establish 9(a) recognition. 219 F.3d 1164–1166.

[12] The Court of Appeals for the Third Circuit took an approach similar to the Tenth Circuit's in *Sheet Metal Workers Local 19 v. Herre Brothers, Inc.*, 201 F.3d 231, 242 (3d Cir. 1999). The Court of Appeals for the Fourth Circuit, in *American Automatic Sprinkler Systems v. NLRB*, 163 F.3d 209 (4th Cir. 1998), declined to enforce a Board order finding a 9(a) relationship on the basis of contract language. In that case, however, as the Tenth Circuit noted in *Triple C*, the contracts at issue did not recite that the union had shown or offered to show that it had majority support. *Triple C*, supra at 1154 fn. 2; *American Automatic Sprinkler Systems*, supra at 212, 221.

[13] In Chairman Hurtgen's view, a person who is not a party to the contract (e.g. a decertification petitioner) is not bound to the declaration of the contract and thus is not bound by the rules set forth here.

[14] Where the recognition language is couched in terms of the Union's "offer to show" majority support, the employer may challenge it by establishing that the union did not, in fact, make the required showing of majority support. Such a challenge must be made within 6 months after the written recognition was given, as required by Section 10(b) of the Act. *Triple C Maintenance*, supra at 1156–1160. We leave open the issue of whether an employer would be permitted to make a similar challenge within the 10(b) period where the language he agreed to unequivocally stated that the union did make (as opposed to offered to make) a showing of majority support.

[15] E.g., *J&R Tile*, supra. Of course, we will continue to consider relevant extrinsic evidence bearing on the parties' intent in any case where we find that the contract's language is not independently dispositive. We decide here only that it is possible for us to determine that a 9(a) relationship was established solely on the basis of the parties' contract language, provided that language meets the criteria we adopt here.

[16] As noted above, however, if the union makes the required showing within the term of that agreement, the union will at that point have achieved 9(a) recognition. *Goodless Electric Co.,* supra.

[17] We acknowledge the evidence that the earlier contracts between the parties all contained language that undisputedly established Section 8(f) recognition; that the 1993–1996 contract at issue retained that language; and that the new language in the 1993–1996 contract specifying that the Union was the majority representative was added in a separate section of its own. This evidence suggests that the parties did not merely intend to extend their earlier Section 8(f) relationship. The issue here, however, is not simply whether the parties may have intended to change their relationship but whether they succeeded in doing so. Because the contract language itself is the only direct basis for the

Accordingly, under the requirements established above, we cannot adopt the judge's finding that a Section 9(a) relationship was established by the contract language at issue, even though her finding was clearly supportable under the authorities she cited. The *Deklewa* presumption that the parties' bargaining relationship operated under Section 8(f) has therefore not been rebutted, and the Respondent accordingly had the right to terminate the relationship on the 1993–1996 contract's expiration.

We consequently do not adopt the judge's findings that the Respondent violated Section 8(a)(5) after July 31, 1996, when the contract expired. We will amend the recommended Order accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Staunton Fuel & Material, Inc., Marilyn Mengelkamp d/b/a Central Illinois Construction, alter egos and a single employer, Staunton, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they have to choose between adherence to International Union of Operating Engineers, Local Union No. 520, AFL–CIO, and employment with Respondent.

(b) Telling employees that they are being discharged for refusal to go non-union.

(c) Asking employees about their union activities in a manner constituting interference, restraint, or coercion.

(d) Discharging employees, laying off employees, failing to recall employees, or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment, to discourage membership in Local 520 or any other labor organization.

(e) Failing, without Local 520's consent, to honor the terms of the 1993–1996 collective-bargaining agreement between Respondent and Local 520 prior to the expiration of that agreement.

(f) Unilaterally changing terms and conditions of employment of employees prior to the expiration of that agreement, without giving Local 520 prior notice and an opportunity to bargain.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this Order, offer Dudley Luebbert, Robert Merkle, Sr., and Leonard Moss full reinstatement to their former jobs, or if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Dudley Luebbert, Leonard Moss, and Gary Randle Titsworth, to the unlawful layoff of and failure to recall David Kelly Brown, and to the unlawful failure to recall Robert Merkle, Sr., and within 3 days thereafter notify these employees that this has been done and that such unlawful personnel action will not be held against them in any way.

(c) To the extent Respondent has not already done so, jointly and severally make David Kelly Brown, Dudley Luebbert, Robert Merkle, Sr., Leonard Moss, and Gary Titsworth whole for any loss of earnings and other benefits as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, offer full and immediate employment to those work applicants who would have been referred to Respondent for employment through Local 520's hiring hall during the period running from June 1, to July 31, 1996, were it not for the Respondent's unlawful conduct, and make them whole for any loss of earnings and other benefits they may have suffered by reason of Respondent's failure to hire them, in the manner prescribed in the remedy action of the judge's decision.

(e) For the period running from June 1, to July 31, 1996, to the extent Respondent has not already done so, jointly and severally make whole the employees employed by it in the bargaining unit, as well as those individuals who were unlawfully denied an opportunity to work, for losses suffered as a result of Respondent's unilateral changes in wages and working conditions during that period; reimburse them for any expenses ensuing from Respondent's failure to make contributions to the benefit funds during that period; and make whole the benefit trust funds for losses suffered during that period; all in the manner prescribed in the remedy section of the judge's decision.

(f) Preserve and, within 14 days of a request, provide at the office designated by the Board or its agent, a copy of all payroll records, social security payment records, timecards, personnel records, and all other records, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

union's claim of 9(a) status, it must be reviewed under the criteria we establish above.

(g) Within 14 days after service by Region 14, post at its facilities in Staunton, Illinois, and at each of its jobsites, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 14, 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. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, Respondent shall provide signed copies of the notice for posting by Local 520, if it is willing, at the locations where employees go when seeking referral through Local 520's hiring hall.

(h) In the event that, during the pendency of these proceedings, the Respondent has gone out of business, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all employees employed by the Respondent in the aforesaid unit at any time since March 15, 1996. Such notices shall be mailed to the last known address of each of the individuals above. Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be mailed within 14 days after service by the Region.

(i) 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 Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2001

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Peter J. Hurtgen, Chairman

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Wilma B. Liebman, Member

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John C. Truesdale, Member

_____
Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[18] 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell you that you must choose between adherence to International Union of Operating Engineers, Local Union No. 520, AFL–CIO, and employment by us.

WE WILL NOT tell you that you are being discharged for refusing to go non-union.

WE WILL NOT ask you about your union activities in a manner constituting interference, restraint, or coercion.

WE WILL NOT discharge you, lay you off, fail to recall you, or otherwise discriminate in regard to hire or tenure of employment or any term or condition of employment, to discourage membership in Local 520 or any other union.

WE WILL NOT fail, without Local 520's consent, to honor the terms of the 1993–1996 collective-bargaining agreement that existed between us and Local 520 during the period June 1, to July 31, 1996, for the bargaining unit covered by that agreement.

WE WILL NOT unilaterally change terms and conditions of employment of employees in that unit before the expiration of the 1993–1996 agreement, without giving Local 520 prior notice and an opportunity to bargain.

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

WE WILL, within 14 days of the Board's order, offer Dudley Luebbert, Robert Merkle, Sr., and Leonard Moss full reinstatement to their former jobs, or if such jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or any other rights previously enjoyed. Gary Titsworth and David Kelly Brown have already been reinstated.

WE WILL, to the extent we have not already done so, make David Kelly Brown, Dudley Luebbert, Robert Merkle, Sr., Leonard Moss, and Gary Titsworth whole,

with interest, for any loss of earnings and other benefits as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the unlawful personnel action taken against all of these employees, and within 3 days thereafter notify them that this has been done and that such unlawful personnel action will not be held against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer full and immediate employment to those work applicants who would have been referred to us for employment through Local 520's hiring hall during the period running from June 1, to July 31, 1996, were it not for our unlawful conduct.

WE WILL, for the period running from June 1, to July 31, 1996, to the extent we have not already done so, make whole with interest the employees employed by us in the bargaining unit, as well as those individuals who were unlawfully denied work, for losses suffered as a result of our unilateral changes in wages and working conditions during that period; reimburse them, with interest, for any expenses ensuing from our failure to make contributions to the benefit funds during that period; and make whole the benefit trust funds for losses suffered during that period. WE WILL also pay all these amounts as to supervisors, or persons who would have been referred to supervisory jobs, in the contract unit during that period.

Lynette Zuch, Esq., for the General Counsel.

Mark Weisman, Esq. and Lawrence P. Kaplan, Esq., both of Clayton, Missouri, for the Respondent.

Harold Gruenberg, Esq. of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. These consolidated cases were heard before me in St. Louis, Missouri, on October 14–17, 1997. The charge in Case 14–CA–24132 was filed by International Union of Operating Engineers, Local Union No. 520, AFL–CIO, (the Union) on June 13, 1996, and amended on November 4, 1996, on February 18, 1997, and on July 31, 1997. The charge in Case 14–CA–24311 was filed by the Union on October 28, 1996, and amended on February 18, 1997. The original consolidated complaint based on the June 1996, October 1996, November 1996, and February 1997 charges was issued on February 28, 1997. This complaint and all of the charges and amended charges on which it was based named as the sole respondent Staunton Fuel & Material Inc. (Staunton). The original charge in Case 14–CA–24595 was filed by the Union on May 28, 1997, and amended on June 16, 1997, naming only Staunton as respondent. A second amended charge in Case 14–CA–24595, filed by the Union on July 31, 1997, named as respondents both Staunton and Marilyn Mengelkamp d/b/a Central Illinois Construction (CIC). A consolidated complaint based on all of the foregoing charges was issued on July 31, 1997, naming Staunton and CIC as respondents, and was amended on October 10, 1997, and on October 14, 1997.

The consolidated complaint in its final form alleges that about June 1, 1996, CIC was established by and since that date has been an alter ego of Staunton or, in the alternative, that Staunton and CIC constitute a single integrated business enterprise and a single employer. The complaint in its final form further alleges that Staunton/CIC violated Section 8(a)(1) of the National Labor Relations Act, as amended, (the Act) by telling employees that the employees would no longer be represented by the Union; by telling an employee that he had been discharged because of his union membership and activities; by telling an employee that he would be discharged if he did not abandon membership in the Union; by telling an employee that he would be denied employment if he did not abandon membership in the Union; and by interrogating an employee about his union activities. The complaint in its final form also alleges that Staunton/CIC violated Section 8(a)(3) and (1) of the Act by discharging employees Gary Randle Titsworth, Dudley Luebbert, and Leonard Moss; by laying off and, for about 6 months thereafter, refusing to recall employee David K. Brown; and by refusing to recall employee Robert Merkle, Sr.; all because of these employees' union and concerted activities. In addition, the complaint in its final form alleges that Staunton/CIC violated Section 8(a)(5) and (1) of the Act through CIC's refusal, from about June 1, 1996, to August 1, 1996, and without the Union's consent, to honor or abide by the terms and conditions of employment set forth in a collective-bargaining agreement effective by its terms from August 1, 1993, through July 31, 1996. Further, the complaint in its final form alleges that since about June 1, 1996, in violation of Section 8(a)(5) and (1), Staunton/CIC has failed and refused to comply with the terms and conditions of employment set forth in that contract, by failing and refusing to pay employees for all hours worked, without the union's consent and without giving the Union notice and an opportunity to bargain. Also, the complaint in its final form alleges that Staunton/CIC violated Section 8(a)(5) and (1) of the Act by raising wages about August 1, 1996; by refusing to comply with the hiring-hall provisions of the most recent collective-bargaining agreement; and by failing and refusing since about August 1, 1996, to pay benefit contributions due on behalf of bargaining-unit employees; all without giving the Union notice and an opportunity to bargain. In addition, the complaint in its final form alleges that Staunton/CIC violated Section 8(a)(5) and (1) by failing and refusing to provide, and/or by unreasonable delay in providing, the Union with certain information; and by providing the Union with false and misleading answers to certain requests for information.

On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the brief filed by counsel for the General Counsel (the General Counsel) and the brief and supplemental brief filed by Staunton/CIC, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND THE RELATIONSHIP BETWEEN STAUNTON AND CIC

Staunton is an Illinois corporation with an office and place of business in Staunton, Illinois. At all material times, Staunton has been engaged in business as a highway construction contractor. During calendar year 1996, and also during the 12-month period ending June 30, 1997, in conducting such business operations, Staunton purchased and received at its Illinois facility goods valued in excess of $50,000 directly from points outside Illinois.

About June 1, 1996, CIC was established by and since that date has been an alter ego of Staunton. At all material times, CIC, a sole proprietorship with an office and place of business in Staunton, Illinois, has been engaged as a contractor in the construction industry. During the calendar year of 1996, and also during the 12-month period ending June 30, 1997, CIC, in conducting such business operations, purchased and received at its Staunton, Illinois facility goods valued in excess of $50,000 directly from points outside Illinois.

I find that, as Staunton and CIC admit, each of them is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that assertion of jurisdiction over their operations will effectuate the policies of the Act.

On the basis of the parties' stipulation and the pleadings as amended at the hearing, I further find as follows: At all material times, Staunton and CIC have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as single-integrated business enterprises. Staunton and CIC are, and have been at all material times, alter egos and a single employer within the meaning of the Act.

On occasion, Staunton and/or CIC will be referred to as "Respondent."

II. THE UNION'S STATUS

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union's contractual relationship with Staunton began about 1977. They were parties to a series of 3-year collective-bargaining agreements effective between 1987 and July 31, 1996. Each of these agreements, four in number,[1] included the following language:

Article I—RECOGNITION

> The Employer recognizes the Union as the sole and exclusive collective bargaining agent with respect to wages, hours and all other conditions of employment for the unit comprised of Operating Engineer Equipment Operators, Operating Engineers Apprentices, Operating Engineer Foremen, Master Mechanics, Assistant Master Mechanics, Operating Engineer Mechanics, Operating Engineer Mechanic Trainees, Operating Engineer Engine Men, Operating Engineer Greasers and Operating Engineer Oilers and Fireman employed by the Employer within the territorial jurisdiction of the Union.

The parties stipulated that with certain exclusions immaterial here and with the exclusion of supervisors, the appropriate unit consists of the foregoing employees who are employed by Staunton and CIC. Each of these agreements also included a union-shop clause with a 7-day grace period. Under the terms of the 1993–1996 collective-bargaining agreement, Staunton deducted and remitted union dues.

The parties do not appear to dispute that nothing in the provisions of the 1987-July 1993 agreements suggests that the Union was being recognized as the majority representative of the unit; nor is there any other evidence so suggesting. I conclude that at least as to these three contracts, recognition was extended pursuant to Section 8(f) of the Act.

B. The execution of the 1993–1996 bargaining agreement

On August 1, 1993, Staunton president Robert Mengelkamp was presented with, and asked to sign, a proposed collective-bargaining agreement, to be effective from August 1, 1993, to July 31, 1996, to succeed the agreements which had expired by their terms on July 31, 1993. This proposal, which was similar to contracts which the Union had negotiated with a number of other contractors, includes, as Article I, the same "Recognition" language which had been included as Article I in the three preceding bargaining agreements. The proposal consists of 27 letter-sized pages, with single-spaced typing, plus a 3-page appendix which is also single-spaced. Page 1 of the appendix contains 9 columns which are horizontally divided into 3 groups, each of which has 8 lines; this page is a tabular, dollars-and-cents recitation of 5 kinds of payments which are to be made on behalf of each of 8 numbered groups during each of the 3 years covered by the proposal. The total payment to be made to or on behalf of each employee varies between about $22 and about $31 an hour; as of the expiration of the 1990–1993 contracts, such payments had varied between about $21 and about $28 an hour. The second and third pages of the appendix set forth the kinds of work covered by each grouping. Both of the two collective-bargaining agreements whose effective dates (1990–1993) immediately preceded the 1993–1996 agreement consisted of a total of 42 articles which were specifically numbered as such, the last article being "Article 42—Separability Clause." Article 43 of the 1993-1996 proposal appears toward the bottom of the page which precedes the signature page. The immediately preceding article (Article 42—Employment Security) does not appear in the 1990–1993 agreements; but the immediately succeeding article (Article 44—Beginning and Duration of Agreement) is the same as Article 41 of the 1990–1993 agreements, except for the dates; and

[1] Two of these agreements were both effective between August 1, 1990, and July 31, 1993. One of them covered heavy construction and the other covered highway construction.

and the last article in all three documents (Article 42 in the 1990–1993 contracts and Article 45 in the 1993–1996 proposal), captioned "Separability Clause," is the same in all of them. Article 43 contains the following language, which had not been included in any of the contracts effective between 1987 and July 1993:

> Article 43—MAJORITY REPRESENTATIVE
>
> The Contractors Party hereto recognize [the Union] as the Majority Representative of all employees in Operating Engineers classifications employed by them and the sole and exclusive bargaining agent of such employees.

After a conference with the Union, Robert Mengelkamp signed the Union's proposal as written.

The testimony conflicts as to what occurred during this conference before Mengelkamp signed the proposed contract. As to these events, I find as follows: Then union business agent John Gibson and then union president/business manager Douglas James came into Mengelkamp's office. Gibson said that they had a contract for him to sign. Mengelkamp asked whether there was any new language in the proposed 1993–1996 contract. Gibson said no, except that the subcontracting clause (Article 7, page 7, in the 1990-1993 contracts and the 1993-1996 proposal) was different,[2] and that the wages and fringe-benefits provisions were different. Neither Gibson nor James made any oral representation that the Union represented a majority of Staunton's employees. The conference lasted 10 or 15 minutes. After signing the 1993-1996 proposed contract, Mengelkamp handed it back to the union representatives, who left his office. The signature page of the document includes the handwritten date of August 1, 1993, was signed by James, and bears Gibson's at least purported signature, but there is no evidence as to whether they signed it before or after Mengelkamp did. Although the record fails to show when Mengelkamp obtained a copy of this document, in view of the rather detailed economic provisions I infer that he received a copy shortly after its effective date.

My findings as to what happened during this conference are based on a composite of credible parts of the testimony of James and Mengelkamp. James testified that Gibson was present during at least part of this conference, but that he said nothing and may not have heard everything that was said. James further testified that he told Mengelkamp that Article 43 was a new article in the contract, and read it aloud to him; and that Mengelkamp said nothing about this matter. At the time of the hearing, Gibson was the union's president and business agent, but he unexplainedly failed to testify. If he had testified, he would have been able to testify as to whether he made the statement which Mengelkamp testimonially attributed to him (namely, that there were no changes except wages and fringes), or whether he said nothing (as James testified). In addition, if Gibson had testified, he would have been able to testify as to whether James read Article 43 to Mengelkamp (as James testimonially claimed) in Gibson's presence, whether James made to Mengelkamp in Gibson's presence the statements which James testimonially claimed to have made about Article 43, and whether Gibson was present throughout James' contacts with Mengelkamp (James having testified that Gibson may not have been present at all material times). I infer that if Gibson had testified, he would have corroborated the material portions of Mengelkamp's testimony as to what he was told by the Union before he signed the contract.[3] Further, although I do not believe Mengelkamp's testimony that he did not read the contract at all before signing it,[4] I do accept such testimony to the extent that he denied reading Article 43, in view of the length of the Union's proposal, the relatively inobtrusive placement of Article 43, and the evidence that the conference lasted no more than 15 minutes.

As of August 1, 1993, Staunton was checking off union dues from the wages of all the unit employees and remitting these sums to the Union. Because the 1990–1993 contracts call for such action "upon receipt of a signed written authorization by an employee," and because such authorization is required by the Act as a precondition to a lawful checkoff (see Section 302(c)(4)), I infer that when Mengelkamp signed the 1993-1996 contract Staunton had such checkoff authorizations on file or, at least, had seen them. As previously noted, the 1990-1993 contracts both contained a union-shop clause. When the Union met with Mengelkamp on August 1, 1993, the union representatives had no documents with them indicating that the Union represented a majority of Staunton's employees, and did not offer to present such evidence for Staunton's inspection. James credibly testified to the belief that at that time, the Union represented a majority of the employees. The Union never filed a representation petition with the Board with respect to Respondent's employees; nor has any Board election ever been held among Staunton's or CIC's unit employees, so far as the record shows. As discussed infra, by the time Staunton withdrew recognition from the Union, Respondent had begun to violate Section 8(a)(1) of the Act.

Article 43 had been included in the union's proposal because of James' concern about the problems posed to the Union by *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). About 1993, almost all of the contractors with which the Union had had contractual relations signed contracts which included Article 43 and were otherwise much the same as the contract signed

[2] The 1993–1996 proposal added the provision that the employer would require that all parties to a joint-venture or joint-work undertaking or arrangement agree to be bound by the contract. See the first proviso to Section 8(e) of the Act.

[3] *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1269 (7th Cir. 1987); *Jim Walter Resources, Inc.*, 324 NLRB 1231 (1997); *Olive Garden*, 327 NLRB No. 5, JD slip op. 2 (October 30, 1998).

[4] Mengelkamp testified that although Gibson had informed him that the wages and fringes provisions had been changed, he did not read them because practically all his construction contracts are with the State of Illinois, they require him to pay the prevailing wage, and the prevailing wage is the same as the union-contract rate in the area. I note that as discussed *infra* Part IIIE 2a, between mid-September and October 1996, Brant Cochran performed operator's work on the Carlinville sewer project but was paid less than half the operator's rate (including fringes) called for by the bargaining agreement which expired in August 1996. However, Cochran was on the payroll of CIC, to which Staunton had contracted the supplying of labor on that job.

in 1993 by Mengelkamp. In September 1993, the Union sent to one of the contractors (Massman Construction Co.), which had not yet signed a contract, a "Voluntary Recognition Agreement" which read in part as follows:

> The undersigned Employer acknowledges the majority representative status of [the Union] as result of the voluntary designation of employees in the following unit appropriate for collective bargaining . . .
>
> The Employer hereby recognizes [the Union] in accordance with Section 9(a) of the National Labor Relations Act as the sole and exclusive majority representative of employees in the said unit for purposes of collective bargaining with respect to referral, wages, hours, and all other terms and conditions of employment.

Massman signed this recognition agreement on September 16, 1993, and, at about the same time, excuted a collective-bargaining agreement containing the same language.

The Union's bargaining agreements executed in 1996, to succeed the 1993-1996 agreements, referred to Section 9(a) of the Act in terms.

C. Alleged interference, restraint, and coercion before the expiration of the 1993-1996 bargaining agreement; the allegedly unlawful discharge of employee Titsworth

1. Background

Gary Randle Titsworth was hired by Staunton in March 1985, as a heavy-equipment operator, the position which he filled throughout his employment by Staunton. Titsworth joined the Union in 1985, and remained a member until January 1996, when he obtained a withdrawal card because he did not want to pay dues any more. However, he continued to use the union's referral service, for which he paid a fee.

On October 16, 1995, when Titsworth went to Staunton's Route 185 project to which he was then assigned, he saw that the Laborers' Union had set up a picket line protesting Staunton's at least alleged failure to contribute to the Laborers' benefit fund. When he told Mengelkamp that Titsworth was not going to cross this picket line, Mengelkamp said that Titsworth needed to get used to harassment, picket lines, and things of that nature; and that when Mengelkamp went nonunion, "that would be the normal." Mengelkamp went on to say that if Titsworth would not cross the picket line, then he "had no work there." A few days later, Titsworth went by Staunton's Staunton Lake jobsite, where he observed nonunion people running the equipment that Titsworth normally ran. On October 23, 1995, Titsworth asked Mengelkamp why he had stopped Titsworth's unemployment compensation payments. Mengelkamp said that Titsworth had a job on the Staunton Lake project. Titsworth said that he could not work there, because non-union people on that project were running the equipment which he normally ran. As Titsworth was leaving, he remarked to Mengelkamp, "I can't believe that you are going non-Union." Mengelkamp replied, "That's my decision."[5]

On October 29, 1995, Titsworth went to Mengelkamp's office and asked him whether Titsworth was still employed. Mengelkamp said yes, and told him to report on October 30 to a new job at Mount Vernon on Route 15. Titsworth did so. Although he continued to work there until his discharge on June 1, 1996, during an undisclosed week-long period he worked for Staunton on a Route 127 job which was then being picketed by the Union.

2. Alleged violations of Section 8(a)(1)

In mid-March 1996, when Titsworth went back to the Staunton shop at the end of his shift to pick up his personal vehicle, Mengelkamp told him that he needed to decide whether he was going to stay with Mengelkamp and work nonunion, or to stay with the Union, go back to the union hall, and look for work there. At that time, Titsworth did not reply.[6]

In late March or early April 1996, structural iron worker Charles Hundley, a member of the Union since November 1995, sent Staunton a resume after seeing Staunton's help-wanted newspaper advertisement for iron workers. Either from this advertisement or during a job interview with Mengelkamp held a week or so later, Hundley learned that the job in question was a Government bridge job (see supra fn. 4, infra fn. 10). During the interview, Hundley remarked that "This is a union state"; to which Mengelkamp replied, "I am tired of the Unions. I lost money and I am going non-Union." Also during this interview, it transpired that Hundley was not qualified to perform the job (rod buster) which Mengelkamp had in mind when placing the advertisement. Hundley was not hired; no contention is made that Staunton violated the Act by failing or refusing to hire him.[7]

3. Alleged additional violation of Section 8(a)(1); allegedly unlawful discharge of employee Titsworth

Titsworth remained on Staunton's Route 15 Mount Vernon job until June 1, 1996. Early in the morning of that day, Mengelkamp telephoned Titsworth, said that Titsworth had never given him an answer, and asked him to give an answer the following Monday, June 3. Inferring that Mengelkamp was referring to their March or April conversation where Mengelkamp had given him a choice between staying with Staunton and working nonunion or looking for work elsewhere through the union hall, Titsworth said that he would give Mengelkamp an answer "now, I am not staying." Mengelkamp said, "That's fine. Bring your truck in and park it. You're done." Titsworth returned the truck the following day.

On June 13, 1996, the Union filed the first charge which underlies the instant case, alleging, inter alia, that Staunton had

[5] My findings in this paragraph are based on Titsworth's testimony. For demeanor reasons, I do not credit Mengelkamp's testimony that he did not tell Titsworth that Staunton was going to go nonunion.

[6] My findings in this paragraph are based on Titsworth's testimony. For demeanor reasons, I do not credit Mengelkamp's denial.

[7] My findings in this paragraph are based on Hundley's tetimony. For demeanor reasons, I do not credit Mengelkamp's testimony that between March 1996 and June 1996, he did not tell anyone he was going nonunion.

discharged Titsworth "because he refused to relinquish his [union] membership." Staunton reinstated Titsworth on June 17, 1996. However, as of the date he testified (October 15, 1997), he had not yet received all the backpay at least allegedly due him.

D. The allegedly unlawful withdrawal of recognition; alleged additional interference, restraint, and coercion

By letter to Staunton dated May 1, 1996, union business manager James stated in part:

> Notice is hereby served pursuant to the termination clause of our present contract that [the Union] desires to enter into negotiations with your Company over wages, hours, working conditions and other conditions of employment in the unit presently represented by this Union. This letter is intended and shall have the effect of rendering inoperative the automatic renewal clause contained in the present collective bargaining agreement . . .
>
> Please advise of the date, time, and place at which representatives of your Company, will be available to meet with representatives of the Union for the purpose of commencing negotiations.

By letter dated May 7, 1996, to the Union, its parent international, and the administrators of the benefit funds called for by the 1993–1996 bargaining agreement, Staunton stated:

> Notice is hereby given to terminate any and all Collective Bargaining Agreements as of July 31, 1996.

On June 13, 1996, the Union filed against Staunton the first charge (docketed as Case 14–CA–24132) on which the instant case is based. This charge alleged, among other things, that Staunton had violated Section 8(a)(5) by "declar[ing] its intention to its employees to 'go non-union' and [refusing] to recognize and bargain with [the Union], the representative of a majority of operating engineers who comprise a unit appropriate for collective bargaining." By letter to the Union (with copies to, inter alia, Staunton and company counsel Mark Weisman) dated July 23, 1996, the Regional Director as to Case 14–CA–24132 stated in part:

> The investigation revealed that the Union has represented employees of the Employer, who is engaged in heavy highway commercial construction services, in collective bargaining with the Employer for more than 10 years. The Employer and Union have been parties to a series of collective-bargaining agreements, with the current agreement effective from August 1, 1993 to July 31, 1996. About May 7, 1996, the Employer notified the Union of its intention to terminate all collective-bargaining agreements with the Union as of July 31, 1996. The investigation failed to establish that the Union has made an unequivocal demand for recognition with a contemporaneous showing of majority support to sustain their claim of a collective-bargaining relationship pursuant to Section 9(a) rather than Section 8(f) of the Act. Neither the fact that employees of the Employer are members of the Union nor the language of the recognition clause of the current contract is sufficient to establish a 9(a) relationship. Accordingly, the Employer's announcement of its intention to terminate the current 8(f) contract upon its expiration is not unlawful. I am, therefore, refusing to issue complaint, but only with regard to the allegation the Employer refused to bargain with the Union in violation of Section 8(a))5 of the Act.

On appeal to the NLRB Office of Appeals, this action was reversed on an undisclosed date prior to September 25, 1996.

Meanwhile, by letter to Staunton dated June 27, 1996, the Union stated:

> . . . please be advised that the matter of contributions [to the benefit funds] is to be a negotiated item. Until agreement is reached on the contribution rates to be embodied in a new agreement, the terms and conditions of employment contained in the present contract are to remain in effect without unilateral change by your Company.

After stating that Staunton was to meet with James on July 10, at the union's offices to commence negotiations, the letter stated:

> Any unilateral change by your Company in the present terms and conditions and benefits of employment currently in effect will result in appropriate legal sanctions by [the Union].

In reply to this letter, a July 2, 1996, letter to James from Mengelkamp referred to the Union's June 13 charge (Case 14–CA–24132) and then stated, in part:

> . . . an issue for resolution is whether your union is the majority representative of our employees. Pending resolution of this issue, I must decline your request to commence negotiations for a new collective bargaining agreement.

David Kelly Brown, also referred to in the record as Kelly Brown, joined the Union in February 1993, and was still a member when he testified in October 1997. He obtained his first job with Staunton in 1993, without going through the union hall; but in March 1994, the Union referred him to a job with Staunton, where he worked continuously (except for breaks caused by the weather) until August 1996. On an occasion in the second week of July 1996, Mengelkamp asked Brown if he had heard of Mengelkamp's intention to go nonunion. Brown said yes. Mengelkamp asked whether Brown planned to go nonunion or stay with the union hall. Brown said that he would not give up his card.[8]

E. Alleged unilateral changes in conditions of employment

1. Alleged failure to use the Union's referral system in hiring

The bargaining agreement which expired on July 31, 1996, required Staunton to hire employees through the union hall. In March or April 1996, in response to a help-wanted advertisement by Staunton, employee Bruce Journey applied to Staunton for a job. At that time, he was interviewed by Staunton dispatcher Tom Chapman.

[8] My findings in this paragraph are based on Brown's testimony. For demeanor reasons, I do not credit Mengelkamp's denial.

As previously noted, about June 1, 1996, Staunton established its alter ego, CIC, which is a sole proprietorship owned by Robert Mengelkamp's wife, Marilyn Mengelkamp, who resides with him.[9] CIC as such has never requested referrals through the union hall. About the first week in June 1996, Staunton orally subcontracted to CIC the supplying of labor on the Carlinville sewer project.[10] In July 1996, Chapman telephoned Journey and asked him whether he still needed a job. Journey thereupon went to Staunton's facility, where he spoke with Chapman and Mengelkamp about a backhoe job. Journey then asked Mengelkamp "if they were union." Mengelkamp said that "they were union at the time; but that at the end of July, the union contract would run out and he was going nonunion."[11] Then, Mengelkamp told Journey to report for work on Monday, July 29, 1996, and said that Journey would be working in Carlinville for Mengelkamp's wife's company. Journey reported to work on July 29; his name appears on CIC's payroll for that week, and until the week ending September 17. He continued to work at the Carlinville sewer job until late September 1996. On the last day of this tour of duty on the Carlinville sewer job, he was telephoned by Marilyn Mengelkamp, who said that "they were having union problems and they were going to have to lay us . . . off and they'd be in contact with [the employees] if they got them resolved." As discussed infra, Robert Mengelkamp recalled Journey to the Carlinville sewer job a few days later, and assigned him to Staunton's payroll, without going through the union hall. Journey had never been a member of the Union, and had never registered with the Union's referral system.

Brant Cochran was hired by Robert Mengelkamp for the Carlinville sewer project. Cochran applied for work in response to a newspaper advertisement for non-union laborers and operators, paying prevailing wages, and did not seek referral through the union hall. Mengelkamp said that he wanted Cochran to act as assistant to superintendent Ferris, and told Cochran to report on the following day to Staunton's yard. When he did so, Marilyn Mengelkamp told him to accompany Ferris to the Carlinville sewer project. Cochran was added to CIC's payroll, and began to work on that project, during the first week in July 1996. From the outset of his employment, he greased, oiled, and loaded trucks. About a week and a half after he began to work on that project, Ferris quit, and Cochran became superintendent.[12] Beginning in mid-September 1996 and until his resignation in late October 1996, Cochran spent 75 percent of his time running the front loader, a job covered by the bargaining agreement. Cochran was not a member of any union, had never been a member of the Union, and had never utilized its hiring hall.[13]

In early August 1996, without going through the union hall, Robert Mengelkamp hired employee Clarence Don Robey as an operating engineer on the Carlinville sewer job. He continued to work there, and remained on Staunton's payroll, until September 1996, when Robert Mengelkamp told him that he was being laid off because Mengelkamp was having trouble with the Union, and that as soon as he got "the mess" straightened out, he would recall Robey. Robey had dropped his union membership in February 1995.

In response to a newspaper advertisement, Richard L. Clark filled out a CIC job application blank about late July 1996. During a job interview at Staunton's facility in August 1996, Robert Mengelkamp said that he would need operators, that at the time, "they weren't with the Union," and "there probably might be picket lines." Mengelkamp asked if there would be a problem with that, to which Clark replied no. Later that month, he received a message on his answering machine that Staunton wanted him to report to work on the following morning. Clark worked as an operating engineer on the Route 15 Mount Vernon bridge job (see supra fn. 10) on various dates in late August 1996, and on the Route 16 Litchfield job on various dates in September 1996, after which he was laid off. He was on Staunton's payroll throughout this period.

In response to a newspaper advertisement, Terry Deets applied to Staunton for a job on September 2, 1996. On the following day, he had a job interview with dispatcher Chapman, who said that he would have to clear Deets' hire with Robert Mengelkamp. Thereafter, Chapman told him to report to work at Staunton. Then, Robert Mengelkamp told him to drive a Staunton dump truck to the Carlinville sewer project. Deets worked on that job, as an operator, for about a week. Then, he was transferred to the Route 16 Litchfield job, where he worked as an operating engineer on the wheel saw. In late September 1996, Robert Mengelkamp told him that "they" would have union men operating on the Route 16 Litchfield project, and that he was being laid off. During this period, he was on Staunton's payroll.

By letter to Mengelkamp dated September 25, 1996, company counsel stated, in part:

> . . . As we discussed yesterday, the NLRB's present view, based on a reversal of the Regional Director's prior determination, is that [the Union] remained the exclusive, majority bargaining agent after July 31, 1996, therefore

[9] Marilyn Mengelkamp is referred to here by her full name. Robert Mengelkamp is sometimes referred to here by his surname alone.

[10] On undisclosed dates, Staunton entered into written subcontracts with CIC with respect to what Mengelkamp testimonially described as "the guard rail in Montgomery County, Route 16, and . . . a small bridge project, in Bond County." I am unable to ascertain whether either of these two projects is otherwise referred to in the testimony.

[11] The complaint does not alleges that this statement violated the Act.

[12] The record fails to show whether he was ever a statutory supervisor. The contract unit does not in terms exclude statutory supervisors. The contract unit does include, in terms, "operating engineer foremen." Article 4A (9) of the 1993–1996 agreement states, "A supervisor in the employ of the Employer who holds union membership shall not be bound or in any way affected in the performance of his duties for the Employer . . . by any obligation of union membership." Article 17, which deals with operator-foremen among others, states, in part, "The terms of this article are not meant to restrict the [management's] right to supervise and instruct the members of this bargaining group."

[13] My finding that Robert Mengelkamp conducted the hiring interviews of Journey and Cochran, both of whom were then assigned to CIC's payroll, is based on Journey's and Cochran's testimony. For demeanor reasons, I do not credit Robert Mengelkamp's testimony that he did not interview or hire employees for CIC, and that no employees were assigned to CIC from his office.

> . . . provisions for . . . use of the hiring hall . . . could not be changed absent good faith bargaining.
>
> . . . This may mean the Region will seek payment for Operating Engineer hours (fringes and wages) on behalf of employees other than those [hired off the street and now] working for Staunton.
>
> The only certain way to stop the accumulation of additional liability is to request referrals through the hall. . .

On September 27, 1996, Staunton, the Union, and the Board's Regional Office entered into a settlement only some of whose terms can be ascertained from the record. By letter from Robert Mengelkamp faxed to the Union on that same date, Staunton asked the Union to refer 2 qualified "Backhoe Operators—Finish Grade," and 1 qualified "Wheelsaw Operator—Vermeer T 600 D" to the Route 16 Litchfield job on September 30, 1996. (As previously noted, at about this same time Staunton laid off backhoe operator Journey and CIC laid off track hoe (backhoe) operator Robey from that project for the express reason that Mengelkamp was having trouble with the Union. Also, at about the same time, Staunton had laid off wheel saw operator Deets from its Route 16 Litchfield project with the statement that union men would be working on that project.) James credibly testified that after the expiration of the bargaining agreement, he observed on Respondent's projects employees who had not been referred by the Union. Respondent never gave the Union notice that it was not going to use the referral system, and the Union never agreed that Respondent did not have to use the referral system.

On September 30, 1996, the Union referred employee Leonard Moss to the Route 16 Litchfield job as a wheel saw operator, referred employee Dudley Luebbert to that job as a backhoe operator, and either dispatched David Kelly Brown to that job as a backhoe operator (Brown's version) or told him that he would be reinstated at Staunton as per the settlement agreement (James' version). This was Staunton's first request for referrals after the expiration of the August 1993—July 1996 collective-bargaining agreement. As discussed infra, Moss and Luebbert were discharged that same day, and Brown was laid off about 2 weeks later. About the third week in October 1996, Marilyn Mengelkamp recalled Robey to work at the Route 16 Litchfield job. A few days later, Robert Mengelkamp recalled Journey to that job. Robey and Journey continued to work there until December 1996, when they were laid off.

2. Alleged failure to pay employees in accordance with the 1993–1996 bargaining agreement, and to make payments into the benefit funds described in that agreement

a. Changes in wage rates

All of the wage rates called for by the 1993–1996 agreement were set forth on an hourly basis. As previously noted, Cochran started to work on the Carlinville sewer project before the expiration of that agreement. Initially, he was paid $425 a week, by a CIC pay check.[14] Thereafter, at his request, his salary was increased to about $525 a week, effective before the 1993–1996 bargaining agreement expired.[15] He was paid $525 a week for the rest of his employment, which continued until almost 3 months after the bargaining agreement expired on July 31, 1996. It is unclear whether he performed any unit work until mid-September 1996, after which he spent about 75 percent of his time performing unit work.

When the bargaining agreement expired on July 31, 1996, unit employees Titsworth and Brown remained on Staunton's payroll. On the expiration of the agreement, Staunton increased their hourly wages from $22.45 (the contract rate) to $29.97. Robert Mengelkamp explained that he would not pay the benefits to the hall any more, and he would pay them directly to the employees. As previously noted, after the expiration of the bargaining agreement, employees Robey, Deets, and Clark were added to the payrolls of Staunton or CIC, for which they performed unit work. All of them were hired at $29.97 an hour, a higher hourly rate than any rate called for by the bargaining agreement but, as to employees paid $22.45 an hour, the total amount called for when fringe payments were included.[16]

As previously noted, on September 27, 1996, Staunton, the Union, and the Board entered into a settlement agreement which is not in the record. Effective in late September 1996, the wage rates of a number of the hourly-paid operators in the payroll of Staunton and/or CIC were reduced to about $22.45, $22.50, or $21.52 an hour from their prior rate of $29.97. The 1993–1996 bargaining agreement did not call for anyone to be paid $22.50 or $21.52; the rates closest thereto were $22.45 and $21.32. A memorandum from Staunton, and a copy of the September 25, 1996, letter to Robert Mengelkamp from Respondent's counsel (see supra Part III E1), were received by Titsworth and Deets on September 27 (a pay day) and by Brown on October 11 with his pay check for the week ending October 1. The memorandum from Staunton states that certain deductions had been made from the employee's gross wages "for overpayment of wage due to the reversal of the Regional Director's prior determination regarding [the Union], as stated in the attached, which ties us to the fringe benefit program." These deductions were in fact made from the wages of Titsworth ($225.60) and Brown ($545.20), who (so far as the record shows) were Respondent's only current employees who had been hired through the Union's referral service. There is no evidence that similar deductions were made from the paychecks of any of Respondent's other employees, including Deets, who had received a memorandum specifying deductions to be made but had not been hired through the referral service.

Respondent did not give notice to the Union that it was going to change the wage rates of employees, and the Union did not agree to these changes.

[14] His pay checks in evidence state that he worked a 40-hour week. Assuming this to be accurate, he was being paid $10.625 an hour. The lowest hourly wage rate specified in the bargaining agreement is $17.74, which does not include payments of $7.52 an hour to the benefit funds.

[15] This was the equivalent of about $13.12 an hour; cf. supra fn. 14.

[16] Article 28 of the 1993–1996 contract states, in substance, that on the union's request, payments can be transferred between wage rates and contributions to the funds, without affecting the employer's total financial contribution. Hourly rates called for by the contract varied between $16.57 and $23.55.

b. Failure to pay employees for all hours worked

(1) Introduction

Article 12 of the 1993–1996 bargaining agreement provides that 8 hours constitute a day's work between 7 a.m. and 4:30 p.m., and that 40 hours constitute a week's work from Monday through Friday, inclusive. Article 14 calls for double time on Sundays and holidays and under certain other conditions, and calls for time and a half for all other overtime work. Article 18 provides that an employee who starts to work before the regular starting time is to be paid for 4 hours, plus any overtime involved; and calls for 2 hours' reporting pay to employees who report on the job and there is no work. Respondent did not give the Union any notice of changes in terms and conditions of employment, and the Union did not agree to any changes.

(2) Failure to pay show-up pay

On August 21, 1996, dispatcher Chapman told employee Clark to report for work to Staunton's facility at 5 a.m. on August 22. He arrived there at 4:50 a.m., but Mengelkamp immediately sent him home because it was raining. Pursuant to Respondent's standing instructions, he reported for work at 5:40 a.m. on September 26, but Mengelkamp sent him home at once because it was raining. Clark received no pay for either August 22 or September 26.

(3) Failure to pay for training time

On September 6, 1996, Mengelkamp requested employee Deets to report to the Staunton yard on the following day, a Saturday, in order to learn how to operate a wheel saw. When he reported as requested, the two of them drove to Staunton's storage facility, where Mengelkamp taught Deets how to operate a wheel saw. Deets was not paid for the 3 hours he spent learning to operate this machine. Respondent thereafter assigned him to operate the wheel saw on the Route 16 Litchfield project.

(4) Failure to pay for off-site work

Between July 29, 1996 (before the expiration of the bargaining agreement) and the end of September 1996, admitted bargaining-unit employees who worked on the Carlinville sewer job included Clark, Deets, Robey, Journey, Joseph Slifka, and Scott Coffey (also spelled "Coffee" in the record). The credible testimony of Journey, Robey, Deets, and Clark (who began to work on that job in early June 1996) specifically shows that Robert Mengelkamp directed them to report to work at the Staunton yard at 5:30 or 6 a.m. I infer that Respondent gave similar instructions to the other unit employees who reported to work at the Staunton facility before proceeding to the Carlinville sewer job.[17] Between late October 1996 and the first or second week in December 1996, the unit employees who worked on the Route 16 Litchfield job included Joseph Bates, Slifka, Journey, Robey, Deets, and Clark. The testimony of Journey, Deets, Robey, and Clark specifically shows that Respondent told them to report to work at the Staunton yard at 5:30 or 5:40 a.m. I infer that Respondent gave similar instructions to the other bargaining unit employees who reported to work at the Staunton yard before proceeding to the Route 16 Litchfield job. In late August 1996, the unit employees who worked on the Route 15 Mount Vernon job included Clark, whose testimony specifically shows that Respondent instructed him to report to work at the Staunton yard at 5 a.m. I infer that Respondent issued similar instructions to the other employees who reported to the Staunton yard at 5 a.m. before proceeding to the Route 15 Mount Vernon job, which they reached about 7 a.m.

As to each of these jobs, Respondent's operators drove their personal vehicles to a parking lot near the Staunton yard, parked them there, and proceeded to the jobsite by either riding in or driving a company vehicle. These vehicles consisted of company trucks which were at least mostly used on the jobsite, and they carried material and/or company tools between the Staunton yard and the jobsite. As to at least the Carlinville sewer and Route 16 jobs, when the operators reported to the Staunton yard and before leaving for the jobsite, they checked the fuel and oil on the trucks, fueled them if needed, obtained road construction signs from the warehouse, loaded materials and equipment onto the trucks, and hooked up trailers. Also, at least the unit employees assigned to the Carlinville sewer and Route 16 jobs performed various tasks after their return to the Staunton yard. At times, when driving back to the Staunton yard from the Carlinville sewer jobsite, the unit employees would drop off equipment at the storage terminal about 2 miles outside of Staunton. The unit employees were paid only for the work which they performed on the jobsite after 7 a.m. They were not paid for the time they spent traveling between the Staunton yard and the jobsite, nor for the time they spent working at the Staunton yard, nor for the time they spent working at the jobsite before 7 a.m. Robert and Marilyn Mengelkamp instructed Cochran, who reported the hours of operators on the Carlinville sewer project from June through October 1996, and performed unit work during the latter part of this period, that employees got paid only for hours on the Carlinville sewer project.[18] He reported only the hours worked from 7 a.m. to 3:30 p.m. plus any overtime worked on the jobsite. As to the amount of unpaid time worked by Respondent's bargaining-unit employees who were assigned to the Carlinville and Route 16 Litchfield jobs, the record shows that unit employees began to work at the Staunton yard at 5:30 or 6 a.m. and, in the afternoon, left the Staunton yard between 4:10 and 7 p.m., an hour or two hours after they had left the jobsite.

My finding that most of the unit employee were required to report to the Staunton yard well before 7 a.m., rather than to the jobsite at 7 a.m., is based on credible parts of the testimony of Journey, Robey, Deets, Clark, and Cochran, and inferences therefrom. I do not credit Robert Mengelkamp's testimony that the employees who reported to work at the Staunton yard before proceeding to the jobsite did so because they wanted a ride to the jobsite and not because Respondent instructed them to report to the Staunton yard. I so find for demeanor reasons and

[17] These employees included all the admitted unit employees then on Respondent's payroll except Coffey, who lived in Carlinville.

[18] This finding is based on Cochran's testimony. Because Marilyn Mengelkamp did not testify, and for demeanor reasons, I do not credit Robert Mengelkamp's denial. See cases cited supra fn. 3.

because of the evidence that if the employees had driven to their jobsites directly from their homes, instead of driving from their homes to the Staunton yard and parking their personal vehicles there, at least some of the employees could have left their home much later, and returned to their homes much earlier, than they in fact did. More specifically, Robey in fact left home by 5:05 to 5:10 a.m. to arrive at Staunton's yard by 5:30 a.m., but could have left home at 6:15 a.m. to arrive at the Route 16 Litchfield jobsite by 7 a.m. Similarly, employee Clark in fact left home at 5:15 or 5:20 a.m. to reach the Staunton yard by 5:40 a.m., but could have left home at 6:30 a.m. if he had merely reported to the Route 16 Litchfield jobsite by 7 a.m. Also, if Clark had reported at 7 a.m. directly to the Carlinville sewer jobsite, he would have been able to leave his home between 6:15 and 6:30 a.m., rather than (as he did) between 5 and 5:15 a.m.

c. Failure to make payments into the benefit funds

The 1993–1996 contract calls for employer contributions to various benefit funds. Contributions to the these funds are due by the tenth of the month following the month for which contributions are made. CIC as such never made any benefit contributions. As to employees on Staunton's payroll, Staunton made benefit contributions for the period up to and including July 1996, the last month covered by the contract; the last such payment was made on August 20, 1996. Staunton did not make contributions for the month of August 1996, until October 26, 1996, after reaching the September 1996 settlement agreement in Case 14–CA–24132. Staunton made benefit contributions for the week ending September 24, 1996, but not for any other weeks in September 1996, although unit employees worked for Respondent during other weeks in September 1996. Although contributions were made for October 1996, no contributions were made for the hours that operator Deets worked in October 1996, while on CIC's payroll. No contributions were made for November or December 1996, even though operators were employed. Contributions for January 1997 were not received until March 1997. No contributions were made on behalf of some of the unit members who worked for Respondent during periods for which contributions were made for others. Respondent did not give any notice to the Union, or bargain with it, over changes in benefit-fund contributions, and the Union did not agree to any changes in such contributions.

F. Alleged September 1996 interference, restraint, and coercion

On August 14, 1996, when the Carpenters' Union set up a picket line on the Route 127, Nashville job where employee Brown had been working for Respondent, Brown told Mengelkamp that Brown would not cross the picket line. Brown asked Mengelkamp whether there was any other work. Mengelkamp said no, not at that time; and that he would give Brown a call when either things got settled or Mengelkamp had some more work for him. Mengelkamp did not call. About September 11, Brown drove by a job being performed by Respondent on Route 16 (apparently, a job different from the job referred to herein as the Route 16, Litchfield job) and observed that this job was not being picketed and that people whom he did not recognize were performing operators' work. Then, Brown came to Mengelkamp's office and asked whether he and the Carpenters' Union had got anything resolved with their dispute and if the Carpenters' Union was still picketing the Route 127 job. Mengelkamp said that as far as he knew, the picketing was still continuing and he did not think the dispute would get resolved. Mengelkamp asked Brown whether he wanted to go back to work. Brown said yes, and asked, "Under what conditions?" Mengelkamp said that Brown would have to give up his union card. Brown said that he could not do that.

On September 3, 1996, in response to a newspaper advertisement, Terry Deets filled out a job application at Staunton. Then, he spoke to dispatcher Tom Chapman, who asked if Deets could run any heavy equipment. Deets said he could run everything but a road grader and a crane. Chapman asked if Deets had a union card; Deets said no.[19] Chapman asked if Deets had a CLD driver's license; Deets said yes. Chapman asked if Deets could drive trucks; Deets said yes. Deets asked what hourly rate Staunton was paying equipment operators. Chapman said $29.97. Deets asked Chapman what was being deducted from that $29.97; Chapman said taxes and social security. Later that afternoon, Chapman told him to report at 5:30 a.m. the following day and meet with Mengelkamp, who put him to work that morning on the Carlinville sewer job.

G. Alleged discrimination against employees referred by the Union

1. Discharge of Moss and Luebbert

On Saturday, September 7, after ascertaining that Deets did not know how to operate a wheel saw, Mengelkamp spent 3 hours (for which Deets was not paid), teaching him how to operate a wheel saw. Deets operated the wheel saw on the Route 16 Litchfield project between September 10 and 29, inclusive.

As previously noted, on September 27, 1996, Staunton entered into a settlement agreement with respect to Case 14–CA–24132. Also on September 27, Mengelkamp asked the Union to refer a wheel saw operator and two backhoe operators to the Route 16 Litchfield project for September 30.

On September 30, the Union referred Leonard Moss (a member of the Union since 1968) to operate the wheel saw on Staunton's Route 16 Litchfield project—the job to which nonmember Deets had been assigned as a wheel saw operator since September 10. That same day, Mengelkamp told Deets that that morning, a "union operator" would be assigned to the wheel saw. Mengelkamp told Deets to drive to the Route 16 Litchfield jobsite and to sit far enough away from the machine so that he could watch the operator attempt to operate the wheel saw, but to avoid conversation with him. That same day, September 30, the Union sent David Kelly Brown (see supra Part III E1, F, infra Part III G2) and Dudley Luebbert to Staunton's Route 16 Litchfield job as backhoe operators.

Moss and Luebbert both arrived at the Route 16 Litchfield jobsite at 7 a.m. on September 30, whereupon Daniel J.

[19] His job application stated that he had been an independent owner-operator between 1991 and 1994, but that "Unions forced me out of [business]."

Schireman (also spelled "Shireman" in the record), who was Staunton's superintendent on that job, told them to fill out W-2 forms. Schireman, a witness called by Respondent, testified that Deets reported at 7 a.m. on that jobsite and stood around and waited to replace Moss on the wheel saw. Schireman further testified that employee Slifka reported to that jobsite at 7 a.m., and waited around to replace Luebbert "If need so." Deets had not been referred by the Union, and Slifka was an operator whom the Union had not referred to Staunton and who had been working for it continuously since a date which preceded the expiration of the 1993–1996 contract (see infra fn. 23).

One of the operations to be performed on the Route 16 Litchfield job that day consisted of the removal of pavement from certain areas. The first step of this operation was performed by the wheel saw, which cut a line around the portion of the pavement to be removed. The second step was performed by a backhoe with a breaker; this step consisted of breaking up the pavement within the patch cut out by the wheel saw. The third step consisted of using a backhoe equipped with a bucket to remove from the area which had been cut out by the wheel saw the pavement which had been broken up by the backhoe equipped with a breaker. The backhoe operations could not be begun until after the wheel saw had cut out the appropriate area.

When Moss arrived at the jobsite, job superintendent Schireman took him to the wheel saw and told him to start it. After the two men had checked the fluid levels and other items, Moss tried to start the wheel saw, but it would not start. Moss reported this to Schireman, who said he would get someone right away. Then, Moss performed a closer inspection, and found that a fuse was missing from the control panel. He reported this to foreman Bryan K. Henke, who was sitting in his truck. Henke thereupon said, "Yeah, I forgot"; opened his ash tray or glove box, pulled out a fuse, and handed it to Moss. Then, Moss put the fuse into the wheel saw and started the saw right up.[20] Moss stood near the wheel saw until 9:30 or 10 a.m., when Schireman instructed him to cut out certain patches in the cement. The first two or three patches which Moss cut were 3 or 4 feet apart; Schireman testified that Moss's work up to this point was satisfactory. The next patch to be cut was about an eighth of a mile away. As Moss was moving the wheel saw to that patch (a procedure referred to in the record as "tracking" or "travelling"), Schireman came over and urged him to hurry. The wheel saw has two "tracking" speeds—3 to 6 feet a minute, and 30 feet a minute. Although Moss had on previous occasions operated the same type of wheel saw, and had been able to change the electronic gear shift from low ("creep") to high ("transport" or "road" gear), he was unable to make such a change on Respondent's wheel saw notwithstanding repeated manipulations. Moss said that he was doing the best he could, said that he could not get the machine to "track" any faster, and asked Schireman to find the "road" gear. Schireman said that he could not help Moss with that, because Schireman did not know how to operate the machine. Present in the area was Deets, who had been operating the wheel saw until that day and who at the time had no particular job assignment. Although it was important to keep the project going and to have the area ready for laying asphalt immediately after it arrived and before it cooled, Schireman did not call Deets over for assistance but said to Moss, "If you can't do any better, then I will get somebody that can." Moss said that he would run the wheel saw until Respondent obtained a substitute. Schireman said, "No, that's all right. I'll just take you to your truck." After taking Moss to his truck, Schireman told Deets to take over the wheel saw. He operated it for the rest of the day, which was the last day that machine was used on that project. He had no problem operating the wheel saw, and when he took it over, the wheel saw (including the gear shift) was operating properly.

Moss was never paid for the time he worked on September 30. Laying the events of that day to one side, he had never been laid off for not working fast enough. He had been working as an operating engineer for 30 years.

When Luebbert arrived at the Route 16 Litchfield job at 7 a.m., Schireman assigned him to a backhoe with a bucket. Schireman told him that as soon as the area cut out by the wheel saw had been broken up by the backhoe with the breaker, he was to use the backhoe with the bucket in order to put the broken pavement on a truck. At about 7:30 a.m., Luebbert began to use the backhoe with the bucket in order to move the broken pieces of pavement from the ground to the truck, a cycle which took about 30 seconds. After Luebbert had been performing this operation for 10 to 25 minutes, Schireman told him that he was not fast enough. Luebbert replied that it took longer to put the debris onto the truck than to merely move it from the area to be re-paved. Schireman said that he would move the truck, the broken pavement could be left on the portion of the pavement which was not to be repaved, and the debris would be cleaned up later. Schireman moved the truck and said, "I'll give you ten minutes." Ten minutes later, after Luebbert had moved practically all the broken pavement from the area to be re-paved, Schireman said, "You're not fast enough." Then, Schireman directed Slifka, who had been operating the backhoe with the breaker, to take over the backhoe which Luebbert had been operating. Luebbert had 35 years of experience as an operator, and had more experience on a backhoe than on any other piece of equipment. He had never in the past been laid off for not being fast enough.

Respondent never requested the Union for referrals to replace Luebbert or Moss.

My findings as to the identity of the members of management with whom Moss and Luebbert dealt on September 30, are based on Schireman's testimony that he was the superintendent on the job to which Moss and Luebbert were assigned on that day; on Staunton's payroll records, which identify Henke as the only other supervisor assigned to that job on that day[21];

[20] My findings as to the fuse incident are based on Moss's testimony. For demeanor reasons, I do not credit Schireman's denial. Henke did not testify. Although Schireman testified that he did not give Moss a fuse and did not "recall anything about a fuse," the record shows that this incident involved Henke and fails to show that Schireman was in a position to observe this incident (see infra fn. 22). In any event, on the basis of the witnesses' demeanor, I regard Moss as a more reliable witness than Schireman.

[21] In view of these records and Luebbert's testimony, I do not credit Schireman's testimony that he was the only foreman on the job.

and on comparing Schireman's testimony that it was he who urged Luebbert to go faster, and Brown's credible description of certain conduct which he credibly attributed to Schireman (whom Brown knew by name), with Luebbert's attribution of certain conduct to two individuals whose names he did not know, and whom he testimonially identified as the "first foreman" and the "second foreman."[22]. My findings as to the events involving Moss and Schireman that day are based on a composite of Moss's and Deets' testimony and credible parts of Schireman's testimony. My findings as to the events in connection with Luebbert and Schireman are based on a composite of credible parts of the testimony of Luebbert, Brown, Schireman, and Moss; for demeanor reasons, I do not credit Schireman's testimony, in effect, that Luebbert's backhoe duties included breaking up the pavement (see page 568 lines 4-10, page 575 lines 23–24).

2. Layoff of Brown; alleged refusal to recall Brown and Merkle

As noted supra Part III D, in mid-July 1996, Mengelkamp asked employee Brown, a union member since February 1993, whether he planned to go nonunion or stay with the union hall, to which Brown replied that he would not give up his card. Thereafter, in early August 1996, when Mengelkamp unilaterally increased the employees' direct wages but told Brown that hereafter he was going to have to pay for the benefits himself, Brown told him that members were not allowed to pay for their own benefits. Later that month, when Brown told Mengelkamp that Brown would not cross the Carpenters' picket line on the Route 127, Nashville job where he had been working, Mengelkamp said that there was no other work at the time, but that he would call Brown when matters were settled or there was work. Mengelkamp did not call, although Respondent thereafter performed at least one job which was not being picketed. (See supra Part III F.)

As previously noted, pursuant to a settlement agreement reached on September 27, 1996, with respect to Case 14–CA–24132, the union sent Brown to the Route 16 Litchfield job on September 30. Between September 30, and October 11, inclusive, Brown operated a backhoe, a mechanical broom, and a rotor mill on that job.

At about 5:30 p.m. on Friday, October 11, when Brown went to pick up his check, he found that about $545 had been deducted therefrom (see supra Part III E2a). After Schireman responded to Brown's inquiries by stating that Schireman did not know why this deduction had been made, Brown said that he would ask Mengelkamp about the matter. Then, Brown asked Schireman at what time Brown was supposed to report to work on the following day, Saturday, October 12. Schireman said that Brown was not supposed to work on October 12, and that Mengelkamp planned to lay Brown off once he got done with the rotor mill. Brown asked whether Schireman had called for people out of the union hall. He said no, and that he would call the hall later that night. Brown said that if Schireman had not already called the hall, he would not be able to reach a dispatcher there either that evening or at any time on Saturday.[23] Brown said that he would show up the following day, Saturday, to make sure that Schireman got his operators.

On October 12, when Brown came to the Route 16 Litchfield job before 7 a.m., he encountered Schireman and operating engineer George White, who was a member of the Union but had been hired by Respondent directly and not through the union hall. Brown asked whether Schireman had called the union hall; Schireman said no. Schireman asked Brown if he was the other finish roller operator; Brown said no, that White was. When Schireman again asked Brown if he was the other finish roller operator, Brown said that if no one else showed up, he would run the rubber tired breakdown roller (a different machine from the finish roller) for Respondent. Schireman said that if nobody showed up, Brown would run that piece of equipment. Later that morning, Schireman gave Brown the keys to that piece of equipment, which Brown began to operate. At about 9 a.m., Mengelkamp came to the job and told Brown that if he ever took it upon himself to do what he wanted to do on a job, Mengelkamp would make sure that Brown never worked on Mengelkamp's jobs again. Mengelkamp told Brown to make sure he told this to union business agent James. Brown continued to operate the rubber tired breakdown roller for the rest of the day.[24] On October 14, Mengelkamp sent a fax to the Union stating that on October 11, he had asked the Union to refer to the Route 16 job

> the following for employment on Saturday, October 12, 1996.
>
> 1. Equipment Oiler. . .
> 2. Finish Roller Operator
>
> * * *
>
> I question Kelly Brown's referral to us as a finish roller operator on that date. Mr. Brown, although he has operated a roller on a few occasions is not a finish roller operator. Please accept this response as our request that he not be referred to us for that position in the future.
>
> As to the Oiler position, please be advised that no one reported to the jobsite.

The Union had not referred Brown as a finish roller operator for October 12, and there is no evidence that he ever operated the finish roller on the Route 16 job. This was the first occasion on which Mengelkamp had complained about Brown, who had first worked for Respondent in March 1993, and had been working steadily for it since March 1994.

On Monday, October 14, Brown reported to work at the Route 16 Litchfield job. He continued to operate the rubber tired breakdown roller until about 9 a.m., when he was replaced

[22] This comparison shows that Henke was the foreman who produced the missing fuse.

[23] Article IV A(7) of the 1993–1996 agreement permits the employer to secure employees from sources other than the referral office "If for any reason the referral office is unable to furnish qualified and competent applicants within twenty-four hours at the time the request is made to the referral office (providing the said twenty-four hours does not include Saturdays and Sundays or Holidays").

[24] Staunton's payroll records state that he worked 10.5 hours that day.

on that machine by employee Robert C. Merkle, Sr. a union member for 44 years, who Schireman knew had been referred to the job by the Union as a finish roller.[25] Schireman told Merkle that another man was going to be on the finish roller, and that Merkle was going to be on the rubber tired breakdown roller, whose use in the paving process precedes the use of the finish roller. When Merkle took over the rubber tired breakdown roller, Brown returned to the rotor mill machine. He continued to operate that machine until Thursday, October 17, when he worked 10 hours and Schireman then laid him off with the statement that all of the work was done with the rotor mill machine and Schireman had no other work for Brown.

Merkle operated the rubber tired breakdown roller on the Route 16 Litchfield job on October 14 through October 17. On October 17, the job temporarily stopped because of mechanical trouble with the spreader, whose operation in the paving process precedes the operation of the rubber tired breakdown roller. About 4:30 or 5 p.m., Merkle asked Schireman whether there would be work the next day. Schireman replied that he did not know whether the spreader would be fixed, and that he would have to call Merkle and let him know. At Schireman's request, Merkle gave his telephone number to Schireman, who wrote it down.[26]

Completion of the job required a breakdown roller. Schireman never called Merkle. Beginning on October 21, 3 working days after giving his telephone number to Schireman, Merkle picketed Staunton's asphalt plant for 3 days. After that, he went to work for another employer. After picketing the asphalt plant, he never contacted Staunton to say he was willing to come back to work. He credibly testified that he was picketing because Staunton had not called him back to work, that he would have returned to work if he had been recalled, and that if he and the other pickets had been called back to work, there would have been no picket line to cross. The employees had been told to picket by union president James, who so far as the record shows had not been told that Merkle had been laid off with a statement by Staunton that he would be recalled. A letter from James to Mengelkamp dated October 23, 1996, states, inter alia, "With respect to the reference in your letter of October 22, 1996, to picketing of [Staunton's Route 16 job, the Union] is engaged in a strike against Staunton . . . for unfair labor practices of your company in unilaterally changing wages, fringes, and working conditions."

At the time the Union referred Merkle to the Route 16 job, he had had 44 years of experience as an operator. He had operated cherry pickers, rollers (including breakdown and finish rollers), bore machines, and turn pulls. While working for Staunton, Brown had operated track hoes, backhoes, bulldozers and cranes. Staunton did not recall him until April 17, 1997, when he was recalled under the provisions of an April 10, 1997, settlement agreement in Cases 14-CA–24132 and 14–CA–24311. Brown had never previously been left by Staunton in layoff status for as long as 6 months. Rather, since March 1994, Staunton had previously laid him off only because of weather; and had transferred him between jobs and between various pieces of equipment. Staunton's payroll records between June 1996 and August 1997 show that the same individual operating engineers worked on various Staunton jobs.

By letter faxed to the Union on October 22, Mengelkamp stated that because the Union had been picketing Respondent's Route 16 job and asphalt plant since October 21, he assumed that the Union would not be furnishing operators for any of his jobs. "If this is incorrect and you do intend to furnish operators, please let me know by 3:00 p.m. today so that we can make arrangements for tomorrow. Failing to hear from you, I will take appropriate steps to ensure satisfactory progress on my job." The Union's reply letter, dated October 23, stated, inter alia, that the Union was not agreeable to Respondent's proposal to exclude the referral clause from the contract under negotiation; and that the Union was "engaged in a strike" against Staunton because of its action in unilaterally changing working conditions.

Staunton's payroll records show that 3 or 4 of Staunton's operating engineers worked on the Route 16 Litchfield job (job 9604) during each of the payroll weeks between the week Brown and Merkle were laid off and the payroll week ending December 17, 1996. None of these operating engineers had been hired through the union hall.

H. Allegedly unlawful action with respect to union's requests for information

1. October 23, 1996, requests for information

On or shortly after April 17, 1996, the Union received a report that Staunton was the successful bidder, and the contractor of record, on the Carlinville sewer job. In addition, on an undisclosed date between April 17, 1996, and October 21, 1996, the Union had received a report that a firm called Grant & Associates (Grant) was a subcontractor of Staunton on that job, and that Marilyn Mengelkamp was one of Grant's officers and owners. Also, on an undisclosed date during this period, the Union received information that some nonunion employees were working for CIC on the Carlinville job, and a report from someone on that job that CIC and Staunton were "one and the same." At a meeting with the Union on October 21, 1996, to negotiate a new contract, the Union asked "who was CIC." Mengelkamp replied that CIC was a subcontractor on the Carlinville job. The Union asked about employees for CIC. Mengelkamp would not give the Union any information about that.[27] The Union asked for information about Grant. Mengelkamp said that this was his wife's company.

By letter to "Robert Mengelkamp/Staunton Fuel & Material Inc." dated October 23, the Union asked him to provide

[25] Article 16 of the 1993–1996 bargaining agreement provides, in part: "When changing from one machine to another [during a shift], the original machine must not be left in productive operation. An employee shall not be permitted to change to a machine that another employee covered by this Agreement has been employed to operate."

[26] Article 5 of the 1993–1996 bargaining agreement provides that an employee who had not worked for a period not exceeding 15 days could be recalled.

[27] Staunton was awarded the Carlinville sewer project in April 1996. Mengelkamp testified that Staunton "could have" begun work on this project "a month, six weeks later. I have no idea." He further testified that he orally arranged with his wife that CIC would supply labor for that project.

> . . . the names of the owner(s) or co-partners and parties in interest in [CIC] and with the names of the officers, directors and principal owners of [Grant].[28] In addition, [the Union] requests the names and addresses of operators and oilers hired by Staunton . . . from August 1, 1996 to the present date.

The letter also stated that on October 21, the Union had proffered a clause precluding subcontracting of unit work. James testified that the Union had requested this information because the Union felt it was needed "to successfully have negotiations with Staunton."

On October 28, 1996, the Union filed against Staunton the initial charge in Case 14-CA-24311. This charge alleged, among other things, that since August 1, 1996, Staunton had violated Section 8(a)(5) by failing and refusing to bargain in good faith with the Union, "the majority representative of an appropriate unit"; by unilaterally changing wages, benefits, and other conditions of employment; and by refusing to provide information which was "essential and necessary for effective collective bargaining." On November 4, 1996, the Union filed against Staunton the first amended charge in Case 14-CA-24132. This charge alleged, among other things, that Staunton had violated Section 8(a)(5) by failing to maintain in effect the provisions and terms of Staunton's expired collective-bargaining agreement with the Union , "in order to undermine the majority representative status of the Union."[29]

A letter dated November 25, 1996, signed by Robert Mengelkamp, "President," and under Staunton's letterhead, averred, inter alia, that the Union had made "no specific proposal with respect to subcontracting wages or contract duration" (sic).[30] The letter went on to state that CIC "is a business entity operated by Marilyn Mengelkamp for which I have no other information. With respect to Grant . . ., I have no knowledge of its status." The letter gave the names of 8 individuals as operating engineers hired by Staunton since August 1, 1996. Of these 8, a total of 2 (Frey and Merkle) had been referred by the union hall, and a total of 3 (Frey, Merkle, and White) were union members. As previously noted, the August 1993–July 1996 bargaining agreement had contained a clause which required Staunton to hire all employees through the union hall.[31]

2. December 24, 1996, requests for information

By letter to Robert Mengelkamp dated December 18, 1996, the Union averred that Robert Mengelkamp had stated during the October 21 meeting that Staunton had subcontracted certain work to CIC; that Robert Mengelkamp had then stated that he did not know the people involved in CIC; and that Robert Mengelkamp's November 25 letter had stated that CIC was a business entity operated by Marilyn Mengelkamp for which Robert Mengelkamp had no other information. The union's letter went on to state that Robert Mengelkamp had told the Union during their October 21 meeting that Grant was his wife's company and that he had nothing to do with it, but that Robert Mengelkamp's November 25 letter had denied any knowledge of Grant's status. The Union's December 18 letter stated that the Union was "confused" and stated that the Union would be "pleased to receive any clarifying material you wish to provide."

By letter dated December 24, 1995, to attorney Weisman (who according to the letter had represented Staunton during a negotiating meeting on December 20), union attorney Harold Gruenberg averred, inter alia, that at the December 20 meeting Weisman had asked that the Union submit its requests for information in writing.[32] Gruenberg's letter went on to state that 6 (Bates, Clark, Coffey, Journey, Robey, and White) of the persons listed in Staunton's November 25 letter, and also "Robert Diets" (sic), had been hired without referral by the Union "discriminatorily and in violation of [the Union's] exclusive referral right under NLRA." (The Union later found out that the correct name of "Robert Diets" was Terry Deets.) The letter "demanded that Staunton remedy its discrimination and violation by replacing the illegally hired operators with referrals from [the Union's] list of eligible applicants," and making whole the eligible applicants who would have been referred. In addition, the Union's December 24 letter requested the following information: (a) the names of Grant's officers, directors, and principal stockholders; (b) the names of CIC's officers, directors, owners or co-partners; (c) Grant's and CIC's addresses and telephone numbers; (d) the nature of Grant's and CIC's business; (e) whether during 1995 and/or 1996 Staunton subcontracted construction work to or from Grant and/or CIC, or interchanged construction equipment or employees with Grant and/or CIC, identifying (in each case) the projects where such subcontracting or interchange occurred; (f) whether Staunton supplied Grant and/or CIC with "construction materials, facilities including storage facilities, tools, and/or repair resources . . . during 1995 and/or 1996"; (g) whether, as to Grant and/or CIC, Robert Mengelkamp made decisions with respect

[28] This November 1996 letter averred that CIC was not registered as a corporation or as a fictitious - name entity, and that its address was the same as Grant's address. In April 1997, Respondent advised the Union that CIC had been registered as a fictitious-name entity in March 1997.

[29] The original charge in this case, filed on June 16, 1996, had alleged, among other things, that since March 1, 1996, Staunton had engaged in certain conduct "in order to undermine the Union's majority representative status," and had declared to employees its intention to refuse to recognize and bargain with the Union, "the representative of a majority of operating engineers who comprise a unit appropriate for collective bargaining."

[30] Article 7 of the 1993–1996 agreement provides, in part, "Any employer who sublets any of his work on any project he has must let same subject to this Agreement and he will be held responsible for fulfillment of same." See the first proviso to Section 8(e) of the Act.

[31] The list did not include Deets, who had been hired and added to Staunton's payroll on September 3, 1996; or Moss or Luebbert, both of whom had been hired by Staunton on September 30, 1996; nor did the list include David Kelly Brown, who in August 199,6 had started to honor a picket line at the Staunton job where he had been working, had been told in mid-September 1996, by Mengelkamp that Brown could not work on another Staunton job unless he gave up his union card, and on September 30, 1996, had gone back to work for Respondent pursuant to a settlement agreement. However, the complaint does not allege that Respondent violated Section 8(a)(5) by giving the Union an incomplete list of employees.

[32] Robert Mengelkamp had made a similar request to the Union during their meeting on October 21, 1996.

to management and/or employment policies; and (h) whether CIC was registered with the State of Illinois under the Assumed Business Name Statute (and if so, the county and date of registration) or as a corporation.

By letter to Gruenberg dated January 2, 1997, Weisman stated that he would respond to Gruenberg's December 24 letter as soon as possible. On February 18, 1997, the Union filed a second amended charge against Staunton in Case 14–CA–24132, and an amended charge against Staunton in Case 14–CA–24311. These charges alleged, among other things, that since about August 1, 1996, Staunton had violated Section 8(a)(5) by failing and refusing to bargain collectively with the Union, by withdrawing recognition from it, by raising wages, by refusing to comply with the hiring-hall provisions of the most recent collective-bargaining agreement, by failing to pay benefit contributions, and "since about October 23, 1996 [by] failing to provided information requested by the Union which is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative." On February 28, 1997, the initial complaint was issued against Staunton in Cases 14–CA–24132 and 24311. This complaint alleged, among other things, that at all material times since August 1, 1993, based on Section 9(a) of the Act, the Union had been the employees' exclusive bargaining representative. The complaint further alleged, among other things, that about August 1, 1996, Staunton had violated Section 8(a)(5) by withdrawing recognition from the Union; by unilaterally, and without giving the Union notice and an opportunity to bargain, raising wages, refusing to comply with the hiring-hall provisions of the most recent collective-bargaining agreement, and failing to pay benefit contributions; by failing and refusing since about October 23, 1996, to furnish the Union with the names of CIC's owners or co-partners and parties in interest and the names of Grant's officers, directors, and principal owners; and by unreasonably delaying (between October 23, 1996, and November 25, 1996) in providing the Union with the names and addresses of operators and oilers hired by Staunton from August 1, 1996, to October 23, 1996. The complaint also alleged unlawful discrimination against certain named employees, and various violations of Section 8(a)(1).

3. The April 10, 1997, settlement agreement

On April 10, 1997, Staunton (through Weisman) and the Union (through Gruenberg) entered into an informal settlement agreement, approved by the Regional Director that same day, in Cases 14–CA–24132 and 14–CA–24311. In this settlement agreement, Staunton agreed, inter alia, to recognize and bargain in good faith with the Union "as the exclusive majority representative"; and on request, to "restore all changed working conditions, including wages, hiring hall provisions and benefit contributions, to those which existed prior to August 1, 1996, and maintain them until we bargain in good faith with the Union or a good-faith impasse concerning any proposed changes." Also, Staunton undertook not to "fail and refuse to furnish, or unreasonably delay in furnishing, the Union with information regarding the relationship of other companies and the names and address of Unit employees as requested by letter dated October 23, 1996, and with information regarding the relationship of other companies, as requested by letter dated December 24, 1996 . . . We will furnish the Union with the information it requested by letters of October 23, 1996 and December 24, 1996."

4. The April 21, 1997, renewal of the December 24, 1996, request for information

By letter to Staunton dated April 21, 1997, the Union stated that it was denying a request by Staunton (in a letter dated April 17, 1997) to "resume" contract negotiations. The Union gave as its reason that before being able to engage in "meaningful bargaining," the Union would have to receive the information which in the April 10 settlement agreement Staunton had undertaken to provide. The letter went on to request "the information sought by our letter of December 24, 1996 together with documentation supporting your written responses. Failure to submit this information within 10 days will result in [the Union] requesting appropriate NLRB action for violation of the Settlement Agreement."

5. The alleged delayed and/or false and misleading April 22 and 29, 1997, responses to the Union's October and December 1996 information requests

At least purported responses to the union's information requests on October 23 and December 24, 1996, were set forth in letters to the Union from Robert Mengelkamp, "President," under Staunton's letterhead, dated April 22 and 29, 1997. The April 29 letter stated that CIC was a fictitious-named entity registered on March 28, 1997, in Macoupin County under the Illinois Business Name Statute, and gave its address and telephone number. Also, the April 29 letter stated that CIC was owned by Marilyn Mengelkamp, and that she and one Ulysses Cothran were Grant's officers, directors, and principal stockholders.[33] Both letters specified two projects which Staunton had subcontracted in writing to CIC, but neither letter mentioned the Carlinville sewer project, which was the subject of an oral subcontract (see supra fn. 27). Both letters stated that except for rental of a storage facility, Staunton had not supplied CIC with construction materials, facilities including storage facilities, or tools during 1995 and/or 1996. Both letters stated that Robert Mengelkamp had made no decisions in regard to CIC's management or employment policies, and that Staunton and CIC had not interchanged employees.

As to Grant, one or both of these letters stated that Grant had been in the construction business; that Staunton had subcontracted work to Grant on one job in 1995; that Staunton and Grant had not exchanged labor or equipment in 1995 or 1996; that Staunton had not supplied construction materials, facilities, tools, or repair resources to Grant in 1995 or 1996, except for rental of a storage facility; that Robert Mengelkamp had made no decisions with respect to Grant's management or employ-

[33] Robert Mengelkamp's April 22 letter had stated, inter alia, "I am not informed of the structure of either [Grant or CIC]. I do not request that information from any other subcontractor. However, in lieu [sic] of the settlement agreement terms, I have requested the information and discussed the implications made with Mrs. Mengelkamp." The letter goes on to say that her responses were "attached," but no purported attachment appears in the record.

ment policies; and that Grant had been dissolved in February 1997, and was not presently engaged in business. There is no contention or evidence that these letters made any inaccurate, incomplete, or misleading representations as to Grant. James credibly testified that before the October 21 meeting, the Union had received information that Grant had been a subcontractor of Staunton "on the job" and, to the best of the union's knowledge, Marilyn Mengelkamp was one of Grant's owners and officers.[34]

6. The May 27, 1997, request for information

By letter to Robert Mengelkamp dated May 27, 1997, the Union averred that its investigation had shown that contrary to the representations in his April 29 letter, laborers and equipment operators reported daily to Staunton's shop and were directed by him to proceed in Staunton's vehicles to work on jobs of Staunton and on jobs purportedly subcontracted by him to his wife, Marilyn Mengelkamp. The letter went on to aver that the Union had obtained proof that, contrary to the representations in Robert Mengelkamp's April 29 letter, employees and equipment were interchanged and jointly used by Staunton and CIC.

In addition, the letter stated that the Union had information that "you" required employees to perform work without compensation before and after their 8-hour shifts, "in violation of wage and hour laws and prevailing wage laws." The union's letter then demanded "for collective bargaining purposes," that "you" make available for audit by the Union "all payroll records and paychecks, time cards, and quarterly reports to the Illinois Dept. of Employment Security" of Staunton and CIC;[35] and requested "you" to "produce and make available for examination by [the Union] all contracts and subcontracts between Staunton [and CIC] relating to construction, highway, paving, sewer work and all other commercial, residential or government allocated work projects."

By letter to James dated May 28, 1997, attorney Lawrence P. Kaplan, who is associated with the same law firm as attorney Weisman, stated, in part:

> Apparently, you are contending in your May 27, 1997 [letter] that Marilyn Mengelkamp d/b/a Central Illinois Construction was an alter-ego to Staunton . . . Staunton denies that allegation. However, the fact remains that the time-period of any subcontracting by Staunton . . . to Marilyn Mengelkamp d/b/a Central Illinois Construction was covered by the NLRB settlement entered into between [the Union] and Staunton . . . At no time did Staunton . . . conceal any information concerning its subcontracting to Marilyn Mengelkamp d/b/a Central Illinois Construction.
>
> Please explain to the undersigned in writing why the information you request concerning payroll records, paychecks, timecards and quarterly reports to the Illinois Department of Employment Security of both Staunton [and CIC] are relevant to the negotiations between Staunton . . . and your union, particularly since the subcontracting has not taken place since the summer of 1996.

Kaplan's letter went on to state that for about 2 months Staunton had been requesting bargaining with the Union, and that the Union had "systematically refused to meet with Staunton Fuel for the purpose of negotiations." Then, the letter stated:

> If you can enunciate a reason to have the information requested, in accord with Section 8(a)(5) of the National Labor Relations Act, Staunton Fuel will be happy to produce such information. On the other hand, if your Union continue to refuse to negotiate over the terms of a new agreement, Staunton Fuel will have no alternative but to file charges with the NLRB. Accordingly, please contact the undersigned regarding an initial negotiation session for the purpose of negotiating a collective bargaining agreement between your Union and Staunton Fuel.

Also on May 28, 1997, the Union filed its initial charge in Case 14–CA–24595, alleging, inter alia, that Staunton had violated Section 8(a)(5) by failing and refusing since April 10, 1997, to provide the Union with information "necessary for effective collective bargaining" and by failing to comply with and violating the terms of the April 1997 settlement agreement in Cases 14–CA–24132 and 24311. This charge averred that the Union was "the majority and exclusive representative of employees."

By letter to Kaplan dated June 2, 1997, the Union stated that the information sought by the Union—namely, "subcontractors agreements, payroll records, paychecks, time cards, and quarterly reports" of Staunton and CIC, and an audit of such CIC and Staunton records, had been requested because the Union believed that Staunton and Robert Mengelkamp had concealed and had not provided information "concerning their interrelationship with [CIC] as a common employing entity with common employees, utilizing common equipment at common job sites"; and that negotiations with Staunton not encompassing the relationship with CIC "would make any collective bargaining agreement reached with Staunton Fuel a nullity and would permit Staunton and Robert Mengelkamp to divert employees to Marilyn Mengelkamp and her fictitious-name, nonunion 'company'." In connection with Kaplan's claim that the union's request for records was covered by the NLRB settlement, the union's letter asserted that this settlement "provides that Staunton Fuel 'will not fail or refuse or unreasonably delay in furnishing the Union with information regarding the relationship of other companies'" (see supra Part III H3).

By letter to the Union dated June 3, 1997, Kaplan requested negotiations for a new bargaining agreement between the Union and Staunton. The letter further stated, "We believe your

[34] As to the names and addresses of the operators hired by Staunton from August 1, 1996, "to the present," which information had been requested by the union's letter dated October 23, 1996, Staunton's letter of April 29, 1997, included the names and addresses of each of the 8 employees issued in Staunton's letter to the Union dated November 25, 1996, and also the names and addresses of 3 more employees (Deets, Luebbert, and Russell F. James). Neither the November 25 letter nor the April 29 letter named Moss or Brown. See supra fn. 31.

[35] Article 35 of the 1993–1996 bargaining agreement requires the employer to "elect to come under the Illinois State Unemployment Insurance Act and pay Unemployment Compensation on all employees, regardless of the number employed."

continued refusal to meet and negotiate is a violation of the National Labor Relations Act. If there are specific information requests that you have, those can be made across the table in the course of negotiations." By letter to the Union dated June 4, 1997, Kaplan stated that Staunton "does not refuse to discuss and/or negotiate concerning the alleged relationship between Staunton [and CIC] . . . If, during the course of negotiation, it appears relevant and important that information concerning [CIC] and/or any other matter should be provided for the purpose of negotiations, Staunton . . . will appropriately consider those requests in good faith and supply such information as is appropriate for the purposes of the National Labor Relations Act and the duty to bargain in good faith." The letter went on to ask the Union to supply Staunton with suggested negotiation dates. "Failure to do so . . . will result in charges filed with the National Labor Relations Board alleging a failure to bargain in good faith." By letter dated June 10, 1997, Kaplan asked the Union to negotiate with Staunton regarding a new collective-bargaining agreement.[36] "If you fail to reply before close of business on Thursday, June 12, 1997, we will file charges with the National Labor Relations Board against your union for failure to bargain in good faith." The record fails to show whether such charges were ever filed.

By letter to Kaplan dated June 12, 1997, which stated that it constituted a reply to Kaplan's June 4 letter, the Union stated that the April 1997 settlement agreement (see supra Part III H3) called for Respondent to provide the Union with "information concerning [Staunton's] relations with other companies as requested by the Union on October 23, 1996, and December 4, 1996."[37] The letter went on to say, "Negotiations have been precluded for almost a year by Staunton's refusal to bargain with this Union since August 1, 1996 and by Staunton's discrimination against members of this Union and by Staunton's refusal to provide the Union with information necessary for effective bargaining. Staunton's violations of NLRA are continuing."

By letter to the Union dated June 16, 1997, Kaplan stated that Staunton was not refusing to "discuss and/or negotiate concerning the alleged relationship between" Staunton and CIC. The letter went on to say that Staunton had already provided the information which the Union had requested on October 23 and December 4 (see supra fn. 37). "Having said that, we do not preclude the possibility that there may be additional information that is relevant to your inquiries." The letter went on to propose several possible dates for negotiation of a new contract.

By letter to Kaplan dated June 20, 1997, the Union stated that Kaplan's June 16 letter "proposes a meeting to negotiate or discuss the 'alleged relationship' between Staunton [and CIC] while you and your clients have refused to provide [the Union] with the facts it has requested. [The Union] sees no reason to meet with you and your client to discuss a relationship which you deny exists." The letter went on to deny that Staunton had provided the information requested by the union's letters of October 23 and December 4 (see supra fn. 37), stated that the Union had filed a charge in Case 14–CA–24595 alleging "failure of proper response,"[38] and further stated that Kaplan's "clients have refused to provide [the Union] with payroll and related records of Staunton [and CIC], requested by [the Union's] letter to Robert Mengelkamp dated May 27, 1997. If and when the requested records are produced for [the Union's] examination, [the Union] will inform Staunton Fuel of a date for contract negotiation."

On July 31, 1997, the Union filed against Staunton a third amended charge in Case 14–CA–24132, and filed against Staunton and CIC a second amended charge in Case 14–CA–24595 (the only charge document naming CIC as respondent in terms). These amended charges alleged, among other things, that Staunton and CIC were alter egos and a single employer, and that Section 8(a)(5) had been violated by failing and refusing to bargain with the Union, to furnish the Union with information necessary for collective bargaining, and to honor or abide by the terms and conditions of employment set forth in the 1993–1996 collective-bargaining agreement; and by withdrawing recognition from the Union. The second amended charge in Case 14–CA–24595 also alleged violation since about April 10, 1997, of the settlement agreement in Cases 14–CA–24132 and 14–CA–24311.

Also on July 31, 1997, the Regional Director set aside the informal settlement agreement of April 10, 1997, in Cases 14–CA–24132 and 14–CA–24311, on the grounds that this agreement had been violated about April 29, 1997, by providing false and misleading answers to certain union requests for information made about December 24, 1996, and since about May 27, 1997, by failing and refusing to provide the Union with information requested by the Union about, May 27, 1997. I find infra Part III I 3b, c (4), that Respondent did in fact provide the Union with false and misleading information on April 29, 1997, in violation of Respondent's settlement agreement undertaking to provide the Union with information regarding Staunton's relationship with other companies as requested in the union's letter of December 24, 1996 (more specifically, by omitting the Carlinville sewer project from the list of Staunton's subcontracts to CIC, and by falsely claiming that Staunton and CIC had not interchaged employees and that Robert Mengelkamp made no decisions with respect to CIC's management or employment policies). In addition, I find infra Part III E 3c(4) that Respondent failed and refused to provide the Union with information requested by the Union about May 27, 1997. Accordingly, I find that the Regional Director properly set aside the settlement agreement, and that unfair labor practices may be found on the basis of pre-settlement conduct. *Twin City Concrete, Inc.*, 317 NLRB 1313 (1995).

[36] The letter suggests that the Union may have filed suit against Staunton and the Mengelkamps to require them to make certain trust-fund payments attributable to periods after the expiration of the 1993–1996 bargaining agreement. See *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 530 (1988), referred to in that letter. The letter seems to be suggesting negotiations as to this matter also.

[37] This and other, subsequent correspondence attach this December 4 date to the December 24 request for information. There is no contention or evidence that anyone was confused or misled by this error.

[38] The charge and first amended charge in this case had been filed on May 28 and June 17, respectively.

In the proceedings before me, Respondent has not relied on the settlement agreement as a defense to any of the unfair labor practice allegations in the complaint in its final form.

I. ANALYSIS AND CONCLUSIONS

1. Alleged independent Section 8(a)(1) allegations not dependent on whether Respondent was under a duty to bargain with the Union after July 1996

In agreement with the General Counsel, I find that Respondent violated Section 8(a)(1), through Robert Mengelkamp: (a) by telling employee Titsworth, in mid-March 1996 and before the expiration of the 1993–1996 bargaining agreement, that he needed to decide whether he was going to stay with Mengelkamp and work nonunion, or to stay with the Union, go back to the union hall, and look for work; (b) before the bargaining agreement had expired, by telling job applicant Hundley in about early April 1996, and employee Brown in mid-July 1996, that Mengelkamp was going nonunion; (c) on June 1, 1996, and still before the bargaining agreement had expired, by telling employee Titsworth, after he had replied to Mengelkamp's March 1996 ultimatum by replying that he was not staying with Respondent and consequently working nonunion, "That's fine, bring your truck in and park it. You're done"; and (d) on September 11, 1996, by telling employee Brown, who had been regularly working for Respondent since 1994 but had been honoring a picket line at a Staunton project, that he would have to return to the union hall for referral if he would not go nonunion, and that he would have to give up his union card if he wanted to go back to work for Staunton. *NLRB v. Del Rey Tortilleria, Inc.*, 787 F.2d 1118, 1122–1124 (7th Cir. 1986), enfg. 272 NLRB 1106, 1114 (1984); *Patterson-Stevens, Inc.*, 316 NLRB 1278, 1291 (1995); and cases cited infra fn. 50, in light of *NLRB v. Bufco Corp.*, 899 F.2d 608 (7th Cir. 1990).

In addition, I find that Respondent violated Section 8(a)(1) on September 3, 1996, when dispatcher Tom Chapman, after conducting a job interview with job applicant Terry Deets, asked him if he had a union card. *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 689 (7th Cir. 1982); *Stoody Co.*, 320 NLRB 18 (1995); *Sundance Construction Management, Inc.*, 325 NLRB 1013 (1998). In so finding, I note that this inquiry was made when Deets was applying for a job; that no lawful reason for this inquiry was given to Deets or appears in the record; that Deets was given no assurance against reprisals; that the union-card subject was brought up by Chapman and not Deets; that both before and after this interview, Respondent directed discrimination against union adherents; and that on one of these occasions, Respondent executed a previous plan to substitute the nonunion Deets for a union member (Moss) who had just been terminated because the Union had referred him to the job (see infra Part III I 2). I find that Respondent was answerable for Chapman's conduct because he was a supervisor (as evinced by his action, in Respondent's interest and in the use of independent judgment, in effectively recommending Deets' hire) or at the very least, that Deets would reasonably believe that Chapman was reflecting company policy and speaking and acting for management. *Southern Bag Corp.*, 315 NLRB 725 (1994). Thus, Chapman conducted the interview; he told Deets that Chapman was going to speak with Robert Mengelkamp; that same day, Chapman called Deets back and told him he was hired; and before starting to work, Deets never spoke with Mengelkamp nor (so far as the record shows) with anyone else from Respondent.

2. Alleged violations of Section 8(a)(3) and (1)

I agree with the General Counsel that Respondent violated Section 8(a)(3) and (1) by discharging Titsworth because he refused to relinquish his union membership. Robert Mengelkamp gave Titsworth, in effect, this reason for discharging him, and Respondent has never tendered any other reason.

In addition, I agree with the General Counsel that Respondent violated Section 8(a)(3) and (1) by discharging employees Luebbert and Moss because they had been hired pursuant to a referral by the Union. Mengelkamp's discharge of Titsworth because he refused to relinquish his union membership, Mengelkamp's remarks to employee Brown that he would have to give up his union card if he wanted to work for Staunton, and Mengelkamp's remarks to both Brown and Titsworth about choosing between continued employment by Respondent and using the union's referral service, establish Mengelkamp's aversion to employing persons who had been referred by or were members of the Union. Moreover, before entering into the September 27, 1996, settlement agreement, and even before the expiration of the bargaining agreement which obligated Respondent to hire employees through the Union's referral system, Respondent had been hiring employees off the street. On the morning that a wheel saw operator and two backhoe operators referred by the Union were to report for work, pursuant to a request made to the union's referral service on the day of the September 27, 1996, settlement agreement, Mengelkamp told employee Deets, whom Respondent had hired off the street after learning that he had no union card and who had been operating the wheel saw after Mengelkamp had showed him about 3 weeks earlier how to do it, that a "union operator" would be assigned to the wheel saw that morning, and that Deets was to drive to the job and to watch the operator attempt to operate the wheel saw, but to avoid conversation with him. Further, according to job superintendent Schireman when testifying for Respondent, on that morning Deets stood around and waited to replace Moss on the wheel saw, and employee Slifka (who had not been referred through the hall) stood around to replace Luebbert "if need so." From Mengelkamp's remarks to Deets, this testimony by Schireman, and the absence of any other explanation for foreman Henke's conduct in keeping a fuse in his truck until Moss found out why the wheel saw would not start, I infer that Respondent had removed the fuse from the wheel saw for the specific purpose of making Moss unable to start the machine, and in the expectation (or, at least, the hope) that he would not notice the missing fuse and could be discharged, without his ever operating the machine, on the pretext of incompetence. On the basis of this incident, Mengelkamp's instructions to Deets to keep an eye on the "union operator" but not to talk to him, Schireman's failure to ask Deets to help Moss to find the "road" gear notwithstanding the importance of

keeping the project going,[39] and Deets' reassignment to the wheel saw after Moss had been removed from the job, I conclude that Respondent's seeming lawful explanation for Moss's removal—namely, his problem with the wheel saw—was pretextuous and at least partly based on a setup. Accordingly, such reasons, far from assisting any contention that Moss would have been discharged for inability to operate the wheel saw even if he had not been referred through the union hall, add weight to my conclusion that his discharge violated Section 8(a)(3) and (1) the Act. *Louis A. Weiss Memorial Hospital*, 324 NLRB 946 (1997).

Furthermore, because Luebbert and Moss had both been sent to the job by the union hall, because an employee who had not been referred through the hall had been assigned to wait around to replace Luebbert (at least "if need so"), and because on that same day Respondent had similarly kept an unreferred nonmember (Deets) on tap to replace union referral Moss. I conclude that Luebbert was discharged at least partly because he had been referred through the union hall. Because the record is barren of evidence to support the reason which Schireman gave Luebbert for discharging him—namely, that he was too slow—Respondent has failed preponderantly to show that he would have been discharged for working too slowly even if he had not been referred through the union hall. Accordingly, I find that Luebbert's discharge violated Section 8(a)(3) and (1) of the Act. *Weiss Memorial*, supra, and cases cited.

Also, I agree with the General Counsel that Respondent violated Section 8(a)(3) and (1) by laying off employee Brown about October 17, 1996, and failing and refusing to recall him until about April 17, 1997. As previously noted, in July 1996, after telling him that Robert Mengelkamp intended to go nonunion, Mengelkamp asked Brown whether he intended to go nonunion or to stay with the union hall, to which Brown replied that he would not give up his union card. Thereafter, and while Brown was honoring a picket line set up at Staunton's Nashville job, Mengelkamp told him that he could not come back to work unless he gave up his union card, which Brown refused to surrender. Although at that time Respondent was performing at least one job which was not being picketed, and although since 1994 Brown had worked for Staunton for weeks on end before he began to honor the Nashville picket line, Respondent did not again employ Brown until September 30, 1996, when the Union told him to go to the Route 16 Litchfield job pursuant to the September 1996 settlement agreement. That Respondent did not contemplate that its action in returning him to work would effect a restoration of his previous stable status as a long-time employee is shown by Respondent's early-expressed intention to lay him off once he had completed his initial rotor-mill assignment on the Route 16 project, regardless of Respondent's continued need for operators on that and other projects; by Mengelkamp's otherwise inexplicable resentment when Brown did Respondent what would appear to be a favor by filling in on a Saturday on the rubber tired breakdown roller when Respondent was short-handed (because it had failed to make a timely referral request to the Union and/or because referred operators had failed to show up); and by Mengelkamp's otherwise inexplicable baseless and irrelevant claim to the Union that Brown had been referred to the project as a finish roller operator but was not sufficiently skilled in that operation—although he had not been referred to that project as a finish roller operator, had so advised the job foreman, and had declined the foreman's implied invitation to perform that job, and although there is no evidence that he ever operated that machine on that project. Moreover, although Respondent had previously transferred Brown between a number of different kinds of equipment, and although as of the time of Brown's layoff from the Route 16 job on October 16, 1996, the job still required several months' work using a number of pieces of equipment which Brown had operated while in Respondent's employ, Respondent laid him off with the representation (which was false) that there was no more work on the rotor mill machine which he had been operating, while retaining other employees whose presence on the job was not connected to the Union and who were operating equipment which Brown was able to operate. Further, Brown was not recalled until Respondent had entered into the April 1997 settlement which included such an undertaking, even though, after his layoff, Respondent was performing other jobs which entailed work Brown was capable of performing. I conclude that Respondent laid off Brown solely because he refused to turn in his union card, honored a picket line, and had been told by the Union to report to the Route 16 job, and that the claimed lack of work was purely pretextuous.

Also, I agree with the General Counsel that Respondent violated Section 8(a)(3) and (1) of the Act by failing to recall employee Merkle, a union member for 44 years. Merkle was one of the three employees whom the Union had referred to the Route 16 project pursuant to a request by Respondent pursuant to the April 1997 settlement agreement. The other two (Luebbert and Moss) were discriminatorily discharged the very day they reported to work. Furthermore, on the last day Merkle worked for Respondent, Respondent discriminatorily laid off employee Brown, whom the Union had also sent to the Route 16 job pursuant to the settlement agreement. Moreover, Respondent failed to recall either of them to the Route 16 project, although Respondent thereafter employed on that job employees who operated machines which Brown and Merkle were capable of operating, including the very machines they had been operating just before their layoff. Further, Respondent has given no explanation for its failure to comply with what amounted to a promise to recall Merkle. I find that Respondent failed to recall Merkle solely because he had been referred through the union hall, and that such action by Respondent violated Section 8(a)(3) and (1) of the Act.

[39] Schireman testified that on that date, Respondent was behind schedule and was "real concerned" about the approach of cooler weather, when it would become more difficult to keep asphalt sufficiently warm to assure good-quality paving.

3. Alleged violations of Section 8(a)(5) and (1), and alleged independent violations of Section 8(a)(1) turning on whether Respondent was under a duty to bargain with the Union

a. Alleged failure and refusal by CIC to honor or abide by the terms and conditions of employment during the effective period of, and as set forth in, the August 1993–July 1996 collective-bargaining agreement

Initially, I conclude that CIC was bound by the collective-bargaining agreement which was signed by Staunton and the Union in 1993 and by its terms continued in effect until the end of July 1996. I so find because the parties stipulated at the hearing that Staunton and CIC are a single employer and alter egos and that the appropriate unit consists "of the unit described in the complaint . . . who are employed by Staunton and CIC," and because the unit so described contains the same employee classifications as those listed in the recognition clause of the 1993-1996 agreement. *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 23–24 (1st Cir. 1983), cert. denied 464 U.S. 892 (1983); *Bufco*, supra at 608–609; *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1276-1277 (9th Cir. 1984); *Design Drywall, Ltd., Inc.*, 301 NLRB 437, fn. 1, 440–441 (1991).

Further, the evidence shows that CIC failed to honor the terms of that agreement before its expiration. Union business agent James so testified without contradiction. Thus, it is uncontradicted that before the bargaining agreement expired, employee Journey was hired off the street into a unit job, added to CIC's payroll, and paid $29.97 an hour (a higher rate than called for by the bargaining agreement); and that CIC made no payments on his behalf to the benefit funds.[40] Because CIC engaged in this conduct without the Union's consent, I find that such conduct constituted a violation of Section 8(a)(5) and (1) of the Act by Respondent. *SAS Electrical Services, Inc.*, 323 NLRB 1239 (1997).

b. Alleged unlawful conduct with respect to information related to policing the 1993–1996 bargaining agreement

Because Respondent Staunton/CIC was bound by the bargaining agreement which expired on July 31, 1996, Respondent was under a statutory duty to provide the Union with information which was necessary and relevant to the union's performance, during and with respect to the effective period of the contract, of its duties as the collective-bargaining representative. *SAS Electrical*, supra. Respondent's duty to provide this information survived the expiration of the contract. *Diversified Bank Installations, Inc.*, 324 NLRB 457 (1997); *Audio Engineering, Inc.*, 302 NLRB 942, 943–944 (1991). Because the Union had learned about CIC employees' performance of the Carlinville job, on which Staunton had been the successful bidder, and had received a report that Grant was also a subcontractor of Staunton on that job; because the Union had also received reports that the wife of Staunton's president owned CIC and was one of Grant's officers and owners; because CIC as such was not under contract with the Union at any material time (nor, inferentially, was Grant) (cf. supra fn. 30); because Article 29 of the 1993–1996 contract provided that the work referred to in the agreement "shall be performed solely and exclusively by employees covered by the agreement" with exceptions immaterial here; and because the parties stipulated that CIC and Staunton are a single employer and alter egos, the Union plainly requested information which was necessary and relevant to the union's performance of its duty to police the agreement in its request to Staunton (1) on about October 23, 1996, for the names of CIC's owners; (2) in the December 24, 1996 letter for certain information regarding the relationship between Staunton and CIC, including whether Robert Mengelkamp had made decisions with respect to CIC's management or employment policies; whether during 1995 and/or 1996 CIC and Staunton had interchanged construction employees on construction projects, or construction equipment; whether in 1995 and/or 1996 CIC and Staunton had subcontracted construction work from each other and if so, on which projects; and whether Staunton had supplied construction materials, facilities, or tools; and similar information with respect to Grant; and (3) in the May 27, 1997 letter, for all contracts and subcontracts between Staunton and CIC. *Association of D.C. Liquor Wholesalers*, 300 NLRB 224, 229 (1990).

It is true that in response to attorney Kaplan's May 28, 1997 letter to the Union stating that Staunton would provide this and other information "If you can enunciate a reason," the Union did not specifically refer to policing the expired bargaining agreement. However, Respondent obviously knew (as the Union could not) that such information as to CIC would disclose Respondent's disregard (through CIC) of the bargaining agreement during its term. I am aware of the provision in the bargaining agreement that "no grievance shall be considered which has not been presented in writing within fifteen (15) days of its occurrence. The time limits set forth herein may be extended by mutual agreement of the parties." However, even in the absence of such an agreement, it cannot be said with assurance that any union grievance as to CIC's disregard of the bargaining agreement would be time-barred, in view of Respondent's misrepresentation regarding and concealment of the CIC-Staunton relationship.[41]

Respondent has offered no explanation for its failure even purportedly to supply the requested information for 6 months (as to the October 23 request), and 5 months (as to the December 24 request). Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act by undue delay in purport-

[40] Journey is the only employee on CIC's payroll before the expiration of the bargaining agreement who the parties agreed was in the bargaining unit. However, the parties left open whether others might be in this category. The testimony of Journey and Clark indicates that Merlyn Wirth, who was also on CIC's payroll before the bargaining agreement expired, performed unit work. Only Wirth, Dennis L. Ontis, and Journey were paid $29.97 an hour and given the occupational code "CO," CIC's occupational code for "Company." None of them was hired through the union hall.

[41] See generally, *Holly Sugar Corp. v. Distillery, Rectifying, Wine, & Allied Workers International Union, AFL–CIO*, 412 F.2d 899, 903–904 (9th Cir. 1969); *GK MGT Inc. v. Local 274 Hotel Employees*, 930 F.2d 301, 304–305 (3d Cir. 1991).

edly furnishing such information.[42] Moreover, I find that Respondent further violated Section 8(a)((5) and (1) by furnishing false and misleading information—more specifically, by telling the Union that Staunton and CIC were separate entities, that they had not exchanged labor or equipment, and that Robert Mengelkamp had made no decisions in regard to CIC's management or employment policies, and by omitting the Carlinville project from the April 22 and 29 letters listing projects subcontracted by Staunton to CIC.[43]

c. Alleged post-expiration independent violations of Section 8(a)(1), and alleged post-expiration violations of Section 8(a)(5) and (1)

(1) Whether the recognition clause in the 1993–1996 agreement is sufficient to show that after its expiration, the Union was entitled to recognition under Section 9(a) of the Act

Laying to one side (for the moment) the conversation between Robert Mengelkamp and union representatives just before Mengelkamp signed the 1993–1996 bargaining agreement, *Oklahoma Installation Co.*, 325 NLRB 741 (1998), calls for the conclusion that Article 43 of this agreement effected recognition of the Union as the representative of the contract unit under Section 9(a) of the Act. *Oklahoma Installation* found that recognition under Section 9(a) was sufficiently established solely on the basis of a letter of assent, signed by both the union and the respondent employer, which stated, "The Union has submitted and the Employer is satisfied that the Union represents a majority of its employees in a unit that is appropriate for collective bargaining." I perceive no material difference between this language and the language of Article 43 (MAJORITY REPRESENTATIVE/The Contractors Party hereto recognize [the Union] as the Majority Representative of all employees in Operating Engineers classifications employed by them and the sole and exclusive bargaining agent of such employees).

I do not agree with Respondent that this language fails to evince recognition of the Union by Respondent under Section 9(a) because of its reference to "Contractors" and "classifications employed by them." The contract read as a whole shows that the contract unit is limited to Respondent's own employees; in any event, as to the effect of a contract on an employer's duty to bargain with the contracting union, so far as material here the Board draws no distinction between a contract limited to the respondent employer's employees and a contract which included such employees in a multi-employer unit.[44] Nor is there any significance to the fact that the language in the instant case was included in the contract itself, and not in a separate document. *Decorative Floors, Inc.*, 315 NLRB 188 (1994); *District Council of Painters No. 8 (Northern California Drywall Contractors)*, 326 NLRB No. 9, JD slip op. 3-4 (September 24, 1998). Likewise without merit is Respondent's effort to distinguish *Oklahoma Installation* on the ground that the grant of recognition in that case was made as a settlement of a pending Board unfair practice labor case where the claim was made that the respondent employer was the alter ego of another employer which had recognized the union pursuant to Section 9(a). Respondent's contention that this "context" significantly contributed to the Board's conclusion that *Oklahoma Installation's* recognition language invoked Section 9(a) overlooks the Board's finding that such was "the legal effect of the express terms of the letter of assent."[45]

As to Robert Mengelkamp's testimony regarding the circumstances which surrounded his August 1993 execution of the August 1993–July 1996 bargaining agreement which contained Article 43, I agree with the General Counsel that Board precedent requires me to disregard it. A claim by Respondent that the Union did not in fact represent a majority at the time the 1993–1996 construction-industry contract was executed would have been barred unless, within 6 months after the execution of that contract, Respondent had produced affirmative evidence of the Union's lack of majority, or of coercion in obtaining a majority, at the time of recognition. *NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727, 736–737 (11th Cir. 1998); *Oklahoma Installation*, supra, 325 NLRB No. 140, slip op. 2; *MFP Fire Protection, Inc.*, 318 NLRB 840, 841–842 (1995), enfd. 101 F.3d 1341 (10th Cir. 1996); *New Brunswick General Sheet Metal Works*, 326 NLRB No. 77, slip op. 2, JD slip op. 6 (August 27, 1998). This rule is based on the view that parties to a bargaining agreement in the construction industry are entitled to no less protection than those in other industries, and on the well-established principle that because recognizing a minority union as a Section 9(a) representative in a non-construction context constitutes an unfair labor practice, a challenge to a union's majority status raised more than 6 months after recognition is barred by Section 10(b) of the Act. *Casale Industries*, 311 NLRB 951, 952–953 (1993); *Triple A*, supra, 136 F.3d at 736–737; *Northern California Drywall*, supra, 326 NLRB No. 9, fn. 1, JD sl. op.6. Such an approach in the instant case is further suggested by the fact that at least in a Section 9(a) context, the Union's conduct during the meeting when Mengelkamp signed the 1993–1996 contract would at least arguably have constituted an unfair labor practice.[46]

[42] *Samaritan Medical Center*, 319 NLRB 392, 398 (1995); *Beverly Enterprises*, 326 NLRB No. 29, slip op. 5 (August 21, 1998).

[43] *Association of D.C. Liquor Wholesalers*, supra, 300 NLRB 224 fn. 1.

[44] *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 296–304 (9th Cir. 1978), cert. denied 442 U.S. 921 (1979); *NLRB v. Roger's I.G.A., Inc.*, 605 F.2d 1164 (10th Cir. 1979); *NLRB v Silver Spur Casino*, 623 F.2d 571, 576–578 (9th Cir. 1980), cert. denied 451 U.S. 906 (1981); *Time Chevrolet*, 242 NLRB 625 (1979), remanded on other grounds, 659 F.2d 1006 (9th Cir. 1981).

[45] Quite possibly, Respondent's execution of the April 1997 settlement agreement at least partly accounts for the General Counsel's failure to contend that the existence of a Section 9(a) relationship was evinced by Respondent's repeated May and June 1997 threats to file against the Union refusal-to-bargain charges which would likely have presupposed a Section 9(a) relationship. At least arguably, reliance on such threats would be inconsistent with the General Counsel's July 1997 determination to set the settlement agreement aside; and to rely on the 1993-1996 contract, rather than on the settlement agreement, to establish a Section 9(a) relationship. Cf. *Randall Division of Textron, Inc. v. NLRB*, 965 F.2d 141 (7th Cir. 1992), and cases cited.

[46] See *Waymouth Farms*, 324 NLRB 960 (1997). However, even if the affirmative-concealment claim had been timely raised, Respondent has cited no legal basis, nor am I aware of any, for Respondent's contention that the union's conduct had the legal effect of creating a contract which did not include Article 43 but which otherwise bound both

To be sure, because Section 10(b) does not begin to run until the injured party knew or should have known that an unfair labor practice has occurred,[47] the analogous 6-month period as to the validity of Section 9(a) recognition in the construction industry is tolled until the injured party (here, Respondent) knew or should have known the facts allegedly invalidating such recognition. Moreover, the burden is on the General Counsel (as the party raising the "Section 10(b)" defense) to show that Respondent first raised its misrepresentation claim within 6 months after the date on which it learned or should have learned about the existence of Section 43. See *R. G. Burns Electric, Inc.*, 326 NLRB No. 41 (August 27, 1998); *Chinese American Planning Council*, 307 NLRB 410 (1992). However, the record preponderantly shows that Respondent knew or should have known about the existence of Article 43 much more than 6 months before the misrepresentation claim was first raised before me by means of Mengelkamp's October 1997 testimony that when he signed the 1993–1996 contract in August 1993, the Union affirmatively concealed from him the existence of Article 43. Thus, the Union's October 1996 charge and February 1997 first amended charge in Case 14–CA–24311, and the Union's November 1996 first amended charge in Case 24-CA-24132, all included allegations that Respondent had violated Section 8(a)(5) on dates after the 1993–1996 contract expired; variously alleged that the Union was the "majority representative" of an appropriate unit; and variously alleged that Respondent had unlawfully withdrawn recognition; had failed to maintain provisions of the expired bargaining agreement, including its hiring-hall provisions; had failed to pay benefit contributions; had unilaterally changed employment conditions; and had unilaterally raised employees' wages. Moreover, a letter dated September 25, 1996, from Respondent's counsel to Respondent stated that the Board's Regional Office was taking the position that the Union "*remained* the exclusive, *majority* bargaining agent after July 31, 1996" (emphasis supplied), and that, "therefore," certain provisions in the contract which had expired on July 31, 1996, "could not be changed absent good faith bargaining." Furthermore, the February 1997 complaint alleged that "about" or "since about" August 1, 1996, Respondent had violated Section 8(a)(5) by, inter alia, refusing "to comply with the hiring-hall provision of the most recent collective-bargaining agreement," by raising wages, and by failing to pay benefit contributions, all without giving the Union notice and an opportunity to bargain. All of these allegations in these charges and in this complaint, and the Region's position as described in counsel's letter of September 25, 1996, were obviously based on the assumption that the expired 1993–1996 contract embodied recognition of the Union pursuant to Section 9(a); indeed, the February 1997 complaint alleges:

> 7B. Since about August 1, 1993, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the Unit and since then the Union has been recognized as the representative by Respondent. This recognition is embodied in a collective-bargaining agreement, effective by its terms from August 1, 1993 through July 31, 1996.
>
> 7C. At all material times since August 1, 1993, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

Further, the record shows that on April 10, 1997, more than 6 months before Mengelkamp testified about the execution of the 1993–1996 contract, Respondent's counsel (retained prior to December 24, 1996) signed on Respondent's behalf the settlement agreement in which Respondent undertook, inter alia, to bargain with the Union "as the exclusive majority representative" and, on request, to restore all working conditions to those which existed prior to August 1, 1996.[48] I conclude that the General Counsel has shown that Respondent knew or should have known of the existence of Article 43 more than 6 months before raising its affirmative-concealment claim.[49]

For the foregoing reasons, I find that the 1993–1996 bargaining agreement created a bargaining relationship under Section 9(a) of the Act.

(2) Whether Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, and violated Section 8(a)(1) by telling employees that it was going non-union

Where, as here, an employer has entered into a collective-bargaining agreement which recognizes the contracting union as the representative of the contract unit under Section 9(a), on the expiration of that agreement the union enjoys a presumption of continued majority support. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996); *NLRB v. Imperial House Condominium*, 831 F.2d 999, 1007 (11th Cir. 1987); *NLRB v. H & H Pretzel Co.*, 831 F.2d 650, 654 (6th Cir. 1987); *Fleming Industries*, 282 NLRB 1030, 1034 (1987). Although this presumption is rebuttable, Respondent has tendered no such rebuttal evidence at all. Accordingly, I find that Respondent was under a duty to bargain at all times relevant here, including the period after the 1993–1996 contract expired. Therefore, I find that Respondent violated Section 8(a)(1) by telling employee Brown in September 1996 that Respondent was going nonun-

parties. See *Waymouth*, supra; *Textron Lycoming Engine Division, Avco Corporation v. United Automobile, Aerospace and Agricultural Implement Workers*, 118 S. Ct. 1626 (1998).

[47] *Wisconsin Valley District Council v. NLRB*, 532 F.2d 47, 53–54 (7th Cir. 1976); *Amcar Division, ACF Industries, Inc. v. NLRB*, 592 F.2d 422, 430–431 (8th Cir. 1979); *SAS Electrical*, supra, 323 NLRB 1239 (1997).

[48] Of course, I am not relying on the settlement to show any liability by Respondent for the claims made in the February 1997 complaint or the corresponding claims in the July 1997 complaint. Rather, I rely on this settlement solely to show that Respondent knew or should have known of the presence of Article 43. See Rule 408 of the Federal Rules of Evidence; *Breuer Electric Mfg. v. Toronado Systems of America*, 687 F.2d 182, 185 (7th Cir. 1982); *U.S. v. Hauert*, 40 F.3d 197, 200 (7th Cir. 1994); *Jennmar Corp.*, 301 NLRB 623, 631 fn. 6 (1991).

[49] I note that as late as the first day of the October 1997 hearing, Respondent's counsel stated, ". . . how can you say that a contractor who clearly doesn't understand Board law could conclude that the language [of Article 43] was sufficient to establish 9(a) status?" Even then, counsel did not allege that the 'contractor' had ever been unaware that Article 43 was in the contract.

ion.[50] In addition, I find that Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union about August 1, 1996.

(3) Whether Respondent violated Section 8(a)(5) and (1) by unilaterally changing conditions of employment without giving the Union notice and an opportunity to bargain

As the Court of Appeals for the Seventh Circuit said in *NLRB v. Transport Service Co.*, 973 F.2d 562, 567 (1992):

> Even after the collective bargaining agreement expires, an employer may not unilaterally change the terms and conditions of employment subject to mandatory bargaining . . . Instead, the employer must recognize the terms and conditions of the agreement that are subject to mandatory bargaining until a new agreement is in force or until the parties bargain in good faith to impasse . . . After reaching an impasse, the employer can implement changes unilaterally as long as the changes were previously offered to the union. [Internal quotation marks omitted.]

A fortiori, an employer violates Section 8(a)(5) and (1) of the Act by unilaterally effecting such changes without giving the union advance notice and an opportunity to bargain. *Gaucho Food Products, Inc.*, 311 NLRB 1270, 1271 (1993); see also, *Litton Financial Printing Division v. N.L.R.B.*, 501 U.S. 190, 198–199 (1991); *Clear Pine Mouldings, Inc. v. N.L.R. B.*, 632 F.2d 721, 729–730 (9th Cir. 1980), cert. denied 451 U.S. 984 (1981).

It is undisputed that after the expiration of the contract, and without giving the Union notice and an opportunity to bargain, Respondent raised wages about August 1, 1996;[51] failed to comply with the reporting-pay provisions of the 1993–1996 agreement; failed to comply with the hiring-hall provisions of the 1993–1996 agreement;[52] and failed to pay benefit contributions on behalf of unit employees. It is likewise undisputed that beginning no later than July 29, 1996, 2 days before the contract expired, Respondent failed to pay employees for all hours worked, although such payments are required by the 1993–1996 agreement, the Union never agreed to such a practice, and the Union was not given prior notice and an opportunity to bargain about it. I find that by engaging in such conduct, Respondent further violated Section 8(a)(5) and (1) of the Act.

(4) Whether Respondent violated Section 8(a)(5) and (1) in connection with the Union's requests for information

It is well settled that the names and addresses of employees hired into the bargaining unit are presumptively relevant to the performance of a union's duty to represent employees in the bargaining unit. *MBC Headwear*, supra, fn. 2, 427. The names and addresses of the unit employees hired by Respondent between August 1, 1996, and October 23, 1996, were requested by the Union on October 23, 1996. Although the record shows that during this 3-month period, Respondent had hired only about 12 employees, and their names and addresses were obviously in Respondent's records, Respondent unexplainedly delayed for a month in supplying this information. I find that Respondent violated Section 8(a)(5) and (1) of the Act by unduly delaying its provision of this information. See cases cited supra fn. 42.

The record shows that the Union had good reason to suspect (and, it was eventually stipulated, was correct in its suspicions) that CIC was an alter ego of Staunton, and had good reason to suspect that through CIC, Staunton was failing to comply with the statutory duties flowing from its 1993-1996 contract with the Union. Accordingly, I find to have been relevant and necessary, to the Union's performance of its statutory duty to represent the bargaining unit, the following information requested by the Union on December 24, 1996, with respect to the relationship between Staunton and CIC: (1) the names of CIC's owners, co-partners, parties in interest, officers, and directors; (2) whether CIC was a corporation or a fictitious named entity; (3) whether CIC was registered as a corporation or under the Illinois Assumed Business Name Statute (and if so, the county and date of registration); (4) the nature of CIC's business; (5) CIC's address and telephone number; (6) whether during 1995 and/or 1996 Staunton subcontracted construction work to or from CIC, specifying each such project; (7) whether Staunton and CIC interchanged construction equipment or construction employees (and if so, on which projects), in 1995 and/or 1996; (8) whether Staunton supplied construction materials, facilities, or tools to CIC during 1995 and/or 1996; and (9) whether Staunton's president, Robert Mengelkamp, made decisions with respect to the management or employment policies of CIC, which was owned by his wife. For the same reason, I find relevant and necessary to the performance of the Union's statutory duty of representation the information requested by the Union on May 27, 1997, consisting of Staunton's and CIC's payroll records and paychecks, time cards, and quarterly reports to the Illinois Department of Employment Security for the period between August 1, 1996, and May 27, 1997. Also, because the Union had received reports that Grant (like CIC) was owned by Robert Mengelkamp's wife and was a subcontractor to Staunton and that all three companies had the same address, the Union was entitled to the information, which it requested on various dates between October 21, 1996, and May 27, 1997, as to the names of Grant's officers, directors, and principal stockholders; the date of its incorporation; Grant's address and telephone number; the nature of Grant's business; whether during 1995 and/or 1996 Staunton subcontracted construction work to or from Grant, or interchanged employees or equipment, identifying each project where such subcontracting or interchange occurred; whether during 1995 and/or 1996 Staunton supplied Grant with construction material and related facilities; and whether Robert Mengelkamp made decisions with respect to Grant's management and/or employment facilities. *Walter N. Yoder & Sons, Inc. v. NLRB*, 754 F.2d 531 (4th Cir. 1985);

[50] *Manna Pro Partners v. NLRB*, 986 F.2d 1346, 1348, 1354 (10th Cir. 1993); *Haberman Construction Co.*, 236 NLRB 79, 86–87 (1978), enfd. in relevant part, 641 F.2d 351, 357-358 (5th Cir. 1981); *MBC Headwear, Inc.*, 315 NLRB 424, 428 (1994); *McKenzie Engineering Co.*, 326 NLRB No. 50, JD slip op. 8–9, 18 (August 27, 1998).

[51] The complaint does not allege that Respondent violated the Act by lowering wages about September 1996 (see supra Part III E 2a).

[52] Respondent's counsel disavowed on the record any contention that such hiring -hall provisions are not mandatory subjects of collective bargaining.

Genovese and DiDonno, Inc., 322 NLRB 598 (1996); *McCormick Dray Lines, Inc.*, 317 NLRB 155, 160–161 (1995); *National Broadcasting Co.*, 318 NLRB 1166, 1168–1169 (1995).

However, Respondent never did supply the Union with the requested payroll records and paychecks, time cards, and quarterly reports. I find that by failing and refusing to supply the information, Respondent violated Section 8(a)(5) and (1). Furthermore, after initially telling the Union on November 25, 1996, that he had no knowledge as to Grant's status (a representation which was almost certainly false, in view of his concomitant statement that Grant was his wife's company), Robert Mengelkamp unexplainedly delayed until April 22, 1997, before telling the Union that Grant had been inactive for some time and had been dissolved in February 1997. I find that Respondent violated Section 8(a)(5) and (1) of the Act by thus unreasonably delaying the provision of this information; see cases cited supra fn. 42. Moreover, Respondent unexplainedly delayed in even purportedly supplying the requested information as to CIC; more specifically, Respondent did not even purport to supply this information until November 25, 1996; April 22 and 29, 1997; and June 1, 1997. Further, much of the information which it did purportedly supply was false or misleading. More specifically, Respondent's list of jobs subcontracted by Staunton to CIC omitted the Carlinville sewer project, and untruthfully asserted that Robert Mengelkamp had made no decisions in regard to CIC's management or employment policies and that CIC and Staunton had not interchanged employees. I find that Respondent violated Section 8(a)(5) and (1) of the Act by unreasonable delay in providing the Union with requested information as to CIC, and by providing false and misleading information. See cases cited supra fns. 42–43.

CONCLUSIONS OF LAW

1. Respondent Staunton and CIC are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and are and have been at all material times, alter egos or a single integrated business enterprise and a single employer within the meaning of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act in the following respects:

a. By telling employee Gary Randle Titsworth, in mid-March 1996, that he needed to decide whether he was going to stay with the Union and go back to the union hall and look for work, or stay with Respondent and work nonunion.

b. By telling employee Titsworth, on June 1, 1996, after he had said he was not staying with Respondent and consequently working nonunion, to bring in his truck and park it, "You're done."

c. By telling employee David Kelly Brown, on September 11, 1996, that he would have to return to the union hall for referral if he would not go nonunion, and that he would have to give up his union card if he wanted to go back to work for Respondent.

d. By asking job applicant Terry Deets, on September 3, 1996, whether he had a union card.

e. By telling job applicant Charles Hundley in April 1996, and employee Brown in July and September 1996, that Respondent was going nonunion.

4. Respondent has violated Section 8(a)(3) and (1) of the Act in the following respects:

a. By discharging employee Titsworth on June 1, 1996.

b. By discharging employees Dudley Luebbert and Leonard Moss on September 30, 1996.

c. By laying off employee David Kelly Brown about October 17, 1996, and failing to recall him until about April 17, 1997.

d. By failing to recall employee Robert Merkle, Sr., since about October 19, 1996.

5. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All operating engineer equipment operators, operating engineer apprentices, operating engineer foremen, master mechanics, assistant master mechanics, operating engineer mechanics, operating engineer mechanic trainees, operating engineer engine men, operating engineer greasers and operating engineer oilers and firemen employed by Respondent Staunton and Respondent CIC within the territorial jurisdiction of the Union, excluding office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

6. Since about August 1, 1993, and at all material times, the Union has been the exclusive collective-bargaining representative of the unit pursuant to Section 9(a) of the Act.

7. Respondent has violated Section 8(a)(5) and (1) of the Act in the following respects:

a. By failing, without the union's consent, to honor the terms of the August 1, 1993–July 31, 1996, collective-bargaining agreement between Respondent and the Union.

b. By withdrawing recognition from the Union about August 1, 1996, as the exclusive collective-bargaining representative of the unit.

c. By engaging in the following conduct without giving the Union prior notice and an opportunity to bargain:

(1) Raising the wages of unit employees about August 1, 1996.

(2) Failing since about July 29, 1996 to comply with the hiring-hall provisions of the most recent collective-bargaining agreement.

(3) Failing since about June 1, 1996, to pay benefit contributions on behalf of unit employees.

(4) Failing to pay unit employees reporting pay, and pay for all hours worked.

(d) By failing and refusing to provide the Union with certain information since about May 27, 1997; by unreasonable delay, between October 23, 1996, and November 25, 1996, in providing the Union with other information; by unreasonable delay, between December 24, 1996, and April 29, 1997, in providing the Union with other information; and by providing the Union with false and misleading information about April 29, 1997.

8. The unfair labor practices set forth in Conclusions of Law 3, 4, and 7 affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

The parties stipulated that if a remedy is ordered, Staunton and CIC are jointly and severally liable.

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist from such conduct, and from like or related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act. Thus, Respondent will be required to offer reinstatement to employees Luebbert, Moss, and Merkle,[53] and to the extent Respondent has not already done so, to make them, Titsworth, and Brown whole for any loss of pay they may have suffered by reason of the discrimination against them. Because the job from which Luebbert, Moss, and Merkle were unlawfully separated has been completed, at the compliance phase of this proceeding Respondent will have the opportunity to limit the duration of the remedy by showing, by a preponderance of the evidence, that they would not have been transferred to other sites after the completion of the project on which they were working. *Norman King Electric*, 324 NLRB 1077 (1997); *Urban Constructors, Inc.*, 320 NLRB 1166 (1996); *American Electric*, 325 NLRB 637 (1998). In addition, Respondent will be required to make employees and supervisors whole for any losses they may have suffered by reason of Respondent's failure, at any time after June 1, 1996, to honor the contract between the Union and Staunton which expired at the end of July 1996. *F. G. Lieb Construction Co.*, 318 NLRB 914 (1995); *SAS Electrical*, supra, 323 NLRB 1239 (1997). Further, Respondent will be required, on the union's request, to rescind all unilateral changes, put into effect after the expiration of the 1993–1996 contract, in the employees' terms and conditions of employment generated by the contract; but nothing here shall permit or require any such action if not requested by the Union. In addition, Respondent will be required to make the employees in the bargaining unit whole for any losses they may have suffered by reason of such unilateral changes.[54] Also, Respondent will be required to offer full and immediate employment to any individuals who since June 1, 1996, were denied an opportunity to work for Respondent as employees because of its failure to comply with the hiring-hall provisions of Respondent's 1993–1996 agreement with the Union and with its failure to continue to observe that condition of employment (as to vacancies for supervisors, see supra fn. 54) after the contract expired, and to make them whole for any loss of earnings they may have suffered by reason of Respondent's failure to hire them, as prescribed in *J.E. Brown Electric*, 315 NLRB 620 (1994); and in *SAS Electrical*, supra.[55] Loss of wages because of severance from or failure to obtain employment with Respondent is to be calculated as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950).

Further, Respondent will be required to make whole these employees and individuals by making all required fringe benefit contributions that have not been made since June 1, 1996 (but, as to supervisors and applicants for supervisory positions, up to July 31, 1996, only), including any additional amounts due the funds, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979),[56] and by reimbursing the employees and individuals for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). All payments to individuals as described in this paragraph are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971).

All payments due individuals under the terms of the Order are to be made with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, Respondent will be required to bargain with the Union, on request, and to post and mail appropriate notices. As to the mailing requirement, I note that Respondent employs

[53] Titsworth and Brown have already been reinstated. Merkle attained his 65th birthday on October 17, 1996, the date on which Respondent laid him off from the Route 16 job with the implied promise, which Respondent did not keep, that he would be recalled when work resumed on that job. He testified in October 1997, that he had retired from the trade on December 1, 1996. However, Merkle credibly testified that if Respondent had recalled him to work, he would have returned, "I like to work." Accordingly, and because Respondent's unlawful failure to recall him about late October 1996, has rendered it uncertain whether he would have retired on December 1, 1996, or any later date had he still been actively working for Respondent, I conclude that it is appropriate to require Respondent to offer him reinstatement. Of course, any period during which he failed to make a reasonable search for work (because he wanted to be in retirement status or for any other reason) will be excluded from the backpay period. No different result is required by *Richard W. Kaase Co.*, 162 NLRB 1320, 1322 (1967), the most apposite case revealed by my research. *Kaase* was a backpay case in which a discriminatee's failure to seek work would have affected the backpay specification, and there is no indication in *Kaase* that backpay was claimed for any period following the discriminatee's discharge and concomitant retirement.

[54] In view of the underlying unfair labor practices found in *F. G. Lieb Construction Co.*, 311 NLRB 810 (1993), and SAS, supra—namely, noncompliance with collective-bargaining agreements during their term—I do not read either *SAS* or *Lieb Construction*, 318 NLRB 914, as calling for offers of employment to or reimbursement to supervisors with respect to periods after the expiration of a contract which included these supervisors in the contract unit.

[55] Although both *Brown* and *SAS* involved a failure to honor contractual hiring-hall clauses during the effective period of the contract, with respect to employees I read *Brown* as extending to the appropriate remedy for such conduct after the contract has expired. I so conclude because, when instituting the use of a reinstatement order to remedy Section 8(a)(5) failures to hire through a union hiring hall, *Brown* overruled to that extent cases which involved failure to use the hall during periods which fell, wholly or in part, after the expiration of the contracts requiring use of the hall. See the following cases thus overruled in *Brown*, supra, 315 NLRB at 622–623: *American Commercial Lines*, 291 NLRB 1066, 1076 (1988); *Southwestern Steel & Supply*, 276 NLRB 1569, 1573 (1985), enfd. 806 F.2d 1111 (D.C. Cir. 1986); *Southwest Security Equipment Corp.*, 262 NLRB 665, 669–670 (1982), enfd. 736 F.2d 1332 (9th Cir. 1984), cert. denied 470 U.S. 1087 (1985); *American Commercial Lines*, 296 NLRB 622, 625, 641 (1989).

[56] To the extent that any individual who is entitled to relief, as described above, has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's contribution for the period since June 1, 1996, the Respondent will reimburse that individual, but the amount of such reimbursement will constitute a setoff to the amount that Respondent otherwise owes the funds. *Donovan & Associates*, 316 NLRB 169, 170 fn. 2 (1995).

employees at multiple jobsites, that the record evidence shows that jobs involved in Respondent's unfair labor practices have been completed, and that Respondent has likely completed other jobs since its unfair labor practices began. See *Jo-Del, Inc.*, 326 NLRB No. 27 (August 24, 1998); *3E Co.*, 313 NLRB 12 fn. 2 (1993), enfd. 26 F.3d 1 (1st Cir. 1994). Because the beneficiaries of this Order may include individuals who have never worked and will never work for Respondent, in addition to mailing notices, and posting notices at its own places of business, Respondent will be required to sign copies of the notice to be posted by the Union, if it is willing, at places where notices to employees seeking referral from the Union are customarily posted; see *Bufco Corp.*, 291 NLRB 1015, 1018, 1033 (1988), enfd. 899 F.2d 608 (7th Cir. 1990). Because the information requested by the Union but relevant only to whether Staunton and CIC are alter egos or a single employer has been rendered unnecessary by the hearing stipulation that Staunton and CIC occupy that status, and because the other information which Respondent unlawfully withheld from or falsified to the Union is included in the instant record, the Order will not affirmatively require Respondent to provide any specific information to the Union. As to the order requested by the General Counsel relating to records to be preserved and provided to the Board, see *Atwood Mobile Products, Division of Atwood Industries, Inc.*, 326 NLRB No. 115, slip op. 1, JD slip op. 11 (September 30, 1998).

On the basis of these findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended Order.[57]

ORDER

Respondent Staunton Fuel & Material, Inc., and Marilyn Mengelkamp d/b/a Central Illinois Construction, alter egos and a single employer, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees that they have to choose between adherence to International Union of Operating Engineers, Local Union No. 520, AFL–CIO, and employment with Respondent.

(b) Telling employees that they are being discharged for refusal to go nonunion.

(c) Asking employees about their union activities in a manner constituting interference, restraint, or coercion.

(d) Telling employees that Respondent is going nonunion, at a time when Respondent has no right to go nonunion.

(e) Discharging employees, laying off employees, failing to recall employees, or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment, to discourage membership in Local 520 or any other labor organization.

(f) Refusing to bargain with Local 520, on request, as the exclusive bargaining representative, under Section 9(a) of the Act, of the following unit:

> All operating engineer equipment operators, operating engineer apprentices, operating engineer foremen, master mechanics, assistant master mechanics, operating engineer mechanics, operating engineer mechanic trainees, operating engineer engine men, operating engineer greasers and operating engineer oilers and firemen employed by Respondent Staunton and Respondent CIC within the territorial jurisdiction of Local 520, excluding office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

(g) Failing, without Local 520's consent, to honor the terms of any collective-bargaining agreement between Respondent and Local 520 with respect to that unit.

(h) Unilaterally changing terms and conditions of employment of employees in that unit, without giving Local 520 prior notice and an opportunity to bargain.

(i) As to information requested by Local 520 necessary and relevant to its function as collective-bargaining representative of employees in that unit, failing or refusing to supply such information, unreasonably delaying in supplying such information, or providing false or misleading information.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Dudley Luebbert, Robert Merkle, Sr., and Leonard Moss full reinstatement to their former jobs, or if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Dudley Luebbert, Leonard Moss, and Gary Randle Titsworth, to the unlawful layoff of and failure to recall David Kelly Brown, and to the unlawful failure to recall Robert Merkle, Sr., and within 3 days thereafter notify these employees that this has been done and that such unlawful personnel action will not be held against them in any way.

(c) Offer within 14 days from the date of this Order, full and immediate employment to those work applicants who would have been referred to Respondent for employment through Local 520's hiring hall were it not for the Respondent's unlawful conduct, and make them whole for any loss of earnings and other benefits they may have suffered by reason of Respondent's failure to hire them, in the manner prescribed in the remedy action of this Decision.

(d) To the extent Respondent has not already done so, jointly and severally make David Kelly Brown, Dudley Luebbert, Robert Merkle, Sr., Leonard Moss, and Gary Titsworth whole for any loss of earnings and other benefits as a result of the discrimination against them, in the manner set forth in the remedy section of this Decision.

(e) On Local 520's request, as to Respondent's unilateral changes in wages and working conditions without giving Local 520 prior notice and an opportunity to bargain, restore the wages and working conditions to their prior status; but nothing

[57] 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 Section 102.48, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

in this Order permits or requires such restoration absent Local 520's request.

(f) For the period beginning June 1, 1996, to the extent Respondent has not already done so, jointly and severally make whole the employees employed by it in the bargaining unit, as well as those individuals who were unlawfully denied an opportunity to work, for losses suffered as a result of Respondent's unilateral changes in wages and working conditions; reimburse them for any expenses ensuing from Respondent's failure to make contributions to the benefit funds; and make whole the benefit trust funds for losses suffered; all in the manner prescribed in the remedy section of this Decision. This clause of the Order also applies to any supervisors who should have been referred to jobs in, or may have been in, the contract unit, with respect to the period before August 1, 1996.

(g) Preserve and, within 14 days of a request, provide at the office designated by the Board or its agent, a copy of all payroll records, social security payment records, timecards, personnel records, and all other records, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

(h) On request by Local 520, recognize and bargain collectively with Local 520 as the exclusive representative of the employees in the aforesaid unit, with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody it in a signed written agreement.

(i) Within 14 days after service by Region 14, post at its facilities in Staunton, Illinois, and at each of its jobsites, copies of the attached notice marked "Appendix."[58] Copies of the notice, on forms provided by the Regional Director for Region 14, shall be posted by the Respondent and maintained for 60 consecutive days, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, Respondent shall provide signed copies of the notice for posting by Local 520, if it is willing, at the locations where employees go when seeking referral through Local 520's hiring hall.

(j) Mail a copy of the notice to all employees employed by the Respondent in the aforesaid unit at any time since March 15, 1996, and persons employed by Respondent as supervisors in the contract unit at any time in June or July 1996. Such notices shall be mailed to the last known address of each of the individuals above. Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be mailed within 14 days after service by the Region.

(k) 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 Respondent has taken to comply.

Dated, Washington, D.C. December 17, 1998

APPENDIX

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

After a hearing in which all parties had the opportunity to present evidence and state their positions, the National Labor Relations Board has found that we violated the National Labor Relations Act in certain respects and has ordered us to post and abide by this notice.

WE WILL NOT tell you that you must choose between adherence to International Union of Operating Engineers, Local Union No. 520, AFL–CIO, and employment by us.

WE WILL NOT tell you that you are being discharged for refusing to go non-union.

WE WILL NOT ask you about your union activities in a manner constituting interference, restraint, or coercion.

WE WILL NOT TELL YOU that we are going nonunion, at a time when we have no right to go nonunion.

WE WILL NOT discharge you, lay you off, fail to recall you, or otherwise discriminate in regard to hire or tenure of employment or any term or condition of employment, to discourage membership in Local 520 or any other union.

WE WILL NOT refuse to bargain with Local 520, on request, as the exclusive bargaining representative, under Section 9(a) of the Act, of the following unit of employees:

> All operating engineer equipment operators, operating engineer apprentices, operating engineer foremen, master mechanics, assistant master mechanics, operating engineer mechanics, operating engineer mechanic trainees, operating engineer engine men, operating engineer greasers and operating engineer oilers and firemen employed by us within Local 520's territorial jurisdiction, excluding office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT fail, without Local 520's consent, to honor the terms of any collective-bargaining agreement between us and Local 520 with respect to that unit.

WE WILL NOT unilaterally change terms and conditions of employment of employees in that unit, without giving Local 520 prior notice and an opportunity to bargain.

As to information requested by Local 520 necessary and relevant to its function as collective-bargaining representative of employees in that unit, WE WILL NOT fail or refuse to provide such information, unreasonably delay in supplying such information, or provide false and misleading information.

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

WE WILL, within 14 days of the Board's order, offer Dudley Luebbert, Robert Merkle, Sr., and Leonard Moss full reinstatement to their former jobs, or if such jobs no longer exist, sub-

[58] 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."

stantially equivalent jobs, without prejudice to their seniority or any other rights previously enjoyed. Gary Titsworth and David Kelly Brown have already been reinstated.

To the extent we have not already done so, WE WILL make David Kelly Brown, Dudley Luebbert, Robert Merkle, Sr., Leonard Moss, and Gary Titsworth whole, with interest, for any loss of earnings and other benefits as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the unlawful personnel action taken against all of these employees, and within 3 days thereafter notify them that this has been done and that such unlawful personnel action will not be held against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer full and immediate employment to those work applicants who would have been referred to us for employment through Local 520's hiring hall as employees in that unit were it not for our unlawful conduct.

WE WILL make these work applicants, and also the work applicants who would have been referred to us for employment before August 1, 1996, through Local 520's hiring hall as supervisors in the contract unit, whole, with interest, for any loss of pay and other benefits they may have suffered by reason of our failure to hire them.

On Local 520's request, as to our unilateral changes in wages and working conditions without giving Local 520 prior notice and an opportunity to bargain, WE WILL restore the wages and working conditions to their prior status; but nothing in the Board's order permits or requires such restoration without Local 520's request.

For the period beginning June 1, 1996, to the extent we have not already done so, WE WILL make whole with interest the employees employed by us in the bargaining unit, as well as those individuals who were unlawfully denied work, for losses suffered as a result of our unilateral changes in wages and working conditions; reimburse them, with interest, for any expenses ensuing from our failure to make contributions to the benefit funds; and make whole the benefit trust funds for losses suffered. With respect to the period before August 1, 1996, we will pay all these amounts as to supervisors, or persons who would have been referred to supervisory jobs, in the contract unit.

On request by Local 520, WE WILL recognize and bargain collectively with Local 520 as the exclusive representative of our employees in the unit described above, with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment; and if an understanding is reached, embody it in a signed written agreement.

STAUNTON FUEL & MATERIAL