No. 26-

IN THE

Supreme Court of the United States

RIETH-RILEY CONSTRUCTION CO., INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Many federal agencies create rules of conduct through adjudication. "The National Labor Relations Board," however, "uniquely among major federal administrative agencies, has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rulemaking." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). In this case, the NLRB interpreted a rule that it had previously created by adjudication, and Petitioner challenged that interpretation as inconsistent with the rule's plain text. In rejecting that argument, the Sixth Circuit held that it need not construe agency decisions announcing adjudicative rules "like statutes."

This raises an important question of federal law that has not been, but should be, settled by this Court. Under the Administrative Procedure Act, a reviewing court "shall . . . determine the meaning or applicability of the terms of an agency action"—a term that includes an agency's own rules, whether announced through notice-and-comment rulemaking or adjudicative order. 5 U.S.C. §§ 706, 701(b)(2), 551(13). This Court has held, moreover, that reviewing courts are entitled to take the NLRB's adjudicative standards "to mean what they say, and to conduct substantial-evidence review on that basis," *Allentown Mack*, 522 U.S. at 376–77, and that courts must exercise independent judgment—applying at the outset all traditional tools of construction—when reviewing an agency's interpretation of a statute, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394, 403–04 (2024), or its own regulations, *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019).

The question presented is: Whether a reviewing court must independently interpret a standard of conduct that an agency announced through adjudication.

PARTIES TO THE PROCEEDING

Petitioner is Rieth-Riley Construction Co., Inc., the petitioner-cross-respondent below. Respondents are the National Labor Relations Board, the respondent-cross-petitioner below, and Local 324, International Union of Operating Engineers, AFL-CIO, which intervened in support of the Board below.

CORPORATE DISCLOSURE STATEMENT

Rieth-Riley Construction Co., Inc. is not a subsidiary or affiliate of a publicly owned corporation, and no publicly held company owns 10% or more of Rieth-Riley's stock. No other publicly owned corporation or its affiliate has a substantial financial interest in the outcome of this litigation.

STATEMENT OF RELATED PROCEEDINGS

Rieth-Riley Constr. Co. v. NLRB, Sixth Circuit Case Nos. 24-2105 & 25-1073. The court's opinion is reported at 173 F.4th 269 (Apr. 13, 2026), *reh'g en banc denied* (June 17, 2026). The appeal arose from NLRB Case Nos. 07-CA-285321, 07-CA-300190, 07-CA-300191. The opinion of the National Labor Relations Board is reported at 373 NLRB No. 149 (Dec. 13, 2024). The Sixth Circuit's ruling is subject to a separate petition for certiorari filed on the same day as this petition.

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PETITION FOR WRIT OF CERTIORARI

For nearly 70 years, the National Labor Relations Board's decision in *Retail Associates, Inc.*, 120 NLRB 388 (1958), Pet.App.227a–45a, has governed when a party may withdraw from a multiemployer bargaining unit. The operative rule is phrased in two prongs: withdrawal is permitted only upon adequate written notice given prior to "the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations." Each prong is anchored to the definite article "the"—and thus to a specific date that must actually exist.

In the agency decision below, a divided Board held a union's withdrawal timely even though it came after the contract-modification deadline and even though no date to begin negotiations was ever agreed upon. The majority reached that result by quietly rewriting the second prong of the *Retail Associates* standard—reading "the agreed-upon date" to mean "any agreed-upon date"—and thereby nullifying the first. *Rieth-Riley Constr. Co.*, 374 NLRB No. 13 (Dec. 16, 2024), Pet.App.39a–40a; *see also* Pet. App.78a–79a (Member Kaplan, dissenting in part). The Sixth Circuit enforced that result, holding that a Board's adjudicative standard need not be read like a statute. *Rieth-Riley Constr. Co. v. NLRB*, 172 F.4th 492 (6th Cir. 2026), Pet.App.15a, *reh'g en banc denied*.

That holding cannot be reconciled with this Court's precedent or the Administrative Procedure Act. *Allentown Mack Sales and Service, Inc. v. NLRB* holds that an agency may not apply "a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced." 522 U.S. 359, 374

(1998). And Section 706 of the APA requires reviewing courts to "determine the meaning or applicability of the terms of an agency action"—a mandate this Court recognized in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 391 (2024) (quoting 5 U.S.C. § 706). The Sixth Circuit abdicated that duty. It said it did not need to independently construe the *Retail Associates* standard, and in so doing allowed the Board to recharacterize the standard without consequence on judicial review.

The conflict matters beyond this case. The NLRB "has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rulemaking," *Allentown Mack*, 522 U.S. at 374—and it is far from alone in engaging in case-by-case rulemaking. The Federal Trade Commission, Securities and Exchange Commission, Environmental Protection Agency, Federal Energy Regulatory Commission, Board of Immigration Appeals, and U.S. Patent and Trademark Office, among other agencies, all issue rules through adjudication that regulated parties must obey or else face the prospect of an enforcement action—just as if those rules were statutes or substantive legislative rules.* If a reviewing court need not independently construe these standards—and if the issuing agency may silently recharacterize them without consequence—then the safeguard of reasoned decisionmaking that the APA established and that *Loper Bright* recognized is a dead letter for an entire category of agency law that currently lacks any settled interpretive methodology.

* *See* Christopher J. Walker, Melissa Wasserman, & Matthew Lee Wiener, Precedential Decision Making in Agency Adjudication 27, 35–36 & Appendices B–Q (Admin. Conf. of the U.S. Dec. 6, 2022), https://www.acus.gov/sites/default/files/documents/Precedential%20Decision%20Making%20in%20Agency%20Adjudication%20-%20Final%20Report%202022.12.06_0.pdf.

Adjudicative standards, no less than statutes and regulations, must mean what they say. This Court should grant certiorari to establish that principle.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet.App.1a–29a) is reported at *Rieth-Riley Construction Co., Inc. v. NLRB*, 172 F.4th 492 (6th Cir. Apr. 8, 2026). An order denying rehearing en banc (Pet.App.225a–26a) was entered June 17, 2026. The decision and order of the National Labor Relations Board (Pet.App.30a–224a) is reported at *Rieth-Riley Construction Co., Inc.*, 374 NLRB No. 13 (Dec. 16, 2024).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its opinion and judgment on April 8, 2026, and denied rehearing en banc on June 17, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is filed on September 3, 2026, and is therefore timely. Sup. Ct. R. 13.1, 13.3.

STATUTORY PROVISIONS AND INTERNAL OPERATING PROCEDURE INVOLVED

5 U.S.C. § 706 (Administrative Procedure Act—Scope of Review):

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and

determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 701 (Application; definitions)

(b) For the purpose of this chapter—

***

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 551 (Definitions)

For the purpose of this subchapter—

***

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.]

6 Cir. I.O.P. 34 (Oral Argument—Calendaring; Panel Selection and Identity; Notice of Hearing, Postponement, and Presentation of Oral Argument; Screening and Summary Decisions)

(a) **Calendaring.**

(1) **Annual Schedule.** The court generally sits over one or two-week periods scheduled

> so as to afford all judges at least five weeks between sittings. Active judges are generally scheduled to sit four days during one of the sitting weeks. At least six active judges are assigned to one of the two sitting weeks at random; the balance of the court's active judges are assigned to the other sitting week. Judges are later assigned to panels during the sitting weeks using an automated routine which randomizes the creation of panels based on the judges assigned to the sitting week.

***

(b) **Panel Selection and Identity.**

> (1) **Subsequent Appeals Returned to Original Panel.** In appeals after this court returns a case to the lower court or agency for further pro-ceedings, or after the Supreme Court of the United States remands a case to this court, the original panel will determine whether to hear the appeal or whether it should be assigned to a panel at random.

STATEMENT OF THE CASE

For nearly seven decades, the NLRB's *Retail Associates* standard has governed when a party may withdraw from a multiemployer bargaining unit—until the Board, in this case, quietly rewrote that standard while professing to apply it.

Rieth-Riley Construction Co., Inc., is an Indiana-based construction contractor that performs asphalt paving and other highway-and-road-construction work in Michigan. Administrative Record ("AR") 1504–05. During the construction season, it employs approximately 130 to 170 operating engineers in Michigan, who have been represented by Local 324, International Union of Operating Engineers, since at least 1993. AR1505–08; AR2783–86. Historically, the Union bargained with Rieth-Riley not one-on-one but as part of a multiemployer group, through an employer association—the Michigan Infrastructure and Transportation Association, or "MITA." AR1509–10.

The governing multiemployer agreement, which the parties call the "Road Agreement," contained an "evergreen" contract-modification provision requiring any party who wished to terminate or modify the agreement to give written notice at least 60 days before its expiration. AR2779. With a June 1, 2018, expiration date, the deadline for such notice was April 2, 2018. *See id.* A party that failed to give timely notice by that date could not unilaterally alter the agreement, which would instead "continue in force from year to year." *Id.*

1. The *Retail Associates* Rule

The rule that governs this dispute comes from the National Labor Relations Board's 1958 decision in *Retail Associates, Inc.*, Pet.App.227a. There, the Board found that a union's attempted withdrawal from an association-wide unit was neither unequivocal nor made in good faith. Pet.App.234a. Because the union had objected that under the Board's rules it could never withdraw from multiemployer bargaining, unlike a company, the Board thought "it reasonable to establish in appropriate future cases, where such issues are squarely presented, specific ground rules, resting upon existing principles and policies under the Act, to govern questions of representation in multiemployer bargaining units." Pet.App.236a. The Board thus announced its withdrawal rule prospectively—as a standard to guide conduct in later cases in which the question would be presented. Pet.App.236a.

The Board announced two "specific ground rules." Pet. App.236a. The first governs withdrawal before bargaining begins. The Board declared that it would "refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations." Pet.App.236a. The second governs withdrawal after bargaining begins: "Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances." Pet.App.236a.

The Board grounded these controls in the National Labor Relations Act's overriding concern for stability in bargaining relationships. It explained that the right to withdraw from a multiemployer unit "has never been held, for Board purposes, to be free and uninhibited, or exercisable at will or whim," because "to tolerate such inconstancy and uncertainty in the scope of collective-bargaining units" would "ignore the fundamental purpose of the Act of fostering and maintaining stability in bargaining relationships." Pet.App.233a. Multiemployer units, the Board reasoned, "can be accorded the sanction of the Board only insofar as they rest in principle on a relatively stable foundation," so "reasonable controls" must "limit the parties as to the time and manner that withdrawal will be permitted." Pet.App.233a–34a. The "timing of an attempted withdrawal," the Board emphasized, "is an important lever of control in the sound discretion of the Board to ensure stability of such bargaining relationships." Pet.App.236a. Any withdrawal, moreover, must be "unequivocal, and exercised at an appropriate time." Pet.App.234a.

2. The Parties' Pre-withdrawal Communications

The events giving rise to this case began in early 2018, as the Road Agreement approached expiration. In February 2018, MITA and the Union exchanged "reopener" letters. MITA's letter stated the Road Agreement would terminate upon expiration and invited the Union to propose dates "for negotiations on a successor agreement." AR2787. The Union's corresponding letter, signed by its business manager, stated: "The Union hereby offers to meet and confer for the purpose of negotiating a new contract. . . ." AR2793. That same day, the business manager filed a notice with the Federal Mediation and Conciliation Service with the "Reopener" box checked. AR3839; AR768–69.

Over the following weeks, the Union's conduct continued to convey an intent to bargain on a multiemployer basis. On March 20, 2018, its business manager asked MITA for proposed bargaining dates, AR1440–41; AR3879, and as late as April 2, 2018—the contract-modification deadline—the Union had given no indication that the decades-old multiemployer relationship was about to change, *see* Pet.App.34a–35a.

On April 26, 2018—after the modification deadline had passed—the business manager realized the Union had sent a reopener letter rather than a bare termination letter. Pet.App.35a. But neither he nor anyone at the Union ever told MITA or Rieth-Riley that the reopener letter had been sent in error—not in April 2018, not when the Union purported to withdraw, and not until the hearing some 18 months later, when the Union first claimed the letter had been sent by "mistake." *See* Pet.App.35a; *see also* AR286–87; AR315–18; AR1431–33. MITA therefore reasonably took the Union's reopener letter for exactly what it appeared to be—a signed, sincere offer to negotiate a new multiemployer agreement. *See* AR1432–33.

3. The Union's Belated Withdrawal

On May 1, 2018, the chair of MITA's labor-relations division again emailed the Union's business manager asking for dates to bargain a successor Road Agreement. AR1516–17; AR3291. The next day, May 2, 2018, the Union sent MITA and Rieth-Riley a short email stating that it "except[ed]" [sic] MITA's termination of the Road Agreement and was "withdraw[ing] from Multi[]employer bargaining with MITA for road." AR3293; AR977. That was the first time the Union ever said it did not intend to continue bargaining with MITA on a multiemployer basis. *See* Pet.App.35a. As the chair of MITA's labor-relations division put it, "prior to that [email,] we all thought that we were going to negotiate like we always do." AR1035.

The withdrawal came 29 days after the April 2, 2018, contract-modification deadline, 42 days after the Union's business manager asked MITA for bargaining dates, and roughly 70 days after the parties exchanged reopener letters. And no date to begin multiemployer negotiations had ever been agreed upon. Pet.App.170a.

4. The Aftermath

MITA and Rieth-Riley refused to treat the belated withdrawal as effective and pressed the Union to return to the bargaining table. Pet.App.36a, 116a–17a. The Union rebuffed every overture, Pet.App.35a–36a, insisting it was not "required to engage in any bargaining on a multi[]employer basis," AR2886. Rieth-Riley therefore unilaterally implemented a proposed wage increase. Pet.App.132a–33a. Tensions escalated: after a one-day picket at a MITA contractor's jobsite, MITA-represented contractors—including Rieth-Riley—began a four-week lockout on September 4, 2018. Pet.App.36a, 145a–55a. The lockout ended after Michigan Governor Rick Snyder intervened and the parties agreed to negotiate on an individual-employer basis. Pet.App.155a. Over ten subsequent bargaining sessions, Rieth-Riley and the Union failed to reach agreement. Pet.App.45a, 160a–64a. On July 30, 2019, the Union's business manager called a strike that continues to this day. Pet.App.165a–66a. Meanwhile, at the Union's urging, the NLRB's General Counsel had filed an unfair-labor-practice complaint. Pet. App.163a; AR2554–55 & AR2702–16.

5. The Proceedings Before the ALJ and the Board

After 17 days of hearings in the consolidated cases, an administrative law judge issued his decision in January 2022. Pet.App.30a, 100a, 95a–224a. The ALJ ruled against Rieth-Riley on "the threshold issue from which the rest of the legal dominos fall," concluding that the Union had timely withdrawn from multiemployer bargaining and that Rieth-Riley's lockout and certain unilateral compensation changes therefore violated the NLRA. Pet.App.169a–75a.

On December 16, 2024, a divided Board held the Union's withdrawal timely under the first *Retail Associates* rule. Pet.App.30a–43a. The Board acknowledged the Union's May 2 withdrawal came after the April 2 contract-modification deadline. Pet.App.39a. But it held the Union was not required to meet that deadline because the *Retail Associates* rule is "plainly stated in the disjunctive": withdrawal must occur before "the date set by the contract for modification, *or* to the agreed-upon date to begin the multiemployer negotiations." Pet.App.39a–40a (Majority's emphasis). Because the union's notice of withdrawal "was given prior to **any** agreed-upon date for beginning multiemployer negotiations," the majority said the notice was "timely." Pet.App.37a (emphasis added).

From that single premise the rest of the Board's order followed. Having deemed the withdrawal timely, the majority held that Rieth-Riley could not insist on multiemployer bargaining, that its lockout and 2018 wage increase were therefore unlawful, and—reversing the ALJ—that the resulting strike was an "unfair labor practice" strike rather than an economic one. Pet. App.43a–56a. The Board also imposed an affirmative bargaining order barring any effort by Rieth-Riley employees to seek decertification of the Union for as long as the Board deemed "reasonably necessary." Pet. App.57a–65a.

Member Kaplan dissented in part. Pet.App.71a–91a. Because the Union's withdrawal came after the Road Agreement's 60-day modification deadline, he explained, it was untimely, the lockout was lawful, and the strike was economic. Pet.App.71a–91a. He believed the majority's contrary reading of the *Retail Associates* rule rendered its first prong meaningless and with it the parties' own contractual agreement concerning the deadlines for withdrawing from multiemployer bargaining. Pet. App.78a–79a, 90a. This "undermines, rather than supports," he wrote, "the Board's stated policy objective of ensuring stability in multiemployer bargaining relationships." Pet.App.79a.

6. The Sixth Circuit's Decision

Rieth-Riley's appeal did not reach a randomly assigned panel. Two years earlier, the same three judges had heard a separate Rieth-Riley petition for review from a separate NLRB proceeding. *Rieth-Riley Constr. Co. v. NLRB*, 114 F.4th 519 (6th Cir. 2024), *cert. denied*. Although that earlier decision did not return any case to the Board for further proceedings, and did not concern the allegations at issue here, the panel assigned this case (along with a companion union-decertification appeal also involving Rieth-Riley) to itself and heard argument outside the ordinary argument calendar on February 26, 2026, before Judges Moore, Cole, and Mathis.

The panel then enforced the Board's order on April 8, 2026. Pet.App.1a–29a. The court held that "members of a multi[]employer bargaining group can withdraw at any time before bargaining has commenced." Pet.App.15a. The panel rejected Rieth-Riley's argument that the *Retail Associates* rule should be interpreted using standard tools of construction: "We do not, however, read judicial opinions like statutes. This same rationale applies to our review of a Board decision like *Retail Associates*." Pet.App.15a (citation omitted). The panel added that it would reach the same result "even if we apply traditional rules of statutory interpretation." Pet.App.15a. That alternative analysis, however, did not address the significance of the definite article "the" in both prongs of the *Retail Associates* rule—or the consequence that reading "the agreed-upon date" to mean "any agreed-upon date" renders the rule's first prong surplusage. Rehearing en banc was denied on June 17, 2026.

A few days later, the same panel ruled against Rieth-Riley in the companion case. *Rieth-Riley Constr. Co. v. NLRB*, 173 F.4th 269 (6th Cir. 2026), *reh'g en banc denied*. That decision is subject to a separate petition for certiorari.

REASONS FOR GRANTING THE WRIT

1. The Sixth Circuit's Decision Conflicts with This Court's Precedent in *Allentown Mack* and Section 706 of the Administrative Procedure Act.

The Administrative Procedure Act requires agencies—the NLRB included—to engage in "reasoned decisionmaking." *Allentown Mack Sales & Serv., Inc. v.*

NLRB, 522 U.S. 359, 374 (1998) (citation omitted). The requirement of reasoned decisionmaking means, above all else, that "the rule applied" must be the same as "the rule announced." *Id.* at 375. For, as Justice Scalia's majority opinion explained, "[i]t is hard to imagine a more violent breach of that requirement than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced." *Id.* at 374. When an agency applies "a standard other than the one it enunciates," the "evil . . . spreads in both directions, preventing both consistent application of the law by subordinate agency personnel (notably ALJ's), and effective review of the law by the courts." *Id.* at 375. Reviewing courts therefore are entitled to take an agency's "standards to mean what they say, and to conduct substantial-evidence review on that basis." *Id.* at 376–77.

This principle admits of no exception for standards announced through adjudication. *Id.* at 374. The Board may be free as a general matter to make policy case by case, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), but once it announces a standard, it must apply that standard according to its plain terms, *see Allentown Mack*, 522 U.S. at 375–77. If the Board wishes to depart from the plain meaning of a standard it previously announced, it must "forthrightly and explicitly" acknowledge it is changing the rule and provide a reasonable explanation for the change. *Id.* at 378. What it may not do is apply a standard "in fact different from the rule or standard formally announced" while professing to follow it. *Id.* at 374 (Board purported to follow its good-faith doubt and preponderance standards while actually changing them); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."). As the Fifth Circuit put the matter, "there may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case." *NLRB v. Int'l Union of Operating Eng'rs, Loc. 925*, 460 F.2d 589, 604 (5th Cir. 1972) (citation omitted). It could not be otherwise, as our Founding Fathers recognized: "Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?" The Federalist No. 62 (James Madison or Alexander Hamilton).

Nor may the Board escape review by doing one thing and calling it another. As *Allentown Mack* made clear, "[a]n agency should not be able to impede judicial review, and indeed even political oversight, by disguising its policymaking as factfinding." 522 U.S. at 376. The same principle applies with full force when an agency disguises a change to its governing standard as the routine "interpretation" of that standard. *See id*. at 377–78. Whether the label is "factfinding" or "interpretation," the vice is identical: the agency evades effective judicial review by obscuring that it has departed from the rule it announced. *See id*. at 376–79.

The panel below departed from these principles. It held that "Board decision[s] like *Retail Associates*" should not be "read . . . like statutes" and that canons of construction do not apply. Pet.App.15a. That holding cannot be squared with *Allentown Mack*'s command that courts must take "the clearly understood legal standards that [the Board] enunciates in principle. . . . to mean what they say," and to review the evidence against that standard accordingly. 522 U.S. at 376–77.

The panel's decision is equally irreconcilable with Section 706 of the Administrative Procedure Act. "Because the NLRA is silent as to the standard for reviewing nonfactual matters, the standard of review for such matters is provided by section 10(e) of the Administrative Procedure Act [5 U.S.C. § 706]." *NLRB v. Beverly Enters.-Mass., Inc.*, 174 F.3d 13, 22 (1st Cir. 1999). As this Court noted in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), that statute requires courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and"—most relevant here—"determine the meaning or applicability of the terms of an agency action." *Id.* at 391 (quoting 5 U.S.C. § 706). Indeed, *Loper Bright* expressly cited *Allentown Mack* for the proposition that courts must ensure agencies engage in "reasoned decisionmaking" within the boundaries of their delegated authority. *Id.* at 395 (quoting *Allentown Mack*, 522 U.S. at 374).

These mandates apply squarely in this case. An adjudicative order is unquestionably an "agency action" under the APA. *See* 5 U.S.C. § 551(13) (defining "agency action" to "include[] the whole or a part of an agency rule [or] order . . . "); *see also id.* § 701(b)(2) (providing that for purposes of Chapter 7 of Title 5, "agency action" has the meaning given to it in Section 551). Section 706's directive that courts "determine the meaning . . . of the terms of an agency action" therefore requires a reviewing court to construe the *Retail Associates* standard independently—the very task the panel said it did not need to undertake. The meaning and legal effect of the Board's own adjudicative standard is thus a question of law that the court must decide for itself.

These two requirements, both grounded in the APA, are complementary but distinct: *Allentown Mack* constrains the *agency*, while Section 706 imposes an independent obligation on the *court*. The Sixth Circuit's error was therefore twofold. It allowed the Board to apply a rule "in fact different" from the one it announced, and it refused to independently construe the standard to correct that departure.

The conflict with these legal principles is not theoretical; it is immediate and real. The Board majority quietly substituted the indefinite article "any" for the definite article "the" in the operative text of its own standard—changing "**the** agreed-upon date" to "**any** agreed-upon date"—a substantive rewrite of the first *Retail Associates* rule that the dissenting Board member recognized rendered it "virtually without legal effect." Pet.App.79a (Member Kaplan, dissenting in part). The textual mechanics of that substitution, and why it cannot be reconciled with the rule's plain terms, are developed in Part 3.1 below. Suffice it to say for now, the Board changed its standard while purporting to apply it, and the Sixth Circuit refused to correct that error by independently reading the standard like it would any other legal text—according to its plain meaning.

The conflict with this Court's precedent is thus direct and undeniable. The Board was required to enforce its standard as written; the Sixth Circuit was required to independently determine that standard's meaning. Each failed to carry out their respective duties.

2. The Question Presented Is of Exceptional Importance.

This case presents a question of foundational importance for regulators and regulated parties alike: whether courts must construe standards that agencies announce through adjudication the same way they construe statutes and regulations—according to their plain meaning and, as necessary, using all the traditional tools of construction, *Loper Bright*, 603 U.S. at 403 (statutes); *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019) (regulations)—or not.

Many agencies create adjudicative rules, but as this Court observed in *Allentown Mack*, the Board, "uniquely among major federal administrative agencies, has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rulemaking." 522 U.S. at 374. That observation holds no less true nearly 30 years later: by one account, from 2015 through 2024, the Board issued only 27 rules through notice-and-comment rulemaking while deciding approximately 2,000 unfair-labor-practice and representation cases by adjudication.[†] There is more labor law notice-and-comment rulemaking in the People's Republic of China. *See* Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. 411, 411–12 (2010).

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† Mitchell Scacchi, *Regulation by Adjudication Gives Agencies Maximum Flexibility in Wielding Their Powers*, Yale J. on Regul., Notice & Comment (Jan. 28, 2026), https://www.yalejreg.com/nc/regulation-by-adjudication-gives-agencies-maximum-flexibility-in-wielding-their-powers-by-mitchell-scacchi/.

When the Board proceeds by adjudication, the standards it announces operate as "precedents" that the Board is "expected to" follow, "[s]ubject to the qualified role of stare decisis in the administrative process." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765–66 (1969) (plurality opinion). As the *Wyman-Gordon* plurality explained, "[a]djudicated cases may and do . . . serve as vehicles for the formulation of agency policies" and "generally provide a guide to action that the agency may be expected to take in future cases." *Id.* As a result, labor and management must conform their conduct to Board precedent or risk unfair-labor-practice charges, adverse Board rulings, and court-enforced remedial orders. In this way Board precedent "guides future conduct in much the same way as though it were a new rule promulgated under the rule-making power. . . ." *Id*. at 771 (Black, J., concurring in the result). "There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (plurality opinion) (following *Wyman-Gordon*). Because an adjudicative standard carries precedential force, the principal safeguard is the one *Allentown Mack* supplies: courts must hold the Board to the meaning of what the standard says. 522 U.S. at 376–77.

Without that safeguard, the Board could rewrite its standards at will, without acknowledging it, leaving regulated parties unable to determine what the law requires from the Board's own precedents. *Allentown Mack* recognized that this very phenomenon frustrates the Court's supervisory function: where the Board divorces the rule it announces from the rule it applies, it "becomes difficult for this Court to know, when certiorari is sought, whether the case involves the generally applicable issue of the Board's adoption of an unusually high standard . . . or rather just the issue of an allegedly mistaken . . . judgment in the particular case." *Id.* at 376. That is precisely the difficulty the Board's conduct creates here: by recharacterizing a change to its standard as a mere application of it, the Board obscures whether this case presents the generally applicable question of interpretive methodology or a one-off dispute. It is the former—and *Allentown Mack* itself identifies that as a reason for this Court's attention.

This is an ever-present danger given the way the Board operates. Because the Board makes its law case by case, it is uniquely prone to policy oscillation across administrations—a problem this Court flagged in *Wyman-Gordon* and that has drawn sustained scholarly criticism both before and since. *See* 394 U.S. at 765 n.3 (plurality opinion) (citing Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 Yale L.J. 729 (1961)); *see also* Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163, 170 (1985) ("Increasingly, the Board is not looked upon as a stable agency, and its rules not viewed as a stable body of law that must be consulted for organizing one's labor affairs."); R. Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, Over Policy Prescriptions, at the NLRB*, 5 FIU L. Rev. 347, 349 (2010) ("A common criticism [of the Board] is that the caselaw oscillation, a.k.a. flip-flops, plagues Board law."). Publius warned against precisely this danger: "a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success." The Federalist No. 62 (James

Madison or Alexander Hamilton). This petition does not challenge the Board's general authority to make policy through adjudication. *See Bell Aerospace Co.*, 416 U.S. at 294. The question is whether the Board may recharacterize rules it creates by adjudication at will, applying a rule "in fact different" from the one it announced while professing to follow it. *See Allentown Mack*, 522 U.S. at 374. The distinction between policymaking and faithful application is the line *Allentown Mack* drew—and both the Board and the panel erased it.

The importance of the question is underscored by an entrenched line of circuit caselaw holding that "[a]n agency's interpretation of its own precedent is entitled to deference. . . ." *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998) (citing *Inland Lakes Mgmt., Inc. v. NLRB*, 987 F.2d 799, 805 (D.C. Cir. 1993)); *see also Ceridian Corp. v. NLRB*, 435 F.3d 352, 355 (D.C. Cir. 2006) (noting the court has "repeatedly held" this). So long as the interpretation is "a reasonable one," that is the end of the matter. *See Cassell*, 154 F.3d at 483; *see also*, *e.g.*, *Dist. 4, Commc'ns Workers of Am. v. NLRB*, 59 F.4th 1302, 1311 (D.C. Cir. 2023) (similar); *Aburto-Rocha v. Mukasey*, 535 F.3d 500, 503 (6th Cir. 2008) ("considerable deference" owed); *Zheng v. U.S. Dep't of Just.*, 416 F.3d 129, 131 (2d Cir. 2005) (similar to *Cassell*). Whatever force this line of caselaw once had, it cannot survive this Court's recent decisions.

These cases trace their roots to one of two deference doctrines: *Chevron* deference or *Auer* deference (sometimes called *Seminole Rock* deference). The *Chevron* line reasons as follows: the Board's precedents are designed to implement the policy of the NLRA; the NLRB has "considerable discretion to interpret the NLRA"; therefore, "so long as the agency's construction of a statutory ambiguity is reasonable, [the court] will uphold it." *Inland Lakes Mgmt.*, 987 F.2d at 805 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). Similarly, the *Auer* (or *Seminole Rock*) line rests on the once all-too-reflexive notion that courts should give "controlling weight" to an agency's interpretation of its own regulation "unless it is plainly erroneous or inconsistent with the regulation." *Zheng*, 416 F.3d at 131 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *see also Aburto-Rocha*, 535 F.3d at 503 (stating "[a]n agency's interpretation of its own precedents receives considerable deference," and in partial support citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

Unsurprisingly, given when the case was decided (1998), parts of the *Allentown Mack* opinion embrace both notions. In the first part of its opinion, the Court reviewed whether the Board's standard for employer polling (used to gauge employee support for unions) was arbitrary and capricious, in violation of the APA. *Allentown Mack*, 522 U.S. at 363–66. The Court ultimately concluded it was not, relying on the principle that "[c]ourts must defer to the requirements imposed by the Board if they are 'rational and consistent with the Act,' and if the Board's 'explication is not inadequate, irrational or arbitrary.'" *Id.* at 364 (first quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); and then quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)). In a later part of the opinion, the Court held that the Board had failed to apply the polling rule according to its own terms. *Id.* at 372–80. In doing so, the Court denied the dissent's suggestion that this holding was inconsistent with decisions according "substantial deference to an agency's interpretation of its own regulations." *Id.* at 377 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). *Allentown Mack* thus indicated that deference should extend to agency interpretations of both statutes and regulations. *But see Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) (noting the Court had previously refused enforcement of Board orders where the Board "failed to give the plain language of the standard its ordinary meaning" (citing *Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971)).

Today, however, under *Loper Bright*, courts must "exercise independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires," and may not defer to an agency's reading of a statute simply because a legal text is thought ambiguous. 603 U.S. at 412–13. And under *Kisor*, "a court should not afford *Auer* deference unless," after exhausting all the "traditional tools" of construction, the agency's own pronouncement is "genuinely ambiguous," and even then there are limits. 588 U.S. at 573–79 (citation omitted). Where "there is only one reasonable construction," "a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." *Id.* at 575. And as Section 706 of the APA provides, reviewing courts "shall" decide "the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The premise on which the deferential line depends—that delegation compels reflexive deference even on pure questions of law absent unreasonableness—thus no longer holds. It is an orphaned remnant of *Chevron*-era reasoning that *Loper Bright*'s logic necessarily abrogates.

The D.C. Circuit recently reinforced this trajectory in a related context, holding on remand from the Supreme

Court in the wake of *Loper Bright* that a Board rule created through adjudication must be independently tested against the Board's statutory authority rather than accepted on the Board's own assurance that the rule is reasonable. *See Hosp. Menonita de Guayama, Inc. v. NLRB*, 183 F.4th 745, 753–55 (D.C. Cir. 2026).

The Sixth Circuit itself has recognized that, post-*Loper Bright*, it no longer owes deference to the Board's statutory constructions and reviews them de novo—no less in a case involving the Petitioner here. *Rieth-Riley Constr. Co. v. NLRB*, 114 F.4th 519, 528–29 (6th Cir. 2024) (citing *Loper Bright*, 603 U.S. 369); *accord NLRB v. Starbucks Corp.*, 159 F.4th 455, 478 (6th Cir. 2025) (citing other circuits taking the same approach). Yet the deference-to-precedent line of caselaw, which the Sixth Circuit has followed, applies a *more* deferential standard to the Board's interpretation of its *own adjudicative* standard. This creates an indefensible asymmetry—indeed, an internal circuit contradiction: the Board's interpretation of a statute receives de novo review, but its interpretation of its own adjudicative standard receives deference. The asymmetry is not merely illogical—it is perverse. It means that the more power an agency concentrates by choosing adjudication over rulemaking, the less scrutiny courts will apply to the agency's subsequent manipulation of its own work product. If a court cannot reflexively defer to an agency's reading of its own notice-and-comment regulation under *Kisor*, 588 U.S. at 573–79, a fortiori it should not reflexively defer to an agency's reading of its own adjudicative precedent, which received even less procedural formality. *Allentown Mack* and APA Section 706, as informed by *Loper Bright* and *Kisor*, foreclose that result. If the Board can rewrite the plain text of its standards while professing to apply them—and escape independent judicial review by labeling the product an "interpretation"—then the judicial duty to "say what the law is" is abdicated. *Loper Bright*, 603 U.S. at 385 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

This is all why the question here is best understood not as one about how much deference the Board's "gloss" on *Retail Associates* deserves, but as one about the meaning and continued existence of a binding rule. The latter is a question of law for the court; and once framed correctly, it admits of only one answer: courts must read the standard the Board announced according to its plain terms and hold the Board to it.

3. The Decision Below Is Wrong.

3.1. Both the Board majority and the panel below ignored the plain text of the *Retail Associates* rule.

The first *Retail Associates* rule provides that the Board will "refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to **the** date set by the contract for modification, or to **the** agreed-upon date to begin the multiemployer negotiations." Pet.App.236a (emphases added). Understanding the rule's structure is critical. The disjunctive "or" connects two independent alternatives—but each alternative requires a specific date to exist. The definite article "the" in both prongs signals one specific date. *Cf. Slack Techs., LLC v. Pirani*, 598 U.S. 759, 766–67 (2023); *Cochise Consultancy, Inc. v. United States ex rel.*

Hunt, 587 U.S. 262, 272 (2019). Where a date has been "agreed upon," the second alternative works in tandem with the first: a party may satisfy whichever comes first. *See Lenox Grill*, 170 NLRB 1027, 1027 (1968). But where no bargaining date has been "agreed upon"—because, as here, the Union refused to agree to bargaining dates—the second alternative has no referent and is inoperative. It is not satisfied by the absence of a date; it simply does not apply. The first alternative (the contract-modification deadline) therefore controls. The Union's withdrawal on May 2, 2018—nearly a full month after the April 2, 2018, deadline—was untimely.

The Board's reading forecloses this result by substituting "any agreed-upon" for "the agreed-upon," rendering the contract-modification deadline surplusage. The canon against surplusage provides that "[i]f possible, every word and every provision is to be given effect" and that "[n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012). When a proposed construction "renders an entire subparagraph meaningless, . . . the canon against surplusage applies with special force." *Pulsifer v. United States*, 601 U.S. 124, 143 (2024) (citation modified). Substituting "any" for "the" to nullify an entire prong is precisely the sort of contrived construction that the traditional rules of construction forbid. The dissenting Board member recognized this: "If that were, in fact, what the Board intended in drafting the *Retail Associates* standard, then why would the first prong even be included?" Pet.App.79a (Member Kaplan, dissenting in part). The answer is obvious: the Board would not have included the first, contractual-deadline prong, because it would serve no purpose if all that mattered was whether there was "any" agreed-upon date for bargaining.

In coming to their decisions, both the Board and the panel relied on this Court's statement in *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 410–11 (1982), that *Retail Associates* allows withdrawal "prior to . . . the date on which negotiations actually begin, provided that adequate notice is given." But *Bonanno Linen*'s paraphrase was dicta: the employer there attempted to withdraw only *after* bargaining had already commenced, *id.* at 407, and so the issue was whether a bargaining impasse constituted "unusual circumstances" justifying withdrawal during negotiations, *id.* at 405, 411–13. As Member Kaplan observed, *Bonanno Linen*'s summation "does not even mention the contractual deadline prong of *Retail Associates*." Pet.App.77a–78a n.6. A paraphrase in court dicta cannot change the text of the agency rule it paraphrases.

The panel then stated it would reject Rieth-Riley's argument "even if we apply traditional rules of statutory interpretation." Pet.App.15a. But the panel's analysis conflated the disjunctive function of "or" with whether a disjunct lacking a referent can be "satisfied." *See* Pet.App.15a. The panel reasoned that because "or" is "almost always disjunctive," the rule must permit withdrawal upon satisfying either prong independently. Pet.App.15a (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)). That much may be true, but it does not follow that the second prong can be "satisfied" when no bargaining date was ever agreed upon. "Or" cannot conjure a referent from thin air. A condition that requires an event—here, agreement on a date—cannot be "satisfied" by the nonoccurrence of that event, any more than a condition precedent can be deemed fulfilled when its triggering condition never materialized.

The panel's error is structural as well as textual. Under the Board's reading—and the panel's equally expansive reformulation—parties can shatter decades-long multiemployer relationships at will, simply by refusing to agree to bargaining dates and then withdrawing after the contract-modification deadline has passed. Pet.App.79a (Member Kaplan, dissenting in part). This "creates a perverse incentive that runs directly contrary to the policy underlying [the *Retail Associates*] standard." Pet.App.79a. "The predictable result of the majority's interpretation of the *Retail Associates* standard," the dissent added, "will be to discourage bargaining in well-established multiemployer relationships and to undermine the very stability that led the Board to adopt the *Retail Associates* standard in the first place." Pet.App.90a–91a.

3.2. The Board cannot escape review by recharacterizing its standard as an "interpretation."

The panel's approach allowed the Board to insulate a covert change in its standard from meaningful review by recharacterizing that change as a mere "interpretation." As explained in Part 1, this Court's precedent forecloses that maneuver: an agency may not evade review by obscuring that it has departed from the standard it announced. *Allentown Mack*, 522 U.S. at 374–76.

The *Allentown Mack* Court identified the lawful path the Board could have taken: the Board "is entitled to create higher standards . . . by rule, or even by explicit announcement in adjudication (assuming adequate warning). . . ." *Id.* at 367 n.2. The Board thus had an open, lawful route to change the *Retail Associates* standard: announce the change forthrightly and explicitly, and defend it on the merits. What the Board may not do is achieve the same change covertly, "by formally leaving in place" the existing standard while "applying [it] as though [it] meant something other than what [it] say[s]." *Id.* at 374. The Board's "any-for-the" substitution is the covert route *Allentown Mack* forbids, not the forthright route it permits.

4. This Case Is an Ideal Vehicle to Decide the Question Presented.

Five points demonstrate why this case is the right vehicle to take up this issue.

First, this case squarely concerns the interpretation of an adjudicative rule; the dispute is not over some stray statement tucked away in an inconsequential Board decision. All agree *Retail Associates* announced "specific ground rules" for withdrawing from multiemployer bargaining. Pet.App.236a. All agree those ground rules govern this dispute. And all agree on what the ground rules actually say.

Second, the panel's methodological holding was critical to its decision. *See* Pet.App.15a. Although the panel added that it would reach the same result "even if we apply traditional rules of statutory interpretation," Pet.App.15a, that alternative holding itself rested on a textual error—conflating the disjunctive function of "or" with whether a disjunct lacking a referent (an agreed-upon date to begin multiemployer bargaining) can be "satisfied." Because the alternative holding is independently erroneous, in that it does not reflect the "best reading" of the legal text, *see Loper Bright*, 603 U.S. at 400, the panel's interpretive-methodology holding is not dicta and is squarely presented.

Third, *Auer* deference (to the extent it even applies) can be decisive only where the agency's order is genuinely ambiguous. *Kisor*, 588 U.S. at 574. Here, by contrast, the *Retail Associates* standard is unambiguous—the definite article "the" in "the agreed-upon date" requires a date that exists.

Fourth, even if the *Retail Associates* rule were genuinely ambiguous, the Board loses. An agency's reading must still be "reasonable." *Id.* at 575. An interpretation that reads "the" to mean "any," and thereby nullifies an entire prong of the governing standard and the parties' own contract-modification deadline, is not reasonable. This is all the more so since it fails entirely to account for the purpose of the *Retail Associates* rule (*id.*): to promote stability in multiemployer bargaining relationships. And because the Board's reading conflicts with the plain meaning of its own standard, it works precisely the "unfair surprise" that forecloses deference. *Id.* at 579 (citation omitted).

Fifth, no amount of Board precedent applying the *Retail Associates* standard contrary to its plain language can change what that standard actually says. The panel claimed that the Board "has consistently tied a party's ability to withdraw from a multi[]employer unit to the commencement of negotiations. . . .” Pet.App.15a. But not only does that claim rest on the part of the *Retail Associates* standard that is *not* applicable here—the “unusual circumstances” prong that *Bonanno Linen* addressed (*see* Pet.App.15a)—the panel cited no other Board precedent to support this claim. And even if the Board *had* “consistently” allowed withdrawal all the way up until the commencement of negotiations, and after a contract-modification deadline had lapsed, that would not allow the Board to depart from the *Retail Associates* standard as enunciated: “Even the most consistent and hence predictable Board departure from proper application of [its] standards will not alter the legal rule by which the agency’s factfinding is to be judged.” *Allentown Mack*, 522 U.S. at 377. That idea is central to the *Allentown Mack* holding. *See id*. at 374–77.

5. In the Alternative, the Court Should Summarily Reverse and Remand because Rieth-Riley Was Denied a Randomly Assigned Panel.

Even if this Court declines to grant plenary review on the interpretive-methodology question, it should summarily reverse and remand because the panel that decided Rieth-Riley’s appeal was not randomly assigned, as the Sixth Circuit’s own rules contemplate. 6 Cir. I.O.P. 34(a)(1). The same three judges—Judges Moore, Cole, and Mathis—had previously heard a separate Rieth-Riley petition for review from an entirely distinct NLRB proceeding. *See Rieth-Riley Constr. Co. v. NLRB*, 114 F.4th 519 (6th Cir. 2024), *cert. denied*. That earlier decision did not “return[] [the] case to the . . . agency for further proceedings,” and did not concern the allegations at issue here. 6 Cir. I.O.P. 34(b)(1). Yet the panel assigned itself both this case and a companion union-decertification case also involving Rieth-Riley, heard argument in both outside the ordinary calendar, and ruled against the company in each. Rieth-Riley was thus deprived of the benefit of a randomly selected panel.

This Court has long recognized that the proper composition of an appellate panel implicates interests that transcend the merits of any individual case. In *Nguyen v. United States*, 539 U.S. 69 (2003), the Court vacated a Ninth Circuit judgment because one member of the panel had been improperly designated in violation of statute, holding that the panel's improper constitution could not be saved by harmless-error analysis or the parties' failure to object. And in *Williams v. Pennsylvania*, 579 U.S. 1, 14 (2016), the Court held that the participation of an interested jurist on a multimember appellate court violated due process and constituted structural error. The logic of both decisions applies here: where the very process by which the deciding panel is constituted is tainted, the integrity of the result cannot be salvaged by examining what the panel did on the merits. As Judge Batchelder once warned in addressing another irregular panel composition in the Sixth Circuit, "[p]ublic confidence in this court or any other" depends on "the certainty that the court follows the rules in every case. . . ." *Grutter v. Bollinger*, 288 F.3d 732, 815 (6th Cir. 2002) (en banc) (dissenting).

The practical consequences confirm this is not a harmless technicality. The same three judges have now decided three Rieth-Riley cases—including the 2024 decision, the decision at issue here, and the companion union-decertification case—and ruled against the company in every one, creating a body of adverse labor law that exists only in the Sixth Circuit. In the decertification case, the panel became the first court in the NLRA's 90-year history to hold that it lacked jurisdiction to review the dismissal of a decertification petition. *See Rieth-Riley Constr. Co. v. NLRB*, 173 F.4th 269, 278–81 (6th Cir. 2026), *reh'g en banc denied* (separate petition for certiorari pending). And in this case, the panel held that Board adjudicative standards need not be read like statutes—a ruling squarely at odds with *Allentown Mack* and APA Section 706, as informed by *Loper Bright* and *Kisor*. Pet. App.15a.

Summary reversal and remand is the appropriate remedy. In a similar context, this Court has summarily reversed where a lower court "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." Sup. Ct. R. 10(a); *see Nguyen*, 539 U.S. at 83. The appropriate course is the one this Court took in *Nguyen*: vacate the judgment and remand for fresh consideration by a properly—that is, randomly—assigned panel. *See also United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 691 (1960).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED APRIL 8, 2026

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 24-2123/25-1082

RIETH-RILEY CONSTRUCTION CO., INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Intervenor (24-2123).

Argued: February 26, 2026
Decided and Filed: April 8, 2026

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board; Nos. 07-CA-234085; 07-CB-226531.

Before: MOORE, COLE, and MATHIS, Circuit Judges.

Appendix A

OPINION

MATHIS, Circuit Judge. Rieth-Riley Construction Company and the union representative for some of its workers have been in a nearly decade-long conflict. The dispute began in 2018 when Local 324, International Union of Operating Engineers, AFL-CIO (the "Union"), sought to withdraw from a multi employer bargaining arrangement so that it could negotiate individually with Rieth-Riley and the other employers. But what should have been typical collective-bargaining negotiations turned into several alleged unfair labor practices, a weeks-long employee lockout, and a strike that continues to this day.

The National Labor Relations Board issued a decision ordering Rieth-Riley to bargain in good faith with the Union after finding that Rieth-Riley committed various unfair labor practices throughout the dispute. Rieth-Riley now challenges the Board's decision, and the Board asks us to enforce it. For the reasons below, we deny Rieth-Riley's petition for review and enforce the Board's order.

I.

Rieth-Riley is an Indiana-based construction contractor that performs asphalt paving and other highway-and-road-construction work in Michigan. The company employs around 130 to 170 operating engineers in Michigan who have been represented by the Union since at least 1993. Historically, the Union had bargained with Rieth-Riley as part of a multi employer group with other road-construction contractors. This multi employer bargaining was done through an employer association, the Michigan Infrastructure and Transportation Association ("MITA").

A.

We begin in early 2018. At that time, the Union and MITA were parties to a collective-bargaining agreement (the "Road Agreement"), which was set to expire on June 1, 2018. The parties understood that the Road Agreement, as a multi employer bargaining agreement, prohibited the Union from bargaining individually with any of MITA's member companies. Pertinent here, the Road Agreement included a contract-modification deadline requiring that any party wishing to terminate or modify the agreement provide 60 days' notice before the contract's expiration date. That deadline was April 2, 2018. If a party failed to provide notice of its intent to modify or terminate the contract by this date, the contract would "continue in force from year to year." A.R. 2779.

On February 19, 2018, MITA executive vice president Michael Nystrom sent a letter to Union business agent Douglas Stockwell stating that MITA, on behalf of Rieth-Riley and its other member employers, wished to terminate the Road Agreement. This meant that the Road Agreement would expire on June 1, 2018. Along with terminating the current contract, Nystrom's letter included "reopener" language requesting dates for the parties to begin negotiating a new collective-bargaining agreement. He hoped to "reach[] a new contract prior to the termination date [of the Road Agreement]." *Id.* at 2787.

A few days later, Stockwell responded. He mailed the individual contractor companies directly, including Rieth-Riley, stating that the Union also wished to terminate the Road Agreement. The Union's missive did not state a reciprocal desire to begin negotiating a new multi employer contract. But rather than sending a termination notice with identical language to MITA, the Union mistakenly sent a letter with "reopener" language: "The Union hereby offers to meet and confer for the purpose of negotiating a new contract." *Id.* at 2793.

In March, Nystrom asked Stockwell when successor-contract negotiations would begin between the Union and MITA. Stockwell suggested that Nystrom provide him with MITA's availability. Nystrom then sent a follow-up email on April 11 proposing dates for the parties "to begin discussions." *Id.* at 3289. But Stockwell never responded.

On April 26, Stockwell realized that the Union sent a reopener letter (rather than a mere termination letter) to MITA. So on May 2, the Union sent a letter to MITA acknowledging Nystrom's previous termination of the Road Agreement and noted that it would be withdrawing from multi employer bargaining. A MITA representative found the Union's decision disappointing because, before the May 2 letter, MITA "thought that we were going to negotiate like we always do." *Id.* at 1035.

Undeterred, MITA urged the Union to reconsider so they could "initiate negotiations." *Id.* at 3301. The Union held firm. At a general membership meeting in June, Stockwell explained that the Union did not want a multi employer contract and that it instead wanted to negotiate individual contracts with each employer. He also warned that a strike might be necessary to reach this goal. In agreement, the Union's members voted overwhelmingly in favor of granting the Union general strike authority.

An issue soon arose between the Union and Rieth-Riley. The Union's Fringe Benefit Fund Office ran into issues crediting certain employee benefits contributions from MITA members, including Rieth-Riley. The problem began after the Road Agreement expired when Rieth-Riley stopped deducting fund contributions from its employees' paychecks. This was, according to the Union, "the equivalent of an immediate 15% pay increase" for bargaining-unit employees. D. 31 at p.20. Rieth-Riley also announced that "[d]ue to the inconvenience to employees[] created by Local 324, the company [would] proceed with an economic [wage] increase" of $2 per hour. A.R. 2821. It even implemented the raise retroactively to "cover[] the time period from the beginning of June up to the current pay period." *Id.* (emphasis omitted). Rieth-Riley did not provide the Union with notice of these changes or the opportunity to bargain over the pay increase.

Tensions escalated later that summer. Near the end of August, the Union conducted an informational picketing session at Ajax, another company represented by MITA. MITA, perceiving this conduct as a "strike action," responded by notifying the Union that it would initiate a lockout on September 4 if the Union continued to resist bargaining on a multi employer basis. *Id.* at 2839. MITA emphasized that the lockout would continue until "the union ratifies [another] statewide road agreement with MITA on the terms set forth [by MITA].” *Id.* The Union responded promptly, declaring that it was not “required to engage in any bargaining on a multi-employer basis.” *Id.* at 2886.

So, on September 4, the lockout began. It lasted over three weeks. The lockout ended only when Michigan Governor Rick Snyder intervened. With his assistance, the parties agreed that once the construction season ended for the winter they would begin mediation to negotiate a successor contract—this time on an individual-employer basis.

B.

In October 2018, another conflict erupted. Recall that Rieth-Riley stopped deducting contributions from its employees’ paychecks soon after the Road Agreement expired on June 1, 2018. At that time, the company believed that it maintained a § 8(f) bargaining relationship with the Union, which would have meant Rieth-Riley had no duty to bargain with the Union after the Road Agreement expired. *See* 29 U.S.C. § 158(f). But by August 2018, Rieth-Riley had confirmed that the parties had a § 9(a) bargaining relationship instead. This meant that the company (1) accepted the Union as the sole collective-bargaining representative for its Michigan operating engineers, and (2) had a duty to bargain in good faith with the Union even after the Road Agreement expired. Counsel for the Union’s fringe-benefit funds confirmed this in October and recommended accepting Rieth-Riley’s contributions toward its employees' benefits funds. Rieth-Riley no longer held these funds, however, because it had paid the contributions directly to its employees. The company then notified the Union that it would resume making fund contributions and that it needed to "claw back" money from its employees to make the benefits funds whole. A.R. 4622.

The Union pushed back. It responded that the clawback was unlawful and requested that the company wait until the start of negotiations to resolve Rieth-Riley's concern. But Rieth-Riley remained firm. The company notified its employees that it would begin clawing back the funds from their paychecks later that month.

Meanwhile, Rieth-Riley and the Union began bargaining for a successor contract in November 2018. But in spring 2019, things changed abruptly.

On May 29, 2019, the NLRB's General Counsel filed an unfair-labor-practice complaint against Rieth-Riley. It alleged that the company had violated the National Labor Relations Act by, among other things, insisting on multi employer bargaining and locking out the bargaining-unit employees. The General Counsel offered to settle the case if Rieth-Riley paid $1.8 million, which would replace the income employees lost during the lockout. Rieth-Riley rejected this offer.

On July 25, Union representatives met with Rieth-Riley employees and prepared them for a possible strike. As employees entered the meeting, they received copies of the May 29 unfair-labor-practice complaint. And after Stockwell provided employees with an update on contract negotiations, Union president Ken Dombrow discussed the complaint and Rieth-Riley's rejection of the Board's settlement offer. Dombrow later testified that his goal for the meeting was to highlight the complaint's allegations and the rejected settlement offer. During the meeting, employees asked questions about the status of the unfair-labor-practice allegations, when the litigation would be resolved, and how they could receive certain unemployment benefits from the earlier lockout period. Union leaders, listening to these concerns, reassured the employees that the Union backed them completely.

Then, on July 30, Stockwell authorized a strike based on the membership's June 2018 vote granting strike authority. During the strike, employees picketed Rieth-Riley job sites with signs referencing the company's "Unfair Labor Practices." And from the onset of the strike the Union consistently stated that workers were protesting Rieth-Riley's rejection of the Board's $1.8 million settlement offer to compensate employees due to the nearly month-long lockout.

As contract negotiations for a successor contract continued amid the ongoing strike, another issue arose. On June 1, 2020, Rieth-Riley announced a $1 per hour raise, which would affect the bargaining-unit employees. And like before, the company implemented the wage increase without notifying the Union or providing it with an opportunity to bargain. The Board amended its unfair-labor-practice complaint to include the 2020 wage increase.

C.

In January 2022, after a hearing, an administrative law judge issued his decision. The ALJ made four rulings relevant to this appeal. First, the ALJ found that the Union's withdrawal from multi employer bargaining was timely and therefore lawful. Second, he determined that Rieth-Riley violated the NLRA by locking out Union members to pressure the Union to bargain on a multi employer basis. Third, he determined that Rieth-Riley violated the NLRA by unilaterally granting employees wage increases in 2018 and 2020 and by making certain deductions from their paychecks. Fourth, he found that the 2019 strike was an economic strike, not an unfair-labor-practice strike, because insufficient evidence connected the strike to Rieth-Riley's unfair labor practices.

Rieth-Riley appealed the ALJ's decision to the Board. The Board affirmed in part and reversed in part. It reversed the ALJ's conclusion that the 2019 strike was an economic strike, finding the strike was based partly on Rieth-Riley's unfair labor practices. It otherwise affirmed the ALJ's decision, ruling against Rieth-Riley on all claims. As a remedy, the Board imposed an affirmative bargaining order requiring Rieth-Riley to bargain in good faith and prohibiting any attempt at decertifying the Union for as long as "reasonably necessary." *Id.* at 5385.

Rieth-Riley petitions for review of the Board's order. The Board cross petitions to enforce its order.

II.

The Board's decisions are "subject to limited judicial review." *Beth Isr. Hosp. v. NLRB*, 437 U.S. 483, 501, 98 S.Ct. 2463, 57 L.Ed.2d 370 (1978) (quotation omitted). We review de novo the Board's legal conclusions, including the Board's interpretation of the NLRA. *NLRB v. Starbucks Corp.*, 159 F.4th 455, 468 (6th Cir. 2025).

We review the Board's factual findings, and its application of law to the facts, for substantial evidence. 29 U.S.C. § 160(e)-(f); *Hendrickson USA, LLC v. NLRB*, 932 F.3d 465, 469 (6th Cir. 2019). Substantial evidence "is more than a mere scintilla, but means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Urias-Orellana v. Bondi*, __ U.S. __, 146 S. Ct. 845, 850, __ L.Ed.2d __ (2026) (citation modified). We do not disturb the Board's findings just because "we may have reached a different conclusion" in the first instance. *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 304 (6th Cir. 2012). And we are "even more deferential" to the Board's credibility determinations, which we will adopt unless they "are inherently unreasonable or self-contradictory." *Airgas USA, LLC v. NLRB*, 916 F.3d 555, 560 (6th Cir. 2019) (quotation omitted).

III.

Rieth-Riley contends that the Board erred by: (1) finding that the Union timely withdrew from multi employer bargaining, (2) finding that the company committed unfair labor practices, (3) finding that those practices motivated a strike, and (4) issuing an affirmative bargaining order preventing any attempt at Union decertification. We address each argument in turn.

A.

In 1935, Congress enacted the NLRA to address "[t]he inequality of bargaining power between employees . . . and employers." 29 U.S.C. § 151. To that end, § 7 of the NLRA grants employees "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." *Id.* § 157. Employees are entitled to exercise these rights free from "interfere[nce]" or "restrain[t]." *Id.* § 158(a)(1). Generally, an employer cannot refuse to bargain collectively with its employees' representative, nor can the employees' representative refuse to bargain collectively with an employer. *Id.* § 158(a)(5), (b)(3). And both sides must bargain in good faith. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958).

But employers and unions need not bargain over everything. If certain matters do not concern a mandatory subject of bargaining, such as "wages, hours, and other terms and conditions of employment," 29 U.S.C. § 158(d), then the parties do not have to bargain over it, and one side may not "insist" otherwise, *Borg-Warner*, 356 U.S. at 349, 78 S.Ct. 718.

This case implicates multi employer bargaining. As the name suggests, multi employer bargaining involves multiple employers that bargain as a unit with a union. A classic example is the National Football League. Each NFL team is a separate employer. But all the teams operate together as a single unit to bargain with the union that represents NFL players. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 234-35, 240, 116 S.Ct. 2116, 135 L.Ed.2d 521 (1996). Although the NLRA does not mention multi employer bargaining, the Supreme Court has described it as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB v. Truck Drivers Loc. Union No. 449*, 353 U.S. 87, 95, 77 S.Ct. 643, 1 L.Ed.2d 676 (1957). But membership in a multi employer bargaining unit is voluntary. *Universal Insulation Corp. v. NLRB*, 361 F.2d 406, 408 (6th Cir. 1966).

The scope of a bargaining unit is a nonmandatory bargaining subject. *Don Lee Distrib., Inc. v. NLRB*, 145 F.3d 834, 842-43 (6th Cir. 1998). Thus, it is generally unlawful for a multi employer unit to insist on multi employer bargaining with a union. *Id.* In fact, until the Board's decision in *Retail Associates, Inc.*, 120 NLRB 388 (1958), employers and unions could withdraw from a multi employer bargaining arrangement with impunity (even after bargaining had commenced). *See Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 410, 102 S.Ct. 720, 70 L.Ed.2d 656 (1982).

In *Retail Associates*, the Board placed some limits on when employers or unions can withdraw from multi employer bargaining units. Now, neither an employer nor a union can withdraw "from a duly established multi employer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multi employer negotiations." *Retail Assocs.*, 120 NLRB at 395. The Supreme Court reads *Retail Associates* to allow "any party to withdraw [from a multi employer unit] prior to the date set for negotiation of a new contract or the date on which negotiations actually begin, provided that adequate notice is given." *Bonanno Linen*, 454 U.S. at 410-11, 102 S.Ct. 720. In other words, there are no "barriers to withdrawal prior to bargaining." *Id.* at 412, 102 S.Ct. 720.

Permitting either side to withdraw from a multi employer unit "after negotiations commence might well lead to a breakdown of the unit." *NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245, 247-48 (2d Cir. 1966). So when multi employer bargaining has begun, the Board does not countenance withdrawing from the unit unless " 'mutual consent' or 'unusual circumstances' exist." *Bonanno Linen*, 454 U.S. at 411, 102 S.Ct. 720 (quoting *Retail Assocs.*, 120 NLRB at 395).

The Union timely withdrew from the multi employer unit. True, the Union did not notify MITA that it wanted to terminate the Road Agreement before the contract-modification deadline—at least 60 days before the agreement's expiration date. The agreement expired on June 1, 2018. The Union sent notice of its intention to terminate the agreement on May 2, about 30 days before the expiration date. But this is irrelevant. What matters is that the Union notified MITA of its intent to withdraw from the Road Agreement *before* negotiations on a new agreement began. Nothing more was required to withdraw from the multi employer unit. *See Bonanno Linen*, 454 U.S. at 410-11, 102 S.Ct. 720. And because the size of a bargaining unit is not a mandatory bargaining subject, *see Don Lee*, 145 F.3d at 842-43, neither MITA nor Rieth-Riley could continue to insist upon multi employer bargaining.

Rieth-Riley pushes back. But none of its counterarguments persuades us.

First, the company argues that the Board failed to follow *Retail Associates*. On Rieth-Riley's read, if the parties to a multi employer unit have not set a date for bargaining, the contract-modification deadline controls when a party can withdraw from the unit. Here, the parties never set a date to begin multi employer bargaining. So, according to Rieth-Riley, the Union had to withdraw by the contract-modification deadline to properly withdraw from the arrangement.

We must "carefully scrutinize" whether "the Board failed to abide by [its own] precedent." *Kellogg Co. v. NLRB*, 840 F.3d 322, 327 (6th Cir. 2016). Of course, the Board may choose to abandon an old rule in favor of a newer one. But if it does so, that departure must be "explicitly [done] and rationally justified." *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552, 560 (6th Cir. 2013) (quotation omitted).

The Board made no such departure. It has consistently tied a party's ability to withdraw from a multi employer unit to the commencement of negotiations by barring withdrawal after "actual bargaining negotiations based on the existing multi employer unit have begun." *Retail Assocs.*, 120 NLRB at 395. So has the Supreme Court. *See Bonanno Linen*, 454 U.S. at 410-11, 102 S.Ct. 720. And we have said that members of a multi employer bargaining group can withdraw at any time before bargaining has commenced. *Carpenters Loc. Union No. 345 Health & Welfare Fund v. W.D. George Constr. Co.*, 792 F.2d 64, 69 (6th Cir. 1986). Rieth-Riley points to nothing that says otherwise.

Second, Rieth-Riley purports to rely on the tools of statutory construction to argue that, even though *Retail Associates* allows parties to withdraw from a multi employer unit before a contract-modification deadline *or* before negotiations begin, any such withdrawal attempt must occur before the onset of *both*. We do not, however, read judicial opinions like statutes. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). This same rationale applies to our review of a Board decision like *Retail Associates*. Yet even if we apply traditional rules of statutory interpretation, Rieth-Riley fails to show why *Retail Associates*'s use of the disjunctive "or" should be read as the conjunctive "and" in the context of withdrawing from a multi employer unit. 120 NLRB at 395. The use of the disjunctive indicates that *Retail Associates* allows parties to withdraw in either of two circumstances, not by satisfying both conditions. *See United States v. Woods*, 571 U.S. 31, 45, 134 S.Ct. 557, 187

L.Ed.2d 472 (2013) (noting that "ordinary use" of "or" "is almost always disjunctive").

Rieth-Riley claims that the Board's decision in *Lenox Grill*, 170 NLRB 1027 (1968), supports its interpretation of *Retail Associates*. We disagree. In *Lenox Grill*, the Board concluded that an employer timely withdrew from a multi employer unit because it provided notice of its withdrawal "in advance of *either* the contract expiration date or the date set for negotiations." 170 NLRB at 1027 (emphasis added). *Lenox Grill* simply reaffirms that satisfying either requirement suffices to withdraw from a multi employer unit.

Third, Rieth-Riley contends that the Union's withdrawal was untimely because the parties had already begun negotiating a successor agreement when it attempted to withdraw. To support this argument, Rieth-Riley points to a series of meetings held between the Union and multiple employers in mid-to-late 2016. Rieth-Riley maintains that these discussions show that negotiations for a successor to the Road Agreement were already underway when the Union gave notice of its withdrawal in May 2018.

Substantial evidence supports the Board's contrary conclusion. Notably, MITA representative Mark Johnston testified that routine general-purpose meetings were held to discuss open issues, not to comb over specific contracting points. And emails from that timeframe confirm that discussions were "from the 10,000 ft. view point." A.R. 3250. Johnston also testified that "MITA sent a letter in [spring 2018] asking for us to start negotiations and [Stockwell] sent a letter back saying he wasn't or wouldn't." *Id.* at 1035. Moreover, an email from MITA's executive vice president in April 2018 further corroborates that the communications were to schedule "dates to begin discussions." *Id.* at 3289.

The company also points to the Union's February 21 letter to MITA, which mistakenly included reopener language, arguing that it caused real confusion as to the Union's position on bargaining. But this misses the mark. Even if Rieth-Riley believed that the Union was willing to negotiate on a multi employer basis, such negotiations had not yet begun by the time the Union clarified its stance in May 2018.

* * *

In sum, we agree with the Board's determination that the Union timely withdrew from multi employer bargaining on May 2, 2018. Precedent indicates that the Board properly construed and applied *Retail Associates*, and substantial evidence supports the Board's finding that negotiations had not commenced before the Union's notice of withdrawal.

B.

We turn next to consider whether the Board erred in finding that the company committed certain unfair labor practices. The Board found that Rieth-Riley violated § 8(a)(1) and (5) of the NLRA by insisting that the Union engage in multi employer bargaining, granting wage increases in 2018 and 2020 without bargaining with the Union, clawing back benefit-fund contributions from employees without bargaining with the Union, and locking out its bargaining-unit employees in 2018.

Because the Union timely withdrew from the multi employer unit, Rieth-Riley violated the NLRA when it improperly: (1) insisted on multi employer bargaining after the termination of the Road Agreement, (2) increased wages for bargaining-unit employees in July 2018, and (3) locked out members of the bargaining unit in September 2018. Rieth-Riley does not argue otherwise. That leaves us to address only Rieth-Riley's clawback of benefit-fund contributions and its grant of wage increases in 2020, both of which Rieth-Riley carried out without bargaining with the Union.

1.

We turn first to Rieth-Riley's clawback of fringe-benefit contributions from bargaining-unit employees. As of fall 2018, Rieth-Riley remained obligated to bargain in good faith with the Union "with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). An employer commits an unfair labor practice by altering these matters without bargaining with the union. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991). Rieth-Riley does not dispute that it made a unilateral decision to claw back certain contributions from its employees' paychecks to replenish the benefits funds. Instead, it argues that an economic exigency excused its obligation to bargain over its claw-back decision.

An employer cannot implement unilateral changes for mandatory subjects of bargaining except "when economic exigencies compel prompt action." *Bottom Line Enters.*, 302 NLRB 373, 374 (1991). There are two categories of exigencies. The first category typically occurs when a "major economic effect [requires] the company to take immediate action." *RBE Elecs. of S.D., Inc.*, 320 NLRB 80, 81 (1995) (quotation omitted). For this category, the employer is not required to bargain before acting. *Id.* The second category involves other less "dire" circumstances that are "not sufficiently compelling to excuse bargaining altogether," but that "require prompt action" and "cannot await" final agreement. *Id.* at 81. For these lesser economic exigencies, employers must demonstrate that "time [was] of the essence" and that the alleged exigency "demand[ed] prompt action." *Id.* at 82. An employer may invoke the lesser-economic-exigency exception to bargaining only when the exigency "was beyond the employer's control, or was not reasonably foreseeable." *Id.* (citation modified). And the employer still must give the union "adequate notice and an opportunity to bargain." *Id.*

The employer must prove economic exigency. Employers bear "a heavy burden," as "economic exigency requires a compelling business justification." *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 755 (6th Cir. 2003) (citation modified). "Mere business necessity" is insufficient. *Id.* (citation modified).

Rieth-Riley says that its decision to claw back benefit contributions implicates the lesser-economic-exigency exception. If so, the company would have satisfied its statutory obligations to bargain in good faith "by providing adequate notice and an opportunity to bargain over the changes it propose[d] to respond to the exigency and by bargaining to impasse over the particular matter." *RBE Elecs.*, 320 NLRB at 82. And under such time-sensitive circumstances, the bargaining "need not be protracted." *Id.*

Substantial evidence supports the Board's finding that Rieth-Riley did not face an economic exigency. On October 11, 2018, Rieth-Riley notified the Union of its intent to recoup from employees "vacation and holiday benefits paid directly to the employees" from June to September 2018 and invited the Union to bargain. A.R. 2951. The company stated that it would begin clawing back the funds just four days later. The company further communicated to the Union that it "ha[d] recently learned" that it was in a § 9(a) relationship with the Union rather than a § 8(f) relationship. *Id.* at 2954.

The Union then sought to negotiate the fringe-benefit issue. But Rieth-Riley responded that it would initiate the clawback before the end of the month. And it in fact did so despite knowing since the summer of 2018 (and by no later than September 10, 2018) that the company had a § 9(a) bargaining relationship with the Union, which required it to maintain the status quo following the lapse of the Road Agreement. In other words, Rieth-Riley knew at least a month before its October 11 letter that it needed to continue contributing to its employees' benefits funds. Yet, despite this knowledge, the company perpetuated its own economic crisis by paying the contributions to its employees rather than the funds. Thus, the purported economic exigency was not beyond Rieth-Riley's control and, at a minimum, it was reasonably foreseeable.

Because Rieth-Riley failed to prove an economic exigency, its clawback of benefit-fund contributions violated § 8(a)(1) and (5) of the NLRA. As the ALJ put it, "[t]he length of time that elapsed before [Rieth-Riley] acted contradicts the claim that time was of the essence and an economic exigency existed." *Id.* at 4642.

Rieth-Riley resists this conclusion, claiming that its need to comply with the Davis-Bacon Act created the economic exigency. That law requires Rieth-Riley to pay prevailing wage rates to its employees. 40 U.S.C. § 3142. But Rieth-Riley's desire to comply with the Davis-Bacon Act has no bearing on the economic-exigency analysis because the company created the problem by choosing to pay the benefit contributions directly to its employees. And, at a minimum, Rieth-Riley reasonably foresaw the contribution issue upon being reminded, at least a month before it initiated the claw-back effort, that it was in a § 9(a) relationship with the Union.

Rieth-Riley also argues that it provided adequate notice of the clawback to the Union. But providing notice helps only if Rieth-Riley can show that it faced an economic exigency. As explained above, it failed to meet that burden.

Rieth-Riley further argues that the Union waived its right to bargain about the clawback issue by not timely demanding to negotiate. But substantial evidence supports the Board's finding that there was no waiver. Stockwell, the Union's business agent, opposed the claw-back effort and asked Rieth-Riley to discuss the matter during negotiations.

2.

Rieth-Riley also challenges the Board's finding that it committed an unfair labor practice by increasing wages for bargaining-unit employees in 2020 without bargaining with the Union. An employer must bargain with its employees' representative about wages. 29 U.S.C. § 158(d). When an employer unilaterally changes represented employees' wages, it "minimizes the influence of organized bargaining" by suggesting to employees that there is no need for a union. *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385, 66 S.Ct. 203, 90 L.Ed. 145 (1945). So an employer must provide the union with "notice and an opportunity to bargain" before making changes to wages. *NLRB v. Talsol Corp.*, 155 F.3d 785, 795 (6th Cir. 1998). An employer thus commits an unfair labor practice when it enacts wage increases without bargaining with the union, *Litton Fin.*, 501 U.S. at 198, 111 S.Ct. 2215, "for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal" to bargain, *NLRB v. Katz*, 369 U.S. 736, 743, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962).

Rieth-Riley does not dispute that it increased wages for bargaining-unit employees in 2020 without providing the Union notice or an opportunity to bargain. The company argues, instead, that it was excused from its duty to bargain about the wage increases because it subjectively believed the Davis-Bacon Act mandated the raise.

Rieth-Riley asks us to make two assumptions: (1) that the Davis-Bacon Act required Rieth-Riley to implement wage increases in 2020, and (2) that the company believed it had to implement the raise. Even so, Rieth-Riley's unilateral action violates § 8(a)(5) for two reasons. One, Rieth-Riley admitted that it had deep familiarity with the requirements of the Davis-Bacon Act before 2020. And two, the company had routinely consulted the Union beforehand to bargain over similar wage increases. Rieth-Riley therefore had reason to know that bargaining still played a pivotal role in complying with the Davis-Bacon Act, as an increase in compensation could entail many "options, including different benefit increases," which required the Union's input. A.R. 4639. So Rieth-Riley "had some choices over which the parties could have bargained" prior to implementing the wage increase. *See Trojan Yacht*, 319 NLRB 741, 743 (1995).

Considering this, substantial evidence supports the Board's determination that Rieth-Riley violated the NLRA by unilaterally increasing its employees' wages in 2020.

C.

The NLRA protects employees' right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Concerted activities include "the right to strike." *Id.* § 163; *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771, 779, 143 S.Ct. 1404, 216 L.Ed.2d 28 (2023).

There are two types of strikes. One type is an unfair-labor-practice strike. In an unfair-labor-practice strike, the employees are motivated, at least in part, by the employer's unfair labor practice. *Calex Corp. v. NLRB*, 144 F.3d 904, 911 (6th Cir. 1998). Importantly, participating strikers in an unfair-labor-practice strike can be neither discharged nor permanently replaced. So, when the strike ends, "the employer must discharge any replacements in order to accommodate returning strikers." *Belknap, Inc. v. Hale*, 463 U.S. 491, 493, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983). The second type is an economic strike. Employees participating in an economic strike are motivated by bargaining demands and other economic concessions, such as higher wages, shorter hours, or better working conditions. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180-81, 87 S.Ct. 2001, 18 L.Ed.2d 1123 (1967). Employers cannot fire those exercising their right to strike, though these economic strikers are not entitled to have their jobs back if their employer replaces them. *See Belknap*, 463 U.S. at 493, 103 S.Ct. 3172.

"The nature of a strike is a factual issue on which the Board's findings are conclusive if supported by substantial evidence on the record as a whole." *Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 259 (6th Cir. 1990). So we defer to the Board's factual findings, acceding "even more [so]" to its credibility determinations. *Airgas*, 916 F.3d at 560. Importantly here, "[t]he Board is free to find facts and draw inferences different from those of the ALJ," but when it does so, we have "an obligation to examine more carefully the evidence in cases where a conflict exists." *Jolliff v. NLRB*, 513 F.3d 600, 607 (6th Cir. 2008) (quotation omitted).

The Board found that the Union's 2019 strike was motivated in part by Rieth-Riley's unfair labor practices. In doing so, the Board reversed the ALJ's determination that the strike was economic only. Rieth-Riley contends that the Board erred.

Substantial evidence supports the Board's determination that the 2019 strike was at least partly motivated by Rieth-Riley's unfair labor practices. The Union's witnesses testified at the hearing before the ALJ that, at the July 2019 membership meeting before the strike, multiple employees complained about backpay issues stemming from the September 2018 lockout. These witnesses noted that even though the lockout occurred nearly a year beforehand, employees complained about the lingering financial toll. The NLRB's General Counsel also filed an unfair-labor-practice complaint against Rieth-Riley just two months before the strike. The Union addressed the complaint at the July 2019 meeting to inform employees about the grounds of the complaint. And it is undisputed that picket signs and related paraphernalia from the strike identified the lockout as a reason for the protest. Because the company's 2018 lockout was an unfair labor practice, sufficient evidence exists connecting the lockout to the strike. *See Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 820-21 (6th Cir. 1975) (noting that an unfair-labor-practice strike may be found where the employer's unfair practices are "contributing causes," even if they are not the primary reason).

Rieth-Riley makes several arguments in response. None, however, overcomes the company's "burden . . . to show that the strike would have occurred even if [the company] had not committed unfair labor practices." *Id.* at 820.

First, Rieth-Riley argues that the Board should not have relied on testimony from Union representatives because no employee from the bargaining unit testified during the hearing before the ALJ. The company assumes that because there was no testimony from a striking employee, the Board had no choice but to accord little weight to testimony from Union representatives. Granted, the Board should accord the testimony of a union official less weight when situated against "the strikers' own characterization of their motive" to strike. *In re 3D Enters. Contracting Corp.*, 334 NLRB 57, 75 (2001). But nothing requires the Board to hear employee testimony when determining the rationale behind a strike. *See N. Am. Coal Corp.*, 289 NLRB 788, 791 (1988) (finding that employees engaged in an unfair-labor-practice strike even though "the record [conveyed] nothing about the thoughts of the employees . . . as they went out on strike"). As a result, the Board did not err by crediting testimony from Union representatives in deciding whether the 2019 strike was motivated by Rieth-Riley's unfair labor practices.

Second, Rieth-Riley contends that Union testimony was unreliable because it was hearsay. The hearsay rule prohibits the admission of statements made by absent declarants where "a party offers [them] in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). The Board must conduct its hearings "so far as practicable" in accordance with the Federal Rules of Evidence. 29 U.S.C. § 160(b). But it need not "strictly adhere" to those rules. *3750 Orange Place Ltd. P'ship v. NLRB*, 333 F.3d 646, 666 (6th Cir. 2003). The ultimate question is "whether the relaxation of the Federal Rules of Evidence . . . was reasonable under the circumstances and limited in its application to the practicalities of th[e] situation." *Conley v. NLRB*, 520 F.3d 629, 640 (6th Cir. 2008) (per curiam). Rieth-Riley fails to identify any supposed hearsay statements in its appellate brief. And to the extent the Board considered hearsay in its analysis, Rieth-Riley failed to grapple with whether the Board reasonably relaxed the hearsay rule or limited the application of the evidentiary rules based on the practicalities of the situation. *See id.*

Third, Rieth-Riley claims that the Board should not have credited the Union officials' testimony because it conflicted with other evidence. "[I]n examining the union's characterization of the purpose of the strike, the Board and the court must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context." *C-Line Express*, 292 NLRB 638, 638 (1989) (quoting *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1981)). Rieth-Riley says that the Union did not conduct a vote to strike before doing so, and that the strike occurred in the thick of collective-bargaining negotiations. But neither point undermines the fact that the Union had authority to strike and that the strike was at least partially motivated by Rieth-Riley's unfair labor practice. Because no evidence undermines the testimony of the Union officials, the Board could rely on it in determining that an unfair-labor-practice strike had occurred.

D.

Rieth-Riley challenges the Board's sua sponte decision to issue an affirmative bargaining order. But Rieth-Riley failed to raise this challenge before the Board. So we lack jurisdiction to consider it. *See Quickway Transp., Inc. v. NLRB*, 117 F.4th 789, 818 (6th Cir. 2024).

Section 10(e) of the NLRA states: "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). This jurisdictional bar applies to actions taken by the Board sua sponte, *see Van Dorn Plastic Mach. Co. v. NLRB*, 881 F.2d 302, 306 (6th Cir. 1989), that could have been raised in "a petition for reconsideration or rehearing," *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666, 102 S.Ct. 2071, 72 L.Ed.2d 398 (1982).

Rieth-Riley did not object to the Board's bargaining order through a petition for reconsideration or rehearing. Nor has the company identified any "extraordinary circumstances" that would excuse its failure to do so. 29 U.S.C. § 160(e).

IV.

For the reasons above, we **DENY** Rieth-Riley's petition for review and **GRANT** the Board's cross-application for enforcement of its order.

APPENDIX B — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED DECEMBER 16, 2024

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

RIETH-RILEY CONSTRUCTION CO., INC. *AND* LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE), AFL-CIO

LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE), AFL-CIO *AND* MICHIGAN INFRASTRUCTURE AND TRANSPORTATION ASSOCIATION, INC.

Cases 07-CA-234085 and 07-CB-226531

December 16, 2024

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND PROUTY

On January 21, 2022, Administrative Law Judge Charles J. Muhl issued the attached decision. The General Counsel, Respondent Rieth-Riley, and Respondent Local 324, International Union of Operating Engineers filed exceptions and supporting briefs. The General Counsel, Respondent Rieth-Riley, and the Respondent Union each filed answering briefs and reply briefs.[1]

1. Respondent Rieth-Riley subsequently filed a notice of supplemental authority and the General Counsel and Respondent

Appendix B

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] only to the extent consistent with this Decision and Order, to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.[3]

Respondent Rieth-Riley Construction Co., Inc. ("Rieth-Riley") is a contractor that performs highway and road construction work throughout Michigan and has been represented for the purposes of collective bargaining by the Michigan Infrastructure Transportation Association, Inc. (MITA), a multiemployer bargaining association. Rieth-Riley's operating engineers are represented by

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Union filed responses. We have accepted those submissions pursuant to *Reliant Energy*, 339 NLRB 66 (2003).

2. We have amended the judge's conclusions of law consistent with our findings herein.

3. We have modified the judge's recommended Order to conform to the violations found, the Board's standard remedial provisions, and in accordance with our recent decisions in *Thryv, Inc.*, 372 NLRB No. 22 (2022), enf. denied on other grounds 102 F.4th 727 (5th Cir. 2024), *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), and *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021). For the reasons set forth in *Airgas USA, LLC*, 373 NLRB No. 102, slip op. at 1 fn. 2 (2024), the Board's decision in *Thryv* remains valid precedent. We shall substitute a new notice to conform to the Order as modified.

Local 324, International Union of Operating Engineers (IUOE), AFL-CIO ("the Union"). The most recent agreement between MITA and the Union, to which Rieth-Riley was bound, was effective by its terms from March 19, 2013 through May 31, 2018 (the "2013-2018 Road Agreement").

In early May 2018, the Union notified MITA and its employer members, including Rieth-Riley, that it was withdrawing from multiemployer bargaining. Thereafter, the Union sought to negotiate with Rieth-Riley on an individual basis. MITA and its employer members, including Rieth-Riley, however, insisted on continuing multiemployer bargaining with the Union. These opposing positions precipitated the chain of events at issue in the instant proceeding.

For the reasons explained by the judge, as supplemented below, we affirm his finding that the Union timely withdrew from multiemployer bargaining on May 2, 2018. We also affirm the judge's finding that Rieth-Riley violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by insisting the Union engage in multiemployer bargaining and by locking out 129 unit employees from September 4 to 27, 2018, in furtherance of that condition.[4] We further agree, for all the reasons explained by the judge, that Rieth-Riley violated Section

4. The complaint alleged the insistence on multiemployer bargaining and its lockout each independently violated Sec. 8(a)(5) and (1). The judge's analysis supports finding two violations of the Act even though the judge ultimately combined these violations in his conclusions of law.

8(a)(5) and (1) by unilaterally granting wage increases to employees on July 23, 2018, and June 1, 2020, and by unilaterally implementing payroll deductions on October 27, 2018, to recoup vacation and holiday fund contributions made to employees. In addition, we affirm the judge's dismissal of complaint allegations that the Union, through its representatives, violated Section 8(b)(1)(B) and (3) of the Act in June and July 2018 by telling MITA employer members that the Union would not negotiate successor contracts with them if MITA was their bargaining representative.[5]

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5. Rieth-Riley has excepted to the judge's dismissal of these complaint allegations, but its exceptions and supporting brief simply repeat findings of the judge and broadly argue, without any specific supporting arguments, that the judge ignored record evidence, omitted relevant facts, and failed to consider relevant law. Accordingly, we find that Rieth-Riley's exceptions do not meet the minimum requirements of Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations. See also *St. Paul Park Refining Co., LLC d/b/a Western Refining*, 366 NLRB No. 83, slip op. at 1 fn. 3 (2018), enfd. 929 F.3d 610 (8th Cir. 2019) (disregarding exceptions where a respondent did not present "any argument in support of these exceptions"). In their answering briefs, however, the Union and the General Counsel have raised substantive arguments, which Rieth-Riley has substantively addressed in its reply brief. Assuming that Rieth-Riley's substantive arguments are properly before the Board, we reject them on their merits. Rieth-Riley focuses entirely on its assertion that the Union representatives violated the Act because "the Union could not lawfully refuse to engage in multiemployer bargaining with MITA, given its untimely notice of withdrawal." As discussed below, we find that the Union timely withdrew from multiemployer bargaining and, accordingly, Rieth-Riley's argument is without merit.

Beginning on July 31, 2019, operating engineers employed by Rieth-Riley went on strike. Contrary to the judge, we find that the strike was an unfair labor practice strike from its inception. Accordingly, we shall order the appropriate remedies for the employees who participated in the strike.

1. The Union's timely withdrawal from multiemployer bargaining

The 2013-2018 Road Agreement included the following "termination" provision:

> This Agreement shall remain in full force and effect until the first day of June, 2018, and thereafter shall continue in force from year to year, unless either party hereto shall notify the other party in writing at least sixty (60) days prior to the end of the current term [April 1, 2018] or, as the case may be, sixty (60) days prior to the end of any additional contract year, of its intention to make changes in or terminate this Agreement. Such written notice shall specify any changes or amendments desired by the party giving such notice and shall be sent by certified mail to the other party.

On February 19, 2018, MITA Executive Vice President and Secretary Michael Nystrom sent Union Business Manager Douglas Stockwell a letter stating that MITA wished to terminate the road agreement and requesting dates for successor contract negotiations. On

February 21, 2018, Stockwell sent all MITA employer members, including Rieth-Riley, a letter stating that the Union also "desire[d] to terminate" the road agreement. That same day, without Stockwell's knowledge, a union administrative assistant mistakenly sent MITA a template contract reopener letter, which included Stockwell's stamped signature. That letter stated the Union's "desire[] to make changes" to the road agreement, offered to meet to negotiate a new agreement, and did not state that the Union withdrew from multiemployer bargaining.

Stockwell, however, subsequently made clear that he opposed multiemployer bargaining at a meeting in March 2018, attended by the Union, employers, and MITA representatives. According to Respondent Vice President Chad Loney, Stockwell explained at that meeting that he "hated" multiemployer bargaining associations because they drove a wedge between employers and the Union. When Nystrom asked Stockwell to provide potential dates for bargaining sessions later in March 2018 and again on April 11, 2018, Stockwell did not respond. On April 26, 2018, Stockwell discovered that the reopener letter had been sent in error. On May 2, 2018, the Union sent a letter to MITA stating that it accepted MITA's February 19 termination of the road agreement and that "we hereby withdraw from multi-employer bargaining with MITA for [the] road [agreement]." That day, Stockwell emailed the same notification to Rieth-Riley President Keith Rose.

In the following months, the parties remained unyielding in their positions—the Union consistently refused to bargain with MITA on a multiemployer basis while Rieth-Riley and other MITA members declined to engage in individual negotiations. As described in detail in the judge's decision, the parties engaged in a variety of pressure tactics to effectuate these opposing positions, including picketing by the Union and a 1-month lockout implemented by MITA-represented employers including Rieth-Riley. The parties thereafter negotiated an end to the lockout for the purpose of allowing road work projects to be completed before the winter, after an intervention by the Governor of the State of Michigan. The two sides also agreed that, once the construction season ended, the Union would negotiate with individual employers for successor collective-bargaining agreements using federal mediators.

The principal issue in this case is whether the Union timely withdrew from multiemployer bargaining. Multiemployer bargaining is predicated upon mutual consent of a union, multiemployer association, and individual employer members of the association to be bound by group negotiations rather than individual bargaining. See *Joseph J. Callier*, 243 NLRB 1114, 1117 fn. 8 (1979), enfd. 630 F.2d 595 (8th Cir. 1980). In *Retail Associates, Inc.*, the Board held that the policies of the Act nevertheless require "that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted from an established multiemployer bargaining unit." 120 NLRB 388, 393 (1958). Accordingly, the Board announced the following guidelines for withdrawal from multiemployer units:

> We would accordingly refuse to permit the withdrawal of an employer or a union from a

> duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.

Id. at 395. These guidelines were approved by the Supreme Court in *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 410-413 (1982).

The judge concluded, and we agree, that the Union met these guidelines. As noted above, the Union unequivocally withdrew from multiemployer bargaining on May 2, 2018, when it notified MITA and Rieth-Riley that "we hereby withdraw from multi-employer bargaining with MITA for [the] road [agreement]." This notice of withdrawal was timely because it was given prior to any agreed-upon date for beginning multiemployer negotiations. It was also consistent with the Union's steadfast opposition to continued multiemployer bargaining discussed above. Under these circumstances, the May 2 notice sufficiently dispelled any confusion that may have been occasioned by the Union's February 21, 2018 mistaken contract reopener letter. Accordingly, consistent with *Retail Associates*, the Union's May 2, 2018 unequivocal withdrawal from multiemployer bargaining was timely because it was communicated "prior . . . to the agreed-upon date to begin the multiemployer negotiations" for a successor road agreement. Id.[6]

6. Rieth-Riley contends that the parties commenced actual negotiations for a successor agreement prior to May 2, 2018, citing MITA's February 19 notice of termination, the Union's February 21 mistakenly-sent reopener letter, and additional record evidence showing a June 2016 meeting attended by the Union and Rieth-Riley where they discussed the issues of subcontracting and a hiring hall, subsequent 2016 emails where they discussed a date to continue that dialogue, and a January 2017 meeting between the Union and MITA representatives where they acknowledged that those issues would be a matter of concern during successor contract negotiations. For the reasons stated by the judge, we reject this contention.

The Carvel Co., 226 NLRB 111 (1976), enfd. 560 F.2d 1030 (1st Cir. 1977), cert. denied 434 U.S. 1065 (1978), cited by Rieth-Riley, is readily distinguishable. In *Carvel*, the union notified a multiemployer association that it "wished to reopen contract negotiations" prior to the date set for modification. Shortly after the contractual modification date had passed, the union also provided "a list of [its] tentative proposals;" the multiemployer bargaining association acknowledged receipt of the union's tentative proposals; stated those exchanges served as the "initial negotiations which the contract requires;" and advised it would contact the union "to set a firm date for the next meeting for bargaining purposes." 226 NLRB at 112. On these facts, the Board held that an employer's subsequent withdrawal from multiemployer bargaining was untimely under *Retail Associates.* But none of these facts are present here. The preliminary discussions cited by Rieth-Riley all occurred in 2016 and 2017, well *before* the April 1, 2018 modification notice date specified in the 2013-2018 Road Agreement and prior to any notice of any kind being served by any party. None of those discussions rose to the level of the tentative proposals presented in *Carvel.* Nor did the Union ever agree that those discussions constituted the

Although the Union's May 2, 2018 withdrawal occurred after the 60-day deadline set by the road agreement for contract termination or changes (April 1, 2018), we reject the argument that the Union also needed to meet that deadline to satisfy *Retail Associates*. Our dissenting colleague argues that *Retail Associates* only permits a party to withdraw from multiemployer bargaining prior to the date by the contract for modification or the agreed-upon date to begin negotiations, *whichever comes first*. The dissent posits that otherwise "any party can extend the deadline for withdrawal however long it chooses by declining to set an agreed-upon date to commence bargaining." Because the withdrawal here did not meet his standard, our colleague contends that it was untimely. We disagree.

To begin, *Retail Associates* explicitly established a disjunctive test under which withdrawal is timely "upon adequate written notice given prior to the date set by the contract for modification, *or* to the agreed-upon date to begin the multiemployer negotiations." (Emphasis added.) As the Supreme Court has recognized, *Retail Associates*

> neither forces employers into multiemployer units nor erects barriers to withdrawal *prior to bargaining*. At the same time, it has sought to further the utility of multiemployer bargaining as an instrument of labor peace by limiting

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start of initial negotiations. For its part, MITA requested dates to "*begin* discussions" (emphasis added) in its April 11, 2018 email to the Union, which is inconsistent with its subsequent claim that negotiations had already commenced.

> the circumstances under which any party may unilaterally withdraw *during negotiations*.

Charles D. Bonanno, 454 U.S. at 412 (emphasis added). Because the standard is plainly stated in the disjunctive—as the leading treatise on labor law has recognized[7]—a showing that either of the *Retail Associates* time targets has been met is sufficient to establish timely withdrawal from multiemployer bargaining. See *Loughrin v. United States*, 573 U.S. 351, 357 (2014) (clauses in a statute separated by "or" are "almost always disjunctive, that is, the words it connects are to be given separate meanings"); *Ryder Student Transportation Services*, 332 NLRB 1590, 1591 (2000) (finding it unnecessary to determine whether an employer violated both prongs of a two-prong disjunctive test). Our colleague's interpretation, in contrast, converts *Retail Associates* into a conjunctive standard under which withdrawal is timely only if notice is given before the date set by the contract for notice of modification *and* the agreed-upon date to begin negotiations. Our dissenting colleague fails to cite a single case in which the Board has applied his reading of *Retail Associates*.[8]

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7. *The Developing Labor Law*, ch. 11, §III.D.3.a. (John E. Higgins, Jr., ed., 2023) (ebook) (observing that in *Retail Associates*, the "Board conditioned either party's withdrawal upon adequate written notice given *either* prior to the contractually established date for modification of the collective agreement *or* prior to the agreed-upon date for the commencement of multi-employer negotiations") (emphasis added).

8. *Sheet Metal Workers International Assn. Local 104 v. Simpson Sheet Metal, Inc.*, 954 F.2d 554 (9th Cir. 1992), cited by the dissent, is readily distinguishable. In *Sheet Metal Workers*,

Nor can we agree with the dissent that our decision today "creates a perverse incentive" to delay negotiations or otherwise that runs directly contrary to the policy underlying" *Retail Associates* by allowing any party to extend the deadline "however long it chooses." First, it is an unfair labor practice for a party to refuse to meet at reasonable times. See Section 8(d). Second, even if a party could extend the deadline for some period of time by refusing to set a date to begin negotiations, we fail to see how the party would benefit from doing so rather than simply withdrawing from multiemployer bargaining.

We recognize that parties sometimes enter into additional agreements that address their withdrawal

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an employer argued that it was not bound by an arbitration award establishing a new contract negotiated by a multiemployer association and a union, on the basis that it effectively withdrew from the association. Id. at 555. Under the terms of the expired contract between the employer and the union, the employer authorized the association to act as its bargaining representative and withdrawal of that authorization required written notice to the association and union "at least 150 days prior to the expiration of the current CBA." Id. The employer, however, withdrew authorization 95 days prior to expiration of the old contract. Id. Citing *Retail Associates* and acknowledging that the employer had withdrawn "prior to the negotiations that resulted in the new CBA," the court found the withdrawal untimely because it "did not comply with the terms of the contract." Id. at 555-556. Unlike the present case, *Sheet Metal Workers* did not present the question whether withdrawal must take place prior to any deadline or window period set by a modification or termination clause. Accordingly, we do not regard the court's statement that regardless of the status of bargaining, withdrawal must "comply with the terms of the contract" as undermining our decision here.

from multiemployer bargaining. In *Midland Electrical Contracting Corp.*, 365 NLRB 835, 837-838 (2017), enfd. 774 Fed.Appx. 85 (3d Cir. 2019), for example, the employer was party to a multiemployer collective-bargaining agreement that required notice of intent to modify or renegotiate at least 60 days before the agreement expired and was also party to a separate membership agreement with the multiemployer association that required resignation from the association to be served "no less than 90 days prior to the date of expiration of the agreement between the Association and [the union]." The Board found that the employer's attempted withdrawal from multiemployer bargaining was untimely under *Retail Associates* because it occurred after the parties commenced negotiations for a successor collective-bargaining agreement. In addition, responding to arguments made by the respondent about the timeliness of its withdrawal pursuant to the terms of membership agreement, the Board found that the respondent's attempted withdrawal would have been untimely in any event because it did not satisfy the separate deadline established by the membership agreement.

In this case, however, the Union has not entered into any additional agreement addressing its right to withdraw from multiemployer bargaining comparable to the membership agreement at issue in *Midland Electrical.* The only restrictions applicable to the Union are those specified in *Retail Associates*, and the Union met that deadline.

For the foregoing reasons, we affirm the judge's finding that the Union timely withdrew from multiemployer bargaining.

2. Rieth-Riley unlawfully insisted on multiemployer negotiations and locked out unit employees

Because the Union timely withdrew from multiemployer bargaining, the Union was free to refuse multiemployer negotiations with MITA and Rieth-Riley and instead, insist that bargaining be conducted on an individual employer basis. Rieth-Riley and other MITA employer members' insistence that they would only negotiate for a successor agreement on the condition that bargaining occur on a multiemployer basis was thus a demand concerning the scope of the bargaining unit, which is a permissive subject of bargaining. See *Hampton House*, 317 NLRB 1005, 1005 (1995). Accordingly, Rieth-Riley violated Section 8(a)(5) and (1) by insisting on multiemployer bargaining as a condition to reaching agreement. See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349-350 (1958); *Sheet Metal Workers Local 104 (Ernest Ongaro & Sons)*, 323 NLRB 227, 232 (1997).

Moreover, Rieth-Riley separately violated Section 8(a)(5) and (1) when, in furtherance of that condition, it initiated a lockout in September 2018 in support of its demand that the Union ratify a proposed MITA multiemployer agreement. See, e.g., *Greensburg Coca-Cola Bottling Co.*, 311 NLRB 1022, 1023-1024 (1993) (employer violated the Act where it "unlawfully locked out unit employees in support of its proposal altering unit scope"), enf. denied 40 F.3d 669 (3d Cir. 1994).[9]

9. In affirming the judge's finding that Rieth-Riley violated Sec. 8(a)(5) and (1) by locking out its employees, however, we do not rely on his finding that Rieth-Riley's lockout was unlawful because

3. The Union's unfair labor practice strike

Beginning in June 2018, the Union engaged in a number of pressure tactics in support of its position. As more fully described in the judge's decision, these included refusing to refer operating engineers or apprentices to contractors that did not have a collective-bargaining agreement with the Union, refusing to allow out of state operating engineers to work in its jurisdiction, and notifying the benefit funds that the Union did not have a collective-bargaining agreement with a list of contractors and had withdrawn from multiemployer bargaining.

In June 2018, shortly after the 2013-2018 Road Agreement's expiration and the Union's timely withdrawal from multiemployer bargaining, the Union held a general membership meeting, attended by an unknown number of Rieth-Riley employees as well as employees of other MITA employers. At that meeting, Stockwell told members that the road agreement had expired, the Union did not want another multiemployer agreement, but instead wanted to bargain individually with MITA employers. The record reveals, without further detail, that members voted to authorize a strike that day, but the Union chose not to initiate one at that time.

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it was an "offensive" tactic rather than a "defensive" one. See *Harter Equipment*, 280 NLRB 597, 600 (1986) ("there no longer exists any meaningful distinction as to the effects between lawful 'offensive' and lawful 'defensive' economic weaponry"), review denied sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987).

Beginning November 2018, the Union and Rieth-Riley engaged in individual negotiations for a successor agreement. The parties held 10 sessions and reached tentative agreement on some issues. By the summer of 2019, however, several bargaining issues remained sticking points, most notably, subcontracting. At that time, the Union sought a subcontracting clause limiting hiring to union subcontractors. Rieth-Riley rejected those proposals, asserting that it would be difficult to find union subcontractors in areas of Michigan outside Detroit and its surrounding counties.

On May 29, 2019, the General Counsel issued a complaint in Case 07-CA-234085, alleging that Rieth-Riley violated the Act by unilaterally granting employees a wage increase in July 2018, insisting on multiemployer bargaining, locking out employees in September 2018, and, beginning October 2018, unilaterally implementing payroll deductions to recoup vacation and holiday fund contributions made to employees. At some point during the summer of 2019, the General Counsel offered to settle these complaint allegations. The General Counsel proposed a $1.8 million payment by Rieth-Riley, which would have made employees whole for lost wages and benefits suffered as a result of the unlawful lockout. This settlement would have amounted to a payment of about $14,000 per impacted employee. Rieth-Riley, however, rejected that offer.

On July 25, 2019,[10] the Union held a meeting with about 100 of its 180 members who worked for Rieth-Riley.

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10. Unless otherwise noted, all dates hereafter are in 2019.

Stockwell and Union President Ken Dombrow spoke at this meeting and testified about what transpired. Union Communications Director Daniel McKernan also testified about the meeting. According to McKernan, copies of the complaint in Case 07-CA-234085 were distributed to employees as they arrived for the meeting and union representatives handed out additional copies during the meeting as well. Dombrow opened the meeting and then introduced Stockwell, who discussed the lockout, described what had transpired between the Union and Rieth-Riley since the lockout, and the potential for a strike, which Stockwell explained was a last resort. Stockwell also discussed the Union's position that employees had been laid off, not simply locked out, and thus were entitled to unemployment benefits. Although not specifically mentioned by the judge, Stockwell testified that there were a lot of questions and talk about unemployment benefits to cover lost wages, including discussion of the fact that some employees had received benefits while others had not. Stockwell further testified that there was even discussion about employees who had received unemployment payments but were facing demands from the State of Michigan to repay it. Moreover, although not mentioned by the judge, Dombrow testified that the Union was working with the State of Michigan to try to get answers about employees' concerns.

After Stockwell's presentation, Dombrow spoke to the employees. He also mentioned the lockout and then discussed the allegations in the complaint in Case 07-CA-234085, some of which he read out loud. Dombrow reported to members that Rieth-Riley had rejected the General Counsel's $1.8 million settlement offer and that Rieth-Riley seemed completely uninterested in resolving the issues caused by the lockout. According to Dombrow, employees asked questions and made comments throughout the meeting regarding the NLRB case, including how long it would take to resolve that matter, the status of employees' unemployment claims, and the status of contract negotiations. Although not specifically mentioned by the judge, Dombrow testified that "[g]uys were insisting on going on strike that night." The Union did not hold a strike vote at this meeting. Stockwell explained that he did not call a vote at that time because the June 2018 strike vote granted him the authority to commence a strike, should he decide to do so.

Around the time of this meeting, the parties continued to engage in individual bargaining but could not reach agreement over various contractual terms, including wages, fringe benefits, profit sharing, a hiring hall, jurisdiction, and most notably, subcontracting. At that time, the Union proposed a clause that would have required Rieth-Riley to subcontract work to subcontractors who would agree to comply with the terms and conditions of a successor agreement, including any obligation to make fringe benefit fund contributions. During a July 29 negotiation session, Rieth-Riley made a counterproposal that adopted the Union's proposal requiring subcontractors to make fringe benefit contributions, but only with respect to seven Michigan counties in the Detroit area. The Union quickly rejected that proposal.

Either that same day or on July 30, Stockwell determined that the Union would go on strike against Rieth-Riley. On July 30, Stockwell notified Union representatives and Rieth-Riley employees that they would go on an "unfair labor practice" strike beginning July 31. That same day, the Union announced on Facebook the commencement of an "unfair labor practices" strike, further explaining that workers had bargained in good faith and that Rieth-Riley had rejected "a settlement to avoid a trial over unfair labor practices."

Beginning July 31, the Union established picket lines at 13 Rieth-Riley jobsites throughout Michigan. The Union used two picket signs, which stated, "Operating Engineers Local 324 NO CONTRACT against Rieth-Riley Unfair Labor Practices" and "Operating Engineers Local 324 ON STRIKE against Rieth-Riley Unfair Labor Practices." In news articles and press releases, the Union explained that Rieth-Riley's unfair labor practices, the lack of a successor contract, and the related subcontracting issue were all reasons for the strike. In many of these communications, the Union specifically referenced Rieth-Riley's unlawful lockout, employees' related concerns about unemployment benefits, and Rieth-Riley's rejection of the proposed settlement agreement.[11] In some internal

11. For example, in a July 31, 2019 press release, the Union asserted that its workers had "negotiated in good faith and the National Labor Relations Board has offered Rieth-Riley a settlement to avoid a trial over unfair labor practices . . . that could result in the company paying more than $1.8 million in back pay," covering a "controversial lockout" and Rieth-Riley denying "locked-out workers unemployment benefits." In an August

Union communications, however, the Union did not mention any unfair labor practices, but instead focused on the subcontracting issue.[12] As of May 2021, when the hearing in this case concluded, the Union continued to strike and the Union and Rieth-Riley had yet to reach agreement on a successor contract.

On March 10 and August 7, 2020, decertification petitions were filed in Case 07-RD-257830 and Case 07-RD-264330, respectively. The first petition was held in abeyance pursuant to the Board's then-current blocking charge policy, while the second petition was dismissed, subject to reinstatement, based on the Regional Director's merit determination in Case 07-CA-234085. See *Rieth-Riley Construction Co.*, 371 NLRB No. 109, slip op. at 1 (2022).

30, 2019 press release, the Union repeated these same claims, further explaining that "Rieth Riley also denied the locked-out workers unemployment benefits. The State of Michigan ruled in the workers favor allowing them to receive benefits for the period of the lockout." In an August 6, 2019 press interview, McKernan explained that the Union's strike "stems from last year's lockout, where 40 plus contractors locked us out in late September last year. All the other ones (contractors) worked things out for us except for this one contractor (Rieth-Riley)."

12. For example, in an August 2, 2019 letter to the Union's international body, Stockwell requested strike pay and explained that the Union struck because Rieth-Riley "will not sign because of our subcontracting language." And in a September 4, 2019 letter to Rieth-Riley employees, Stockwell explained that over 170 other contractors had signed the new road agreement and described its issues with Rieth-Riley as a "subcontracting battle."

The judge found that insufficient evidence existed to establish that Rieth-Riley's unfair labor practices caused the strike. The General Counsel excepts to the judge's findings in this regard. Our dissenting colleague argues that the Board should adopt the judge's rationale. Contrary to our dissenting colleague, we reverse the judge and find that the strike was an unfair labor practice strike.

"It is well settled that if a strike is caused in part by an employer's unfair labor practice, the strike is an unfair labor practice strike." *RGC (USA) Mineral Sands, Inc.*, 332 NLRB 1633, 1633 (2001) (discriminatory work assignments were contributing factor in strike 10 months later where prior assignments were an ongoing source of fear among employees), enfd. 281 F.3d 442 (4th Cir. 2002). Indeed, "[a]n unfair labor practice strike occurs even when the employer's unfair labor practice is not the sole or major cause or aggravating factor; it need only be a contributing factor." 332 NLRB at 1633. "[S]o long as an unfair labor practice has anything to do with causing the strike, it will be considered an unfair labor practice strike." *Dorsey Trailers, Inc.*, 327 NLRB 835, 855 (1999) (internal citations omitted), enfd. in relevant part, 233 F.3d 831, 839 4th Cir. 2000) ("A strike that is caused in whole or in part by an employer's unfair labor practices is an unfair labor practice strike."). The causal connection between unfair labor practices and a strike may be inferred from the record as a whole. *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145, 1145 (1995), enfd. 77 F.3d 461 (3d Cir. 1996). "It is not sufficient, however, merely to show that the unfair labor practices preceded the strike." *Golden Stevedoring Co.*, 335 NLRB 410, 411 (2001). "Rather, there must be a causal connection between the two events." Id.

Based on the record as a whole, we find, contrary to the judge, that the strike was caused at least in part by Rieth-Riley's unfair labor practices, in particular its unlawful and unremedied lockout of unit employees. While the lockout occurred in September 2018, the record clearly establishes that at the time the strike commenced employees remained upset by the loss of pay suffered as a result of the lockout. Moreover, the strike occurred in close proximity to the issuance of the complaint in Case 07-CA-234085 on May 29 and the July 25 meeting at which Dombrow read portions of the complaint aloud. See *Citizens Publishing & Printing Co.*, 331 NLRB 1622, 1623 (2000) (unfair labor practice strike where union official testified employees voted to strike after being advised that the General Counsel intended to issue a complaint on union's unfair labor practice charges). Dombrow testified without contradiction that employees insisted at the July 25 meeting on striking that night. Much like a strike vote, this evidence supports a finding that the unfair labor practices were a casual factor in the strike that followed.[13] The strike followed on the heels of those

13. Employees' statements at this meeting advocating an immediate strike support a finding that the prior unfair labor practices were a causal factor in the strike that the Union subsequently called even though Dombrow did not specifically testify that the statements followed the discussion of the complaint at that meeting. Before the meeting, employees were well aware of the unfair labor practices and the fact that the Region had issued the complaint. Moreover, it is undisputed that copies of the

expressions. Many of the Union's picket signs and related communications similarly identified the unfair labor practices, specifically including the lockout, as a reason for the strike. *Detroit Newspapers*, 326 NLRB 700, 707 (1998) ("record evidence regarding employee discussions, union communications (both to its membership and to the general public), and picket signs, all clearly indicat[ed] that . . . strikers were motivated at least in part by the prestrike unfair labor practices"), revd. on other grounds sub nom. *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (D.C. Cir. 2000).

In finding that the strike was not an unfair labor practice strike, the judge relied, in part, on the fact that the strike occurred 10 months after the unfair labor practices. While this timing is relevant to whether the strike was caused by the unfair labor practices, it is not determinative. *R & H Coal Co.*, 309 NLRB 28, 28 fn. 5 (1992) (strike beginning 13 months after unfair labor practices was unfair labor practice strike from its inception where delay credibly explained as tactical decision by union, unfair labor practices remained unremedied, and union's communications and picket signs referred to unfair labor practices), enfd. 16 F.3d 410 (4th Cir. 1994). Notwithstanding the 10-month period between the lockout and the strike, the record as a whole supports

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complaint were distributed as employees arrived and thereafter, and Dombrow testified that the employees asked questions and made comments throughout the meeting. In these circumstances, we infer that the unfair labor practices were at least a contributing factor in the support for an immediate strike expressed by employees at the meeting.

a finding that the lockout was a contributing factor in the strike for the reasons stated above.

While the strike also commenced shortly after Rieth-Riley rejected the Union's subcontracting proposal, this rejection was consistent with Rieth-Riley's longstanding position regarding subcontracting. Even assuming that the strike was also caused in part by Rieth-Riley's refusal to agree to the Union's subcontracting proposal, the fact that other, economic issues played a major role in the decision to strike does not preclude a finding that it is an unfair labor practice strike so long as the unfair labor practices were at least a contributing factor. *RGC (USA) Mineral Sands, Inc.*, 332 NLRB at 1633. As shown, that is the case here.

In finding that the strike was not an unfair labor practice strike, the judge also emphasized that the Union did not hold a strike vote on July 25, which he termed "confounding." Indeed, the judge went so far as to say that "had the employees voted to strike after the discussion of the General Counsel's complaint, then it would be possible to infer that the strike was an unfair labor practice strike." To begin, this finding ignores the uncontradicted testimony, discussed above, that employees urged an immediate strike at the July 25 meeting. In any event, and contrary to the judge's suggestion, a strike vote is not a dispositive factor in determining whether the strike was caused by unfair labor practices. See *R & H Coal Co.*, 309 NLRB at 28 fn. 5 (finding an unfair labor practice strike where a union "controlled the decision whether and when to strike" and "employees had little or no role in the decision to strike."); *North American Coal Corp.*, 289 NLRB 788, 791 (1988) (unfair labor practice strike where employees did not vote on whether to strike and only the union president testified about the reasons for the strike; causal connection established where union informed employees about the nature of the unfair labor practice and its opinion that any strike would be an unfair labor practice strike during an employee meeting preceding the strike).

The judge also gave little weight to the testimony of Dombrow, Stockwell, and McKernan about employee sentiment expressed at the July 25 meeting, which he dismissed as hearsay, and faulted the General Counsel for failing to present testimony from employees themselves. Again, we disagree. For one, Dombrow and Stockwell's testimony about what employees stated and the sentiments expressed at the meeting is not hearsay. It is direct evidence of employee statements and sentiments at the meeting, which under Board precedent is probative of the issue of the motive for the strike. See *North American Coal Corp.*, 289 NLRB at 792 ("Credible evidence that the employer's unfair labor practices were referred to in the course of the meeting of employees that led to the strike proves that the strike is an unfair labor practice strike, absent evidence to the contrary."). Nor is there any requirement for testimony by employees concerning their reasons for striking. *North American Coal Corp.*, 289 NLRB at 791; *Brooks, Inc.*, 228 NLRB 1365, 1367 fn. 12 (1977) ("in some instances the employees' reasons [for striking] are good evidence" of the actual cause of a strike," but "[w]hat is important is what in fact cause the strike in whole or in part, and not . . . the employees' conscious reasons for going on strike") (internal quotation marks omitted), enfd. sub nom. *NLRB v. Albion Corp.*, 593 F.2d 936 (10th Cir. 1979).[14]

Finally, the judge erred in minimizing the significance of the lockout on the basis that it was "temporary" and had no ongoing impact on employees, unlike a discharge or refusal to bargain, and that each employee would have received about $14,000 under the rejected settlement offer.[15] The lockout was for the purpose of forcing the

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14. The judge's criticism of the General Counsel seems to suggest that the judge believed the employees could discuss their first-hand motives for supporting a strike, without limitation, and in a manner more probative than Dombrow and Stockwell's account of what employees stated at the meeting. However, we note that if employees had testified, their testimony about motives for supporting a strike would be limited to reasons for striking "expressed by the employee at the time of the relevant events." *3D Enterprises Contracting Corp.*, 334 NLRB 57, 75 (2001) (citing *F.L. Thorpe & Co.*, 315 NLRB 147, 150 fn. 8 (1994), enf. granted and denied in part, 71 F.3d 282 (8th Cir. 1995)). The Board has stated that it will not rely on testimony of an employee's subjective reasons for striking "as asserted for the first time at the hearing in the unfair labor practice case." Id.

15. The judge cited *Titan Tire Corp.*, 333 NLRB 1156, 1157 (2001); *Gloversville Embossing Corp.*, 297 NLRB 182, 183 (1989); and *C-Line Express*, 292 NLRB 638, 638 (1989), as support for the view that an unfair labor practice's ongoing effect bears on the issue of whether a strike was caused by the unfair labor practice. But these cases all involve the question of whether a strike that was an economic strike at its inception was later *converted* to an unfair labor practice strike. In such cases, the Board has stated that the relevant inquiry is whether the unfair labor practices "caused a

Union to bargain on a multiemployer basis, and Rieth-Riley had not abandoned its position that the lockout was lawful, and that the Union was obligated to bargain on a multiemployer basis, at the time of the strike or, for that matter, as of the date that the hearing closed in this case. Moreover, the 2018 lockout did have an ongoing impact on employees, both in terms of the lost pay and because some employees had been denied unemployment benefits for the period of the lockout and because the State of Michigan was demanding that some employees repay unemployment payments they had previously received. In any event, "[i]n determining whether a strike is an unfair labor practice strike, the Board does not calculate the relative severity of the unfair labor practices, but instead considers only whether the strike was at least in part the direct result of the employer's unfair labor practices." *Boydston Electric*, 331 NLRB 1450, 1452 (2000).

In sum, we find that the record as a whole shows that the strike was caused, at least in part, by the ongoing, unremedied impact of Rieth-Riley's unlawful lockout and thus, we find that the strike was an unfair labor practice strike from its inception. Accordingly, we shall enter an appropriate remedial order to protect the strikers' prospective reinstatement rights.

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prolongation of the work stoppage." *C-Line Express*, 292 NLRB 638. Here, the question presented is whether the Union's strike was an unfair labor practice strike at its *inception*. Applying the well-established precedent set forth above, we find that it was, as the strike was caused at least in part by Rieth Riley's unfair labor practices.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following as Conclusion of Law 5.

"5. Rieth-Riley violated Section 8(a)(5) and (1) by insisting that the Union agree to bargain on a multiemployer basis, thereby changing the scope of the bargaining unit, a permissive subject of bargaining, and by locking out union members in support of that unlawful demand."

2. Insert the following as Conclusion of Law 7, and renumber the subsequent paragraphs accordingly:

"7. The strike was an unfair labor practice strike from its inception."

AMENDED REMEDY

Having found that the Respondent Rieth-Riley (hereafter "Respondent") engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the polices of the Act.

Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain collectively with the Union by: (1) insisting, as a condition of bargaining for any collective-bargaining agreement, that the Union agree to bargain on a multiemployer basis; and (2) in support of this condition, locking out unit employees from September 4, 2018, to September 27, 2018, we shall order the Respondent to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

Although the General Counsel sought an affirmative bargaining order in the complaint, the judge did not specifically address whether this remedy was warranted. We find that an affirmative bargaining order is necessary to fully remedy the violations in this case. The Board has previously held that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Caterair International*, 322 NLRB 64, 68 (1996). That includes cases where, as here, the respondent has insisted on a nonmandatory subject of bargaining as a condition to reaching agreement. See, e.g., *Smurfit-Stone Container Enterprises*, 357 NLRB 1732, 1736-1738 (2011) (employer unlawfully conditioned bargaining on union's agreement to modify existing agreement's termination date during its term), enfd. sub nom. *Rock-Tenn Services v. NLRB*, 594 Fed.Appx. 897 (9th Cir. 2014); *Sheet Metal Workers Local 104 (Ernest Ongaro & Sons)*, 323 NLRB 227, 232 (1997) (union unlawfully refused to bargain on an individual basis after employer timely withdrew from multiemployer unit).

In several cases, however, the United States Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727, 738-740 (D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB*, 117

F.3d 1454, 1460-1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248-1249 (D.C. Cir. 1994). In *Vincent*, supra, 209 F.3d at 738, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' [Section] 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act."

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, supra, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees, who were denied the benefits of collective bargaining by the Respondent's refusal to bargain in good faith with the Union. By insisting, as a condition of bargaining for any collective-bargaining agreement, that the Union agree to bargain on a multiemployer basis and thereby frustrating any possibility of securing a successor contract, the Respondent unlawfully deprived unit employees of the opportunity to obtain the stability and predictability such an agreement would provide. In addition, the Respondent unlawfully implemented new terms and conditions of employment without bargaining with the unit employees' representative, further demonstrating

its disregard of the employees' Section 7 rights. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. To the extent such opposition exists, moreover, it may be, at least in part, the product of the Respondent's failure and refusal to bargain in good faith.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the possibility of a decertification petition or by the prospect of an imminent withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charge and the issuance of a cease-and-desist order. Under these circumstances, a reasonable period during which the Union's majority status cannot be challenged clearly fosters meaningful collective bargaining.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's unlawful failure and refusal to bargain in good faith because it would permit a challenge to the Union's majority status before the taint of the Respondent's unlawful conduct has dissipated,

and before the employees have had a reasonable time to regroup and bargain through their representative in an effort to reach a successor contract. Such a result would be particularly unjust in the circumstances presented here, where the Respondent's insistence on bargaining on a multiemployer basis frustrated any progress toward achieving a collective-bargaining agreement—for which unit employees are likely to fault their bargaining representative, at least in part—and the nature of the Respondent's other unfair labor practices would further tend to undermine the unit employees' support for the Union. Thus, the Respondent's failure to bargain in good faith would likely have a continuing effect, tainting any employee disaffection from the Union arising during the litigation of the Union's charges and for a period of time after the issuance of this decision and order. Moreover, the imposition of a bargaining order would signal to employees that their rights guaranteed under the Act will be protected. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

Moreover, the Respondent has taken no action to repudiate its unlawful demand for multiemployer bargaining. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). To the contrary, the Respondent continues to claim that the Union is required to bargain on a multiemployer basis—a point it continues to argue in this very case.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the Respondent's violations of Section 8(a)(5) and (1) of the Act.

We shall also order the Respondent to make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful lockout. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Because unfair labor practice strikers are entitled to special remedial provisions, even if there is no allegation of any denial of reinstatement, we shall order the Respondent to offer the strikers, on their unconditional offer to return to work, immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the onset of the strike. The Respondent shall make the strikers whole for any loss of earnings and other benefits resulting from any failure to reinstate them within 5 days of their unconditional offer to return to work, backpay to be computed in accordance with *F. W. Woolworth Co.*, supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Any such employees for whom employment is not immediately available shall be placed on a preferential hiring list for employment as positions become available and before other persons are hired for the work. Priority for placement on such a list shall be determined by seniority or some other nondiscriminatory test. See *Grondorf, Field, Black & Co.*, 318 NLRB 996, 997 & fn. 3 (1995), enfd. in relevant part 107 F.3d 882 (D.C. Cir. 1997); *Central Management*, 314 NLRB at 768, 773.

Further, having found that the Respondent violated Section 8(a)(5) and (1) by making unilateral changes to the terms and conditions of employment of unit employees by granting wage increases to employees on July 23, 2018, and June 1, 2020, and by implementing payroll deductions on October 27, 2018, to recoup vacation and holiday fund contributions made to employees, we shall order the Respondent to rescind those changes at the Union's request. We shall require the Respondent to make the unit employees whole for any losses sustained as a result of its unlawful unilateral changes in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), enf. denied on other grounds 102 F.4th 727 (5th Cir. 2024), the Respondent shall also compensate the affected employees for any other direct or foreseeable pecuniary harms incurred as a result of its unlawful conduct, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings.

Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

We shall order the Respondent to compensate the affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In accordance with our decision in *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), the Respondent shall also be required to file with the Regional Director for Region 7 a copy of each backpay recipient's corresponding W-2 form reflecting the backpay award.

Finally, we shall order the Respondent to mail a copy of the attached notice to all current and former unit employees employed by the Respondent in Michigan any time since July 23, 2018. "The Board provides for the mailing of individual notices when posting will not adequately inform the employees of the violations that have occurred and their rights under the Act." *Bill's Electric, Inc.*, 350 NLRB 292, 297 (2007) (internal quotations omitted). Here, a notice mailing remedy is justified as the unit is comprised of construction employees who primarily work at locations away from the Respondent's facilities and, further, it appears from the record that unit employees are still on strike and may not be reporting to the Respondent's facilities. See *Abramson, LLC*, 345 NLRB 171, 171 fn. 3 (2005) (ordering notice mailing where unit employees worked on individual construction sites across a two-state region).

ORDER

The National Labor Relations Board orders that the Respondent, Rieth-Riley Construction Co. Inc., Goshen, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Local 324, International Union of Operating Engineers (IUOE), AFL-CIO (the Union) by insisting as a condition of reaching agreement that it engage in multiemployer bargaining.

(b) Locking out unit employees to pressure the Union to engage in multiemployer bargaining.

(c) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

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

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

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Operating engineers employed by Rieth-Riley in the State of Michigan in building construction, underground construction, and/or heavy, highway and airport construction, at the site of construction, repair, assembly and erection, including equipment operators, field mechanics, oilers, apprentices, and on the job trainees; but, excluding employees represented by other labor organizations, and professional, office and clerical employees, guards and supervisors as defined under the Act.

(b) On request by the Union, rescind the changes the terms and conditions of employment for its unit employees that were unilaterally implemented on July 23, 2018, October 27, 2018, and June 1, 2020.

(c) Make unit employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of its unlawful conduct, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Accord all striking employees, from the date of the strike, the rights of and privileges of unfair labor practice strikers, including, on their application, offering strikers immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the start of the strike, and make such employees whole for any loss of earnings or other benefits resulting from any failure to reinstate them on unconditional request, in the manner set forth in the amended remedy section of this decision.

(e) Compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(f) File with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form reflecting the backpay award.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful lockout as it pertains to each affected employee, and within 3 days thereafter, notify the employees in writing that this has been done and that the lockout will not be used against them in any way.

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

(i) Post at its Goshen, Indiana facility and all of its facilities in the State of Michigan copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms

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16. If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the

provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 23, 2018.

(j) Within 14 days after service by the Region, duplicate and mail, at its own expense, copies of the attached notice marked "Appendix" to all to all current and former unit employees employed by the Respondent in Michigan any time since July 23, 2018. Copies of the notice, signed by the Respondent's authorized representative, shall be mailed to the last known address of each of these individuals.

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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."

(k) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 16, 2024

Lauren McFerran, Chairman

David M. Prouty, Member

Appendix B

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting in part.

For decades, the Union[1] and the Michigan Infrastructure Transportation Association (MITA), of which Rieth-Riley Construction Co., Inc. (the Respondent) was an employer-member, were parties to a multiemployer bargaining relationship. The parties' collective-bargaining agreement in effect during the relevant time period required a party wishing to modify or terminate the agreement to provide notice by April 1, 2018.[2] It is undisputed that the Union informed MITA of its intent to withdraw on May 2, a month past this deadline. Despite this undisputed fact, my colleagues conclude that the Union's notice of withdrawal from the multiemployer bargaining relationship with MITA was nonetheless timely and effective. Then, having concluded that the withdrawal was timely and effective, my colleagues determine that the Respondent unlawfully insisted on maintaining multiemployer bargaining, that the Respondent unlawfully locked out unit employees in furtherance of that position, and that the Union's subsequent work stoppage was an unfair labor practice strike.

My colleagues and I agree that, in order to determine whether the Union's notice of withdrawal was timely and

1. The Union representing the Respondent's employees is Local 324, International Union of Operating Engineers.

2. All dates refer to 2018 unless otherwise indicated.

effective, the Board must apply the standard set forth more than 60 years ago in *Retail Associates, Inc.*, 120 NLRB 388, 395 (1958), which requires that a party's withdrawal from a multi-employer bargaining relationship is not permitted "except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations." Where my colleagues and I differ, however, is our view on whether the Board is bound to apply that precedential analytical standard in such a way as to render one of the two prongs of the test superfluous or, rather, whether the Board should interpret the two-part disjunctive test of *Retail Associates* functionally such that *both* prongs are given substantive legal effect.[3] In my colleagues' analysis, the parties' own agreement with regard to the requirements for timely withdrawal becomes effectively irrelevant to the Board's determination of

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3. Cf. *Restatement (Second) of Contracts* § 203(a) (1981) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."); see *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (observing that it is a "cardinal principle of contract construction [ ] that a document should be read to give effect to all its provisions and to render them consistent with each other"); *Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 370 NLRB No. 71, slip op. at 3 (2021) (quoting *Mastrobuono*, supra). Similarly, the Board should not read the disparate prongs of the *Retail Associates* standard such as to leave the first prong of that standard—"adequate written notice given prior to the date set by the contract for modification"—without legal effect. 120 NLRB at 395. The majority commits precisely this error here.

whether a party's withdrawal was timely. Indeed, not only does my colleagues' interpretation of the *Retail Associates* test eviscerate the parties' contractual agreement, but it affirmatively undermines the fundamental policy behind the Board's decision in that case: the furtherance of stability in multiemployer bargaining relationships.

In my view, a proper application of the *Retail Associates* standard to the instant case establishes that the Union's unequivocal written withdrawal request did not satisfy either prong of that standard. As a result, I would find that the Respondent's lockout—undertaken in response to the Union's demand for individual bargaining and its use of whipsaw-style economic weapons against individual MITA employers in support of that demand—constituted a lawful economic weapon. Because the Respondent's lockout was lawful, the Union's subsequent strike did not constitute an unfair labor practice strike but was an economic strike solely motivated by the Union's attempt to gain economic leverage. For all these reasons, I would dismiss the relevant complaint allegations and must dissent from the majority's decision.[4]

4. I agree with my colleagues that the Respondent violated Sec. 8(a)(5) and (1) by providing wage increases in 2018 and 2020 and by unilaterally implementing payroll deductions to recoup certain benefit fund contributions made to employees in 2018. I also decline to reach the merits of the judge's dismissal of the allegations that union representatives violated Sec. 8(b)(1)(B) and (3) by making certain unlawful statements in the summer of 2018 in light of the Respondent's failure to provide any argument in support of its exceptions to that dismissal.

Appendix B

1. The Union's attempted withdrawal from multiemployer bargaining was untimely

The Union represents operating engineers employed by the Respondent, which performs road construction work in Michigan. MITA represented the Respondent and other road construction employers for the purposes of collective bargaining with the Union. Their most recent collective-bargaining agreement (the "Road Agreement") expired on May 31, 2018, and included the following termination provision:

> This Agreement shall remain in full force and effect until the first day of June, 2018, and thereafter shall continue in force from year to year, unless either party hereto shall notify the other party in writing at least sixty (60) days prior to the end of the current term [April 1, 2018] or, as the case may be, sixty (60) days prior to the end of any additional contract year, of its intention to make changes in or terminate this Agreement. Such written notice shall specify any changes or amendments desired by the party giving such notice and shall be sent by certified mail to the other party.

Although I am not ordering a make-whole remedy in this case, I note that the provision in the Board's Order in *Thryv* containing the novel make-whole remedy upon which my colleagues rely was vacated by the Fifth Circuit. *Thryv, Inc. v. NLRB*, 102 F.4th 727, 748 (5th Cir. 2024). Accordingly, as I explained in *Airgas USA*, the vacated remedy cannot be cited as extant Board law. *Airgas USA, LLC*, 373 NLRB No. 102, slip op. at 19–20 (2024) (Member Kaplan, dissenting).

On February 19, MITA's representative, Michael Nystrom, sent a letter informing the Union that MITA wanted to terminate the Road Agreement and to negotiate a successor contract. Two days later, on February 21, the Union sent a reopener letter to all MITA employer members, including the Respondent, indicating that it also wished to terminate the Road Agreement; on that same day, a Union administrative assistant sent MITA a template contract reopener letter stamped with Union Business Manager Douglas Stockwell's signature that communicated the Union's "desire to make changes" to the Road Agreement and offered to meet to negotiate a new agreement. Neither of those letters stated that the Union was withdrawing from multiemployer bargaining.

In March, Nystrom told Stockwell that the parties needed to schedule dates for successor contract negotiations. Stockwell asked Nystrom to send him some potential dates, which Nystrom did in early April. On May 2, rather than respond to the suggested dates for successor negotiations, the Union sent a letter stating "we hereby withdraw from multiemployer bargaining with MITA for [the] road [agreement]." Accordingly, the first unambiguous written notification from the Union indicating its intention to terminate the Road Agreement came a full month after the April 1 deadline set forth in that agreement.

The Board has held that where a party is contractually bound to a multiemployer bargaining relationship, withdrawal from that relationship is not "free and uninhibited, or exercisable at will or whim," but must be timely and "unequivocal." *Retail Associates*, 120 NLRB at 393. To ensure stability in these types of bargaining relationships, the Board has concluded that withdrawal is not permitted "except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations." Id. at 395.[5] Further, "[w]here actual bargaining negotiations based on the existing multiemployer bargaining unit have begun," withdrawal is not permitted "except on mutual consent . . . absent unusual circumstances." Id. In my view, the disjunctive standard of *Retail Associates* sets forth two scenarios for withdrawal from a multiemployer bargaining relationship before negotiations have commenced. First, an employer or union may withdraw where it gives timely notice as set forth in the parties' collective-bargaining agreement, i.e., "prior to the date set by the contract for modification." Id. Second, in a situation where the parties have agreed to begin successor bargaining negotiations *before* the date set by the contract for notice of withdrawal, an employer or union may withdraw prior "to the agreed-upon date to begin the multiemployer negotiations." Id. And, of course, once parties in a multiemployer bargaining relationship have begun negotiations, withdrawal is generally not permitted except by mutual consent, further ensuring

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5. These conditions for withdrawal apply equally to unions and employers. See, e.g., *Evening News Assn.*, 154 NLRB 1494, 1495 (1965) (finding union timely withdrew where a contract renewed upon expiration "unless either party served written notice of a desire to modify the contract at least 60 days before the terminal date"), enfd. sub nom. *Detroit Newspaper Publishers Assn. v. NLRB*, 372 F.2d 569 (6th Cir. 1967).

stability. Id. In this way, the "fundamental purpose of the Act of fostering and maintaining stability in bargaining relationships" is ensured. Id. at 393.[6]

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6. Notably, my colleagues do not even attempt to argue that their interpretation of *Retail Associates* is more consistent with the rationale behind the test than mine, given that the Board in *Retail Associates* expressly sought to further stability in labor relations by significantly limiting parties' ability to withdraw from multiemployer bargaining relationships. Rather, their criticism of my position centers on their assertion that my view of the *Retail Associates* test "converts *Retail Associates* into a conjunctive standard," or put another way, my interpretation reads the "or" out of the test. This assertion, however, demonstrates either that they do not understand my position or that they do not understand the difference between disjunctive and conjunctive tests. Or possibly both. As I read *Retail Associates*, the "or" is very much relevant. If the parties *have not* agreed to begin bargaining prior to the date set by the contract for timely notice, then a party has until that contractual date to provide timely notice. *Or*, if the parties *have* agreed to begin bargaining prior to the date set by the contract for withdrawal notification, then, in order to be timely, notice must be provided before the parties begin bargaining *even if*, under the terms of the contract, the party could have provided later notice. If that is not a disjunctive test, then I'm not sure what is.

In addition, my colleagues attempt to undercut my logical application of the *Retail Associates* test by asserting that I have "fail[ed] to cite a single case in which the Board has applied [my] reading of *Retail Associates*." This is a curious criticism, however, given that my colleagues themselves fail to cite a single case in which the Board has found that a party's withdrawal from a multi-employer bargaining relationship was timely under circumstances similar to those present in this case.

In this connection, the majority's decontextualized reliance on *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, The first of these conditions—adequate written notice provided consistent with the requirements of the parties' contract—is clearly not met here. Accordingly, my colleagues focus on the second part of the *Retail Associates* standard, asserting that the Union satisfied the condition of providing adequate written notice prior to "the agreed-upon date to begin the multiemployer negotiations." Id. The problem with my colleagues' analysis is two-fold.

Principally, my colleagues' interpretation of the second prong of the *Retail Associates* standard would, in effect, subsume the first prong. Under the majority's approach, a party would be permitted to ignore the pertinent contractual deadline for modifying or terminating a multiemployer collective-bargaining agreement—and with it, ignore the effective contractual deadline for terminating the multiemployer bargaining relationship itself—yet still successfully terminate the multiemployer bargaining relationship any time after that simply by

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412 (1982), offers no support for their position. There, the parties to a multiemployer bargaining relationship had already begun negotiations for a successor contract and the issue was whether a bargaining impasse constituted "unusual circumstances" sufficient to permit unilateral withdrawal from the relationship during negotiations. Id. That issue is not present here. Rather, in the instant case, the issue is whether the Union lawfully withdrew "prior to the date set by the contract for modification, or to the agreedupon date to begin the multiemployer negotiations." See *Retail Associates*, supra at 395. It is therefore unsurprising that the Supreme Court's summation of the *Retail Associates* standard—quoted by my colleagues out of context—does not even mention the contractual deadline prong of *Retail Associates*.

agreeing to begin negotiations at a later date. If that were, in fact, what the Board intended in drafting the *Retail Associates* standard, then why would the first prong even be included? For it follows that, if a "timely" revocation could take place anytime *after* the contractual deadline, so long as it is before the agreed-upon date to begin bargaining, the parties' contractual deadline is virtually without legal effect. By contrast, if the second prong is interpreted to apply *only* where the agreed-upon date to begin bargaining falls *before* the contractual deadline, then both prongs are given legal effect—i.e., withdrawal must occur before whichever date comes first.

Relatedly, my colleagues' interpretation of the *Retail Associates* standard creates a perverse incentive that runs directly contrary to the policy underlying that standard. According to my colleagues' reading, any party can extend the deadline for withdrawal however long it chooses by *declining to set* an agreed-upon date to commence bargaining. In this way, the uncertainty and potential for manipulation following from my colleagues' construction of *Retail Associates* undermines, rather than supports, the Board's stated policy objective of ensuring stability in multiemployer bargaining relationships. See *Retail Associates*, 120 NLRB at 395 (observing that "the timing of an attempted withdrawal from a multiemployer bargaining unit . . . is an important lever of control in the sound discretion of the Board to ensure stability of such bargaining relationships").[7] Clearly then,

7. My colleagues claim to see no inappropriate incentive created by their interpretation of *Retail Associates* because, in their estimation, a party would benefit from simply withdrawing

the more sensible reading of the two *Retail Associates* scenarios is to foreclose the second scenario regarding the timing of successor negotiations unless the parties have mutually agreed to commence bargaining before the contractual timeframe for terminating the contract and multiemployer bargaining relationship has elapsed.[8]

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from multiemployer bargaining now rather than delaying the withdrawal and risking violating its duty to bargain in good faith by "refus[ing] to meet at reasonable times." Were only life and labor relations so simple. Indeed, in the very case before us, the Union could easily have withdrawn from multiemployer bargaining prior to the contractual deadline but failed to do so because of its own lack of diligence. Having missed the contractual deadline, the Union refused to set a date with MITA to begin successor contract negotiations despite having previously sent a reopener letter, and then withdrew from multiemployer bargaining technically prior to a date for successor negotiations that the Union itself refused to set. As a result, the Union seeks, and the majority now provides, the opportunity for a doover on withdrawal. Neither the Union's missed opportunity to lawfully withdraw sooner nor the risk of violating its duty to bargain by delaying or refusing to set dates to "meet at reasonable times" for successor contract bargaining with MITA dissuaded the Union from this course of conduct. By sanctioning the Union's actions, my colleagues encourage others to follow suit.

8. This interpretation of the *Retail Associates* standard is consistent with the view expressed by the court in *Sheet Metal Workers International Assn. Local 104 v. Simpson Sheet Metal, Inc.*, 954 F.2d 554 (9th Cir. 1992). In *Sheet Metal Workers*, a multiemployer agreement permitted "withdrawal of . . . authorization" from multiemployer bargaining upon written notice at least 150 days prior to the agreement's expiration. Id. at 555. After this contractual deadline had passed but before the multiemployer association and union began successor contract

That did not happen in this case, so the General Counsel failed to establish that the Union satisfied either prong of the *Retail Associates* standard. Accordingly, the Union was not privileged to withdraw from the multiemployer bargaining relationship.[9]

2. The Respondent lawfully insisted on multiemployer bargaining and locked out employees

After the Union sent its untimely May 2 letter of withdrawal, MITA employers, including the Respondent,

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negotiations, an employer bound by the agreement submitted a written withdrawal notice. Id. Subsequently, the union and multiemployer association reached a new agreement. Id. The employer argued that it was not bound by the new agreement on the basis that it had timely withdrawn from the old one. Id. Citing *Retail Associates*, the court acknowledged that the employer's withdrawal occurred "before the start of negotiations," but nonetheless held that the employer had not "effectively withdrawn" from multiemployer bargaining. Id. at 556. The court focused exclusively on the employer's contractual obligation, explaining that the "ability to withdraw from a multiemployer bargaining unit is . . . limited by the agreement of the parties [and i]n order to be effective, withdrawal must be carried out as specified in the agreement creating the multiemployer unit." Id.

9. I agree with my colleagues that, given the absence of any separate agreement between the parties addressing their withdrawal from multiemployer bargaining, the "only restrictions applicable to the Union [pertaining to withdrawal] are those specified in *Retail Associates*." Accordingly, I consider *Midland Electrical Contracting Corp.*, 365 NLRB 835 (2017), and similar cases involving such separate agreements to be irrelevant to the disposition of this case.

declined to bargain with the Union on an individual basis, as they correctly understood that they continued to be parties to a multiemployer bargaining relationship. Indeed, a MITA representative emailed Stockwell on May 14 expressing confusion about the Union's asserted withdrawal and asked to meet to begin successor negotiations. On May 18, Nystrom followed up with Stockwell regarding his earlier March letter with potential bargaining dates and attached a first multiemployer contract proposal to initiate bargaining. Stockwell responded by reiterating the Union's legally incorrect position that it had terminated the parties' multiemployer bargaining relationship. On May 31, the parties' Road Agreement expired.

During the summer of 2018, the Union deployed several economic weapons in an attempt to force MITA to acquiesce to its position that it was permitted to insist on individual bargaining with the Respondent and other MITA employers. This included refusing to provide operating engineers or apprentices to certain MITA employers for their road construction projects unless they signed individual contracts with the Union, refusing to allow Wisconsin operating engineers to work on MITA employer projects in the Union's Michigan jurisdiction, refusing to accept certain MITA employer contributions to the employees' fringe benefit funds, and picketing at a MITA employer construction project resulting in a delay to the start of work that day.

Three days after the picketing, MITA held a meeting to discuss ways in which the road construction employers could support each other in response to the Union's picketing and refusal to bargain on a multiemployer basis. Ultimately, MITA employers approved a lockout of employees. On September 4, the Respondent stopped work and locked out the operating engineers represented by the Union. On September 25, after intervention by the Governor of Michigan, the lockout ended.

As discussed above, the Union's attempted withdrawal from the parties' multiemployer bargaining relationship was untimely and ineffective. Because the Union failed to timely withdraw, the Respondent's insistence on continuing the multiemployer bargaining relationship was a lawful bargaining demand. See *NLRB v. Truck Drivers Local 449 (Buffalo Linen Supply Co.)*, 353 U.S. 87, 97 (1957) (holding that "the Board correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multiemployer bargaining basis from the disintegration threatened by the Union's strike action was lawful"); *Acme Markets*, 156 NLRB 1452, 1455-1456 (1966). Employer lockouts in support of legitimate bargaining demands are lawful. See *American Ship Building Co. v. NLRB*, 380 U.S. 300, 310-313 (1965) (holding that employer's use of a lockout in support of its legitimate bargaining position is not "in any way inconsistent with the right to bargain collectively or with the right to strike"); *Highland Superstores, Inc.*, 314 NLRB 146, 146 (1994) (employer can lawfully lock out employees "in response to economic action by the union, provided that the employer's action is in support of a lawful bargaining position"). Accordingly, the Respondent's lockout here was lawful.

Therefore, I would dismiss the complaint allegations that the Respondent violated the Act by insisting on multiemployer bargaining through MITA and locking out its unit employees in furtherance of that lawful demand.

3. Employees engaged in an economic strike

After the lockout ended in September 2018, the parties engaged in bargaining on an individual employer basis. However, by the summer of 2019, they had not reached an agreement, with several issues remaining as sticking points, notably subcontracting, wages, and a hiring hall.

In May 2019, the General Counsel issued the complaint alleging that the Respondent violated the Act by insisting on multiemployer bargaining, providing a wage increase in July 2018, implementing a payroll deduction to recoup benefit fund contributions in October 2018, and locking out its employees in September 2018. In July 2019, the Respondent rejected a settlement offer.

On July 25, 2019, the Union held a meeting with just over half of the operating engineers employed by the Respondent in attendance. At this meeting, Union representatives generally discussed the events that had occurred since the Road Agreement expired, including the status of negotiations for a successor agreement, the allegations in the General Counsel's complaint, the Respondent's rejection of the settlement offer, and the possibility of a strike. In addition, much of the meeting focused on the lockout and its effects on employees, including the denial of unemployment benefits for some employes. Several employees asked questions on these topics, and some voiced their support for going on strike. Stockwell informed employees that the Union would notify them before going on strike but did not call a vote on a strike.

On July 29, 2019, the Respondent sent a subcontracting counterproposal to the Union that agreed to the Union's proposed language but only for a limited geographic scope. Again, subcontracting had long been one of the major points of contention between the parties. The Union's subcontracting proposal would require the road construction employers to subcontract work only to those contractors who would fully comply with the wage rates, fringe benefit fund contributions, and other terms of the agreement. The Respondent's counterproposal agreed to Union's proposal that subcontractors would adhere to the terms of the agreement but only for the 7 urban counties around Detroit, not the remaining 76 counties in Michigan. The Union quickly rejected the proposal.

The same day or the next day, Stockwell decided the Union should go on strike against the Respondent. In making this decision, Stockwell acted within his authority as the Union's business representative and also relied on a June 2018 strike vote that passed at a meeting of all members who worked for the MITA road construction employers. Stockwell did not contemporaneously ask the Respondent's employees to vote on a strike. According to Stockwell, he called the strike because he was concerned about members' lost wages from the lockout, their inability to get unemployment benefits, the Respondent's recoupment of benefit fund contributions from employees,[10] and the lack of progress in negotiations for a successor agreement. On July 31, 2019, the Union went on strike and established picket lines at many of the Respondent's road construction projects.

For a strike or work stoppage to be considered an unfair labor practice strike it must be motivated, at least in part, by the employer's unfair labor practices, even if economic reasons for the strike were more important than the unfair labor practice activity. See *Burns Security Services*, 324 NLRB 485, 492 (1997), enf. denied on other grounds 146 F.3d 873 (D.C. Cir. 1998). It is not sufficient, however, to merely show that the unfair labor practices preceded the strike. *Golden Stevedoring Co.*, 335 NLRB 410, 411 (2001). "Rather, there must be a causal connection between the two events." Id.

Unlike my colleagues, I would affirm the judge's well-reasoned conclusion that the evidence does not show that the Union's strike was caused by either the Respondent's lockout or its unfair labor practices. Particularly compelling is the lack of a contemporaneous strike vote. The operating engineers employed by the Respondent did not take a strike vote at the 2019 meeting when the General Counsel's unfair labor practice allegations were discussed. Instead, the Union relied on a 2018 economic strike vote from a general membership meeting that preceded the allegedly unlawful actions. Moreover, the Union called

10. On July 18, 2019, the Respondent notified the Union that it would be repaying employees for the benefit fund deductions from their paychecks.

the strike only after the Respondent rejected the Union's subcontracting proposal and countered with its own county-specific proposal—which the Union immediately rejected. Further, as the majority acknowledges, the Union did not mention any unfair labor practices, but instead focused on the subcontracting issue, in its internal communications. Indeed, in an August 2, 2019, letter to the Union's international body, Stockwell requested strike pay and explained that the Union struck because Rieth-Riley "will not sign because of our subcontracting language." A month later, in a September 4, 2019, letter to Rieth-Riley employees, Stockwell explained that over 170 other contractors had signed the new road agreement and described its issues with Rieth-Riley as a "subcontracting battle." Because the record establishes that subcontracting was a longstanding point of contention among the parties, the timing of the strike so soon after the exchange of subcontracting proposals (mere days) compared to the lockout (10 months) also strongly supports the finding of a purely economic motive on behalf of the Union and the Respondent's employees. See *Typoservice Corporation*, 203 NLRB 1180, 1180 (1973) (concluding that work stoppage was an economic strike where employer refused to agree to a contract executed between the union and a multiemployer association from which it had withdrawn, and unfair labor practices had occurred months earlier).[11]

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11. My colleagues acknowledge, as they must, that the significant passage of time between the Respondent's lockout and the Union's strike is relevant to the determination of whether the lockout contributed to the decision to strike, but they simply and unpersuasively dismiss the 10-month delay as not determinative.

Even assuming that the strike was motivated in part by the Respondent's lockout, this fact would be of no legal consequence because the lockout was not an unfair labor practice; it was a lawful economic weapon deployed in response to the Union's insistence on individual bargaining and deployment of whipsaw-style economic weapons in support of that position. Therefore, the only unfair labor practices potentially relevant to the strike issue are a wage increase given to employees a year prior in the summer of 2018 and the recoupment of benefit fund contributions in the fall of 2018, the latter of which the Respondent had already agreed to pay back two weeks before the strike was called. These unfair labor practices may have occurred prior to the Union's strike but there is no evidence that the unit employees were motivated to strike because of them. Indeed, my colleagues conclude only that the lockout contributed to employees' decision to strike.

In reversing the judge, my colleagues find that the strike was caused, at least in part, by the Respondent's lockout and its economic effects on employees. In doing so, they bend over backwards to elevate the significance of vague testimony from Union officials regarding employees' purportedly widespread insistence on going on strike the night of the July 29 meeting. Yet, "in examining the union's characterization of the purpose of the strike, the Board . . . must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context." *C-Line Express*, 292 NLRB 638, 638 (1989) (quoting *Soule Glass Co. v. NLRB*, 652 F.2d

1055, 1080 (1st Cir. 1980)).[12] Here, the record as a whole supports a finding that the Union made a strategic decision to call an economic strike based on the Respondent's rejection of its subcontracting proposal but under the pretext of a purportedly unlawful lockout from 10 months earlier, presumably because it would have the effect of shielding members from the consequences of a purely economic strike. See *Lucky 7 Limousine*, 312 NLRB 770, 770 (1993) (finding unfair labor practice strikers are entitled to special remedial provisions, even if there is no allegation regarding denial of reinstatement). As to the employees' motivation for the strike, we are left without any meaningful insight because the General Counsel did not call a single employee as a witness that would corroborate the testimony of the Union representatives. Causality requires more than is present here.

In sum, I would find that the Respondent's September 2018 lockout of employees was not an unfair labor practice

12. Although these cited cases arose in the context of considering whether an economic strike had been converted to an unfair labor practice strike, the need for skepticism expressed in those cases applies to the Union officials in the instant case as well. Indeed, the majority relies heavily on Union President Ken Dombrow's testimony concerning employee strike sentiment because it was given "without contradiction" despite "not [being] specifically mentioned by the judge." In other words, my colleagues are crediting testimony for a key finding that the judge did not. The judge only found that "[m]ultiple members spoke about their desire to go on strike," without jumping to the majority's conclusion that this sentiment was widely shared in a meeting that included only little more than half of the Respondent's unit employees in the first place.

and did not contribute to the Union's decision to go on strike in July 2019. The strike was purely an economic strike called by the Union in response to an "unacceptable" bargaining proposal regarding subcontracting.

CONCLUSION

My colleagues find that the Union acted lawfully by unilaterally dissolving a longstanding multiemployer bargaining relationship. In order to do so, my colleagues interpret the applicable *Retail Associates* standard in a way that renders the parties' own contractual agreement concerning the deadlines for withdrawing from the multiemployer bargaining irrelevant. By doing so, my colleagues erode the fundamental policies underlying that precedent: maintaining the stability of collective-bargaining relationships and encouraging collective bargaining in general. Indeed, the approach that they adopt is contrary to those policies, incentivizing parties to multiemployer bargaining relationships to delay agreement to begin bargaining for a successor contract to preserve their right to withdraw even after missing a contractual deadline to do so. And, as happened here, such parties may deploy whipsaw-style economic weapons, perhaps hoping to coerce an employer to accept its untimely request to withdraw from multiemployer bargaining.

The predictable result of the majority's interpretation of the *Retail Associates* standard will be to discourage bargaining in well-established multiemployer relationships and to undermine the very stability that led the Board to adopt the *Retail Associates* standard in the first place. Because I cannot accept this abandonment of critical labor policies underlying the Act, I respectfully dissent.

Dated, Washington, D.C. December 16, 2024

Marvin E. Kaplan Member

Appendix B

NATIONAL LABOR RELATIONS BOARD

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with Local 324, International Union of Operating Engineers (IUOE), AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit by insisting as a condition of reaching agreement that it engage in multiemployer bargaining.

WE WILL NOT lock you out to pressure the Union to engage in multiemployer bargaining.

Appendix B

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

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

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Operating engineers employed by Rieth-Riley in the State of Michigan in building construction, underground construction, and/or heavy, highway and airport construction, at the site of construction, repair, assembly and erection, including equipment operators, field mechanics, oilers, apprentices, and on the job trainees; but, excluding employees represented by other labor organizations, and professional, office and clerical employees, guards and supervisors as defined under the Act.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented on July 23, 2018, October 27, 2018, and June 1, 2020.

WE WILL make affected employees whole for any loss of earnings and other benefits resulting from our unlawful conduct, less any net interim earnings, plus interest, and we will also make affected employees whole for any other direct or foreseeable pecuniary harms suffered as a result of our unlawful conduct, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL, from the date of the strike, reinstate on request all striking employees to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the start of the strike, and we will make such employees whole, with interest, for any loss of earnings or other benefits resulting from any failure to reinstate them on unconditional request.

WE WILL compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form reflecting the backpay award.

We will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful lockout as it pertains to each affected employee, and we will, within 3 days thereafter, notify the affected employees in writing that this has been done and that the lockout will not be used against them in any way.

Rieth-Riley Construction Co., Inc.

The Board's decision can be found at https://www.nlrb.gov/case/07-CA-234085 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, DC 20570, or by calling (202) 273-1940.

DECISION

Charles J. Muhl, Administrative Law Judge. For decades, Local 324 of the International Union of Operating Engineers, AFL-CIO has represented operating engineers employed at Rieth-Riley Construction Co., Inc. throughout the State of Michigan. The operating engineers perform road construction work. In recent times, the Michigan Infrastructure and Transportation Association, Inc. (MITA), a multiemployer bargaining association, represented Rieth-Riley and other road construction contractors for purposes of collective bargaining. The most recent collective-bargaining agreement between MITA and the Union was set to expire on May 31, 2018.

In January of that year and unbeknownst to the Union, Rieth-Riley and other contractors executed a confidential "all-for-one" agreement with MITA. The agreement bound the contractors to multiemployer bargaining with MITA as their representative. It prohibited contractors from negotiating individually with the Union. The agreement gave MITA the authority to direct the contractors to lock out their employees during negotiations. It also subjected the contractors to monetary damages if they breached the agreement.

On May 2, 2018, the Union notified MITA and the contractors that it was withdrawing from multiemployer bargaining for a successor collective-bargaining agreement, as was its legal right. Nonetheless, from that point on throughout the summer of 2018, MITA and Rieth-Riley ignored the Union's withdrawal notification and continued to pursue negotiations on a multiemployer basis. Being committed to the all-for-one agreement, neither Rieth-Riley nor any other contractor requested that the Union bargain individually with it, either directly with the contractor or with MITA as the contractor's representative.

In June 2018 following the collective-bargaining agreement's expiration, the trustees of the Union's fringe benefit funds decided to hold and stop crediting contributions from any contractor which did not have a collective-bargaining agreement with the Union and had designated MITA as its bargaining representative. After being notified of the funds' decision in July, Rieth-Riley gave its operating engineers a wage increase of $2 per hour. The company did not notify the Union of the increase or offer to bargain over it.

In early August 2018 when the funds reaffirmed their decision to not credit contributions, Rieth-Riley and other contractors revoked MITA's authority to bargain on their behalf, hoping that would alter the funds' approach. However, the funds instead decided to return to the contractors all the contributions that had been held but not credited.

Then on August 25, 2018, at one jobsite, the Union picketed three contractors who had no contract with the Union at that time. In response, MITA had all the road agreement contractors re-designate MITA as their bargaining representative. MITA then notified the Union that, because of its "strike," MITA and the contractors would implement a "defensive lockout" on September 4, 2018. MITA also proposed a multiemployer collective-bargaining agreement between it and the Union and stated the lockout would end when the Union ratified that agreement.

Ultimately, the contractors, including Rieth-Riley, locked out their employees from September 4 to 27, 2018. In communications to the Union, the contractors, and the press during the lockout, MITA repeatedly conditioned the end of the lockout upon the Union signing the multiemployer contract. The lockout impacted more than 2000 employees, including 129 at Rieth-Riley. The General Counsel has asserted that the lockout cost Rieth-Riley employees approximately $1.8 million total. The lockout ended only after the intervention of the then governor of Michigan. Shortly thereafter, the Union and Rieth-Riley began bargaining individually for a successor collective-bargaining agreement.

On July 31, 2019, as those contract negotiations continued and roughly two months after the General Counsel issued the complaint against Rieth-Riley in Case 07-CA-234085, the operating engineers at the company went on strike. That strike, as well as the negotiations for a successor contract, remained ongoing as of May 27, 2021, the last hearing day in these cases.

In Case 07-CA-234085, the General Counsel's complaint principally alleges that Rieth-Riley's September 2018 lockout of its operating engineers violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). The complaint alleges that Rieth-Riley utilized the lockout in furtherance of the unlawful bargaining objective of requiring the Union to engage in multiemployer bargaining, a permissive subject, by executing a multiemployer contract. The complaint also alleges that Rieth-Riley made four unilateral changes to employees' terms and conditions of employment. The alleged changes include annual wage increases in 2018, 2019, and 2020, as well as deductions from employees' paychecks related to fringe benefit fund contributions in 2018. The complaint also alleges that Rieth-Riley's operating engineers went on an unfair labor practice strike in response to the company's unlawful conduct. In response to the complaint, Rieth-Riley asserts and pursues no less than 20 affirmative defenses, which significantly muddy the waters. Once the water clears, though, I find merit to the General Counsel's complaint allegations regarding the lockout and three of the four unilateral changes. However, I also conclude that the General Counsel presented insufficient evidence to establish that the Union's strike against Rieth-Riley is an unfair labor practice strike.

In Case 07-CB-226531, the General Counsel's complaint alleges that the Union violated Section 8(b)(1)(B) of the Act on six occasions in the summer of 2018. Specifically, the complaint alleges that union representatives made statements to contractor representatives that the Union would not negotiate a successor (individual) collective-bargaining agreement with a contractor which designated MITA as its bargaining representative. In its answer, the Union denies the allegations. I find that the evidence presented failed to establish a violation.[1]

1. On December 26, 2018, the General Counsel, through the Regional Director of Region 7 of the National Labor Relations Board (the Board), issued a complaint in Case 07–CB–226531 against the Union. The complaint was premised upon an unfair labor practice charge and amended charges filed by MITA on August 28, 2018, September 13, 2018, and November 26, 2018. On January 9, 2019, the Union filed its answer denying the substantive allegations. On May 29, 2019, the General Counsel issued a complaint in Case 07–CA–234085 against Rieth-Riley. The complaint was premised upon a charge filed by the Union on January 11, 2019. On June 11, 2019, Rieth-Riley filed its answer denying the substantive allegations and asserting numerous affirmative defenses. Via order dated June 28, 2019, the Regional Director consolidated the two cases for hearing.

For 17 days during October 2019, July 2020, and February, March, and May 2021, both in Detroit, Michigan, and by videoconference, I conducted a trial on the complaints. On July 22, 2021, the General Counsel, the Union, MITA, and Rieth-Riley filed posthearing briefs. On the entire record and after considering those briefs, I make the following findings of fact and conclusions of law.[2]

FINDINGS OF FACT

I. Background

MITA is a multiemployer bargaining association formed in 2005 which represents road construction contractors throughout the State of Michigan. MITA has a labor relations division (LRD) with individual members

2. In order to aid review, I have included citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive. My findings and conclusions are based on my review and consideration of the entire record. In assessing witnesses' credibility, I have considered their demeanors, the context of the testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Where needed, I discuss specific credibility resolutions in my findings of fact. Hearsay statements in exhibits are relied upon where corroborated by the testimony of witnesses. See *Rome Electrical Systems*, 356 NLRB 170 fn. 4 (2010).

from signatory contractors. The MITA LRD negotiates collective-bargaining agreements with various unions. Michael Nystrom is the executive vice president and secretary of MITA, a role he has occupied since 2010. In total, MITA represents about 500 contractors, 65 or so of which have unionized workforces. Local 324, International Union of Operating Engineers, AFL-CIO (IUOE Local 324 or the Union) represents over 14,000 employees/union members at road construction contractors throughout the State of Michigan. Since May 2016, Ken Dombrow has been the union's president. Since September 2012, Douglas Stockwell has been the union's business manager. The MITA LRD and the Union were parties to a collective-bargaining agreement from March 19, 2013, to May 31, 2018, covering highway and road construction in Michigan (the road agreement).[3]

Rieth-Riley Construction Co., Inc. (Rieth-Riley or the company) is a heavy highway construction contractor which performs asphalt paving and other road construction work throughout Michigan. The company's headquarters is in Goshen, Indiana. Since 2009, Keith Rose has been Rieth-Riley's president and, in 2011, he also became its chief executive officer. Chad Loney is a regional vice president who oversees Rieth-Riley's Michigan operations. For the 2013-2018 road agreement, Rieth-Riley was a

3. Tr. 1405–1406, 1409–1411. At the hearing, the Union admitted, and I so find, that the Board has jurisdiction in Case 07–CB–226531. The Union also admitted that MITA and MITA employer-members Hoffman Brothers, Inc.; Payne and Dolan, Inc.; R.L. Coolsaet Construction Co.; and Zenith Tech Inc. are Sec. 2(2), (6), and 7 employers. (Tr. 20–21.)

MITA member. Pursuant to a previously signed power of attorney (POA), Rieth-Riley designated MITA as its agent to negotiate and sign collective-bargaining agreements with IUOE Local 324. Rose was a member of the MITA LRD during the term of the road agreement, as well as in the summer of 2018 following the road agreement's expiration. The road construction season in Michigan is seasonal and runs from early April to the end of November depending on the outside temperatures. Each summer, Rieth-Riley employs about 130 to 170 operating engineers represented by the Union.[4]

Ajax Paving Industries is a road construction contractor with a main office in Detroit. In 2016, 2017, and 2018, Ajax was a member of MITA and had a signed POA designating MITA as its bargaining representative with the Union. Since 2003, Mark Johnston has been Ajax's president. In 2018, Johnston served on and was one of the negotiators for the MITA LRD.[5]

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4. GC Exh. 48; Tr. 1504–1513, 1648. In its answer to the General Counsel's amended complaint in Case 07–CA–234085, Rieth-Riley admitted, and I so find, that the Board has jurisdiction in that case and Rieth-Riley is a Sec. 2(2), (6), and (7) employer. The parties also stipulated that Nystrom was a Sec. 2(13) agent of Rieth-Riley for purposes of bargaining with the Union during the time periods in which MITA held a POA for such bargaining. (Tr. 12–13.) The POA has no text regarding whether MITA's appointment as bargaining representative was for multiemployer or individual bargaining, or both.

5. Tr. 47–53.

In 2012, the State of Michigan passed a right-to-work law which became effective on March 28, 2013, and applied to "an agreement, contract, understanding, or practice that takes effect or is extended or renewed after the effective date." Because the effective date of the road agreement was March 19, 2013, the right-to-work law did not immediately apply to the agreement and would not until any successor contract was reached following the road agreement's May 31, 2018 expiration.[6]

The 2013-2018 road agreement required signatory employers to only subcontract work to subcontractors who agreed to comply with the wage rates and other terms and conditions of employment in the agreement. In the summer of 2014, Stockwell sent a request to MITA for signatory contractors to sign an additional agreement requiring them to guaranty any fringe benefit fund payments not made by subcontractors. In his response, Nystrom noted that the Union previously signed a memorandum of understanding (MOU) with MITA which ran through May 31, 2018. According to Nystrom, the MOU guaranteed that signatory employers would not be liable for the failure of any subcontractor to comply with the wage rates and other terms and conditions of the road agreement. Nystrom concluded by saying that MITA would treat the Union's communication "as a mid-term request to modify the CBA, which is rejected and must be dropped by the Union."[7]

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6. Mich. Comp. Laws Ann. § 423.14 (West 2013).

7. GC Exhs. 2 (contract p. 35), 85; Tr. 1945–1946.

In April 2015, the Union, via Stockwell, began negotiations for a successor contract with the Association of General Contractors (AGC). Like MITA, AGC is a multiemployer association which negotiates collective-bargaining agreements for its members. The AGC contractors perform commercial and industrial construction. Scott Fisher, then AGC's vice president of labor relations, negotiated on AGC's behalf for the contractors who had given POAs to AGC. All of those contractors had Section 8(f) bargaining relationships with the Union. Negotiations occurred both before and after the collective-bargaining agreement at issue expired. The two sides met approximately 8 to 10 times but, in February 2016, the negotiations broke down. Thereafter, Fisher received reports from five different contractor representatives about the Union's conduct at certain construction sites. One of those representatives was John Kersaan, a vice president for Grand River Construction. He reported to Fisher that the Union either had gone on strike or picketed five jobsites for varying time periods, from a day or two to sporadically over a few weeks. When the Union did so, all work stopped on the jobsites. All five contractors had representatives on AGC's negotiating committee with the Union. Eventually, two of the five contractors withdrew their POAs from AGC, continued negotiations on their own with the Union, and ultimately agreed to a contract. However, the two contractors did not sign individual collective-bargaining agreements with the Union. Instead, they restored their POAs with AGC and AGC then adopted the contract (the "AGC agreement") for them and all of AGC's other members with whom it had POAs. Fisher was in regular contact with MITA's

Nystrom during this time period and conveyed all of this information to Nystrom. In turn, Nystrom communicated the information to the MITA LRD for IUOE Local 324. Similarly, Kersaan conveyed this information to Rieth-Riley's Rose in 2016.[8]

II. The Discussions Between the Union and Certain MITA POA Contractors Prior to 2018

In May 2016, Rieth-Riley's Rose and Loney met with the Union's Stockwell and Heath Salisbury, a union representative. The issues they discussed were revising the subcontracting clause to limit hiring to union subcontractors, as well as establishing a hiring hall in response to the right-to-work law. On subcontracting, Rose told the union representatives that it was not possible for Rieth-Riley to hire only union subcontractors in areas of Michigan outside of metro Detroit and its surrounding counties. Noting most of the rest of the state was nonunion, Rose and Loney said such a clause would end up reducing the amount of work Rieth-Riley could get in those nonunion areas. On the hiring hall, Rose said Rieth-Riley had a long practice of hiring and training its own people and would get no benefit out of using a hiring hall in its business.[9]

8. Tr. 1420–1423, 1559–1566, 2075–2090, 2097–2102, 2115–2132. Fisher and Kersaan testified about the reports they received concerning the Union's conduct. This hearsay testimony was not offered for the truth of the matters asserted. No direct evidence was adduced regarding the Union's conduct and any impact it had on employers' businesses.

9. Tr. 1514–1515, 1651–1652. The record evidence contains no additional testimony concerning what was discussed at the

From 2016 to August 2018, Johnston from Ajax Paving served as the lead communicator with the Union for the MITA LRD. On May 27, 2016, Johnston emailed Stockwell to request a meeting between the Union and 8-10 larger union contractors. The email recipients included a handful of representatives from contractors who were MITA members and had POAs with MITA, including Rose from Rieth-Riley. The recipients also included representatives of employers who did not have POAs with MITA. Johnston wrote that the purpose of the meeting was to "discuss all of our futures and how we want to become stronger union contractors." He further stated that open communication between the contractors and the Union was needed, so the contractors could discuss their concerns and hear what the Union's game plan was going forward. Johnston told Stockwell that he wanted a discussion "from the 10,000 [foot] viewpoint." He closed by saying a MITA representative would not be at the meeting.[10]

On June 13, 2016, the group met. Dombrow, Stockwell, and Salisbury attended for the Union while Johnston and Rose were two of the contractor representatives. They discussed subcontracting and a hiring hall. Stockwell provided the contractor representatives with a copy of the union's hiring hall agreement for employment referrals. Nystrom did not attend the meeting. However, three

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meeting, including whether the union's subcontracting language or hiring hall agreement was proposed as a mid-term contract modification, a change to be incorporated in a successor contract, or neither.

10. C. Exhs. 11–14; Tr. 1516–1517, 1629–1630.

days after the meeting, Nystrom emailed that hiring hall agreement to the members of the MITA LRD. Two days later, Rose responded to that email and said he was extremely opposed to the proposal, because he saw it as a means for the Union to exert control over Rieth-Riley's workforce.[11]

For the next several months, Johnston and Stockwell exchanged numerous emails trying to find a date to continue the contractors' dialogue with the Union about subcontracting and the hiring hall. In one of the emails, Stockwell told Johnston "I truly look forward to meet from time to time with you guys."[12]

The next meeting ultimately occurred on January 25, 2017. About a dozen contractor representatives attended the meeting. Dombrow, Stockwell, and Salisbury again were present for the Union, as were Rose and Johnston for the contractors. The group discussed the fact that the existing contract was getting close to its expiration date and they needed to start negotiations on a successor agreement. They also noted that subcontracting and a hiring hall were issues that would surround the negotiations. The Union again presented the contractor representatives with a hiring hall agreement.[13]

On November 29, 2017, some 11 months later and about 6 months prior to the road agreement's expiration

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11. Tr. 1518–1522; C. Exhs. 1, 15.

12. C. Exhs. 16–18, 135.

13. Tr. 62–63; 1652–1657, 1674; C. Exh. 20.

date, Stockwell emailed Johnston and said that he wanted to sit down with the Union's signatory road agreement contractors "to discuss the future, as well as some ongoing issues." Although the meeting was going to be scheduled for some time in January 2018, Stockwell cancelled the meeting via email on December 15, 2017, due to a "current arbitration with MITA and other court dealings." He called it a temporary postponement and stated he looked forward to rescheduling later in the year.[14]

III. Events and Communications from January 1 to May 31, 2018

A. The All-For-One Agreement

On January 9, 2018, Rieth-Riley, through Rose, executed a "multiemployer bargaining agreement" (the "all-for-one agreement") with the MITA LRD negotiating committee. The agreement was developed by Nystrom and Rose to set forth the contractors' game plan for negotiations for a successor road agreement with the Union. As with its previously executed and still valid POA with MITA, Rieth-Riley agreed to have the MITA LRD negotiating committee represent it in bargaining with the Union for a successor contract. The agreement

14. C. Exhs. 21, 134. Johnston testified that the discussions between contractors and the Union in the 2016 and 2017 meetings were "just informational." (Tr. 1040.) Dombrow, the union president, stated that the purpose of the meetings was to have discussions with some of the contractors, but did not recall anyone talking about the next contract or provisions therein. (Tr. 2195.) I credit the consistent testimony of these witnesses.

also prohibited Rieth-Riley from negotiating or entering into any separate or individual agreement with the Union for work covered by the road agreement. It required that Rieth-Riley notify MITA if the Union attempted to bargain separately with Rieth-Riley. The agreement also contained the following provision regarding work stoppages:

> The MITA LRD is authorized to make decisions binding each contractor regarding any labor dispute resulting from the negotiations, including the obligation of each and all contractors to cease work in the event of a strike and if directed to do so, to lock out their employees who are members of Local 324 and who perform road work within the scope of the labor agreement being renegotiated, and therefore not to permit such covered employees to perform any work within the scope of the MITA LRD agreement.

The agreement stated it was a "confidential document" which could not be disclosed by any contractor to the Union, absent the consent of the MITA LRD. Any breach of the agreement by a contractor subjected it to "damages and other legal or equitable recourse." In addition to Rieth-Riley, another roughly 40 contractors signed the all-for-one agreement, including Ajax Paving and a company called Hoffman Brothers.[15]

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15. GC Exhs. 57, 77, 79; C. Exh. 22; Tr. 67, 71–72, 114–115, 679–681, 1425–1427, 1592. All dates hereinafter are in 2018, unless otherwise specified.

In that same month, Rose drafted up talking points that were provided to MITA POA contractors and non-MITA POA contractors who typically signed on to the road agreement negotiated by MITA and the Union. He stated that the Union would work to try and divide the contractors "as they did with AGC in 2016." Rose noted that the Union's desire for a hiring hall and limiting subcontracting to union subcontractors were nonstarters for MITA signatory contractors. He opined that the contractors' best approach was one for all and all for one. Rose added that if a work stoppage happened, it would be best if it happened on the contractors' terms. Then he specifically stated: "If one company is struck or picketed by OE324, then ALL companies who signed the Bargaining Agreement [all-for-one agreement] will lock out ALL OE 324 covered employees from ALL projects."[16]

B. The Arbitrator's Award on the Union's Subcontracting Grievances

On January 18, an arbitrator issued a decision on three grievances the Union filed in 2016 and 2017 against Ajax Paving and two other road agreement contractors. The grievances alleged a violation of the subcontracting clause in the existing road agreement. As described above, that provision required contractors to only subcontract with companies that agreed to adhere to the rates and other terms and conditions of the road agreement. The grievances sought fringe benefit fund contributions from the three

16. U. Exh. 19.

contractors related to subcontractors who had performed work for them but not paid those contributions. The arbitrator granted summary judgment to the contractors. The arbitrator found that, from 1961 to 2014, the Union never had claimed that the subcontracting provision required nonsignatory subcontractors to contribute to fringe benefit funds or that subcontractors had made such contributions. As discussed above, the arbitrator noted Stockwell's June 2014 letter to MITA seeking to require subcontractors to make fringe benefit fund contributions and Nystrom's subsequent rejection of that proposal to modify the contract mid-term. Thus, the arbitrator found the union's grievances untimely, having not been filed until, at the earliest, in April 2016. The arbitrator also found that the language of the subcontracting provision was ambiguous as to the subcontractors' obligations to the funds. Noting the lack of such payments for decades under the provision, the arbitrator concluded the Union had presented insufficient evidence that the collective-bargaining agreement required such payments. The arbitrator suggested to the Union that it take up the issue in upcoming contract negotiations.[17]

C. The Union's Withdrawal from Multiemployer Bargaining

On that negotiation front, the collective-bargaining agreement between MITA and the Union was set to expire May 31. It had the following "termination" provision:

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17. GC Exh. 84.

> This Agreement shall remain in full force and effect until the first day of June 2018, and thereafter shall continue in force from year to year, unless either party hereto shall notify the other party in writing at least sixty (60) days prior to the end of the current term [April 1, 2018] or, as the case may be, sixty (60) days prior to the end of any additional contract year, of its intention to make changes in or terminate this Agreement. Such written notice shall specify any changes or amendments desired by the party giving such notice and shall be sent by certified mail to the other party.[18]

Via letter dated February 19, Nystrom told Stockwell that "the Labor Division of the Michigan Infrastructure & Transportation Association will terminate the above-referenced Collective-Bargaining Agreement on June 1, 2018." Nystrom asked Stockwell to provide dates when Stockwell would be available to negotiate a successor agreement.[19]

On February 21, Stockwell sent a letter to Rose at Rieth-Riley stating:

> This letter is the notice to you as provided for in the Agreement between your Company and the International Union of Operating Engineers, Local

18. GC Exh. 2, contract p. 38.

19. GC Exh. 4. Nystrom sent this same language to the Union back in 2013 prior to successor contract negotiations which resulted in the 2013-2018 road agreement. (C. Exh. 8.)

> 324, AFL-CIO, that the Union desires *to terminate* the above referenced Collective Bargaining Agreement effective June 1, 2018. (Emphasis added.)

Stockwell sent the same letter to all of the road agreement contractors represented by MITA. On that same date, the Union sent a letter to Nystrom at MITA, which stated:

> This letter is the notice to you as provided for in the Agreement between your Company and the International Union of Operating Engineers, Local 324, AFL-CIO, that the Union desires *to make changes* to the current Collective Bargaining Agreement now in effect, for wage increases and other items to become effective June 1, 2018. (Emphasis added.)
>
> The Union hereby offers to meet and confer for the purpose of negotiating a new contract, and we reserve the right, during the course of negotiations, to introduce additional challenges.

Brenda Falsetta, then an administrative assistant for the Union, prepared and sent this letter to MITA with Stockwell's stamped signature. The letter was supposed to state the Union was terminating the road agreement, as it had stated in all the letters to MITA contractors. However, Falsetta mistakenly produced and sent a contract reopener letter instead. Falsetta also sent notices to the Federal Mediation & Conciliation Service (FMCS) indicating that the Union was seeking a "reopener" for each of the MITA contractors under the road agreement.

MITA also received a copy of that notice, which was identical to FMCS reopener notices it received in the past from the Union before the parties negotiated a successor road agreement. At this time, Stockwell was not aware of Falsetta's error.[20]

On March 26, the Union held one of its annual regional contractor business luncheons, where the Union and contractors get together to discuss the health of the Union, its fringe benefit funds, and its relationship with the contractors. At the meeting, Stockwell got up and told everyone how much he hated employer associations, because all they did was drive a wedge between contractors and the Union. He also said he knew MITA guys were in the room. At another meeting in March, Nystrom told Stockwell that they needed to start getting dates together for contract negotiations. Stockwell asked Nystrom to provide potential dates which Stockwell could consider.[21]

On April 11, Nystrom emailed Stockwell and offered May 8 and 10 as dates for the Union and the MITA LRD to meet and negotiate the successor road agreement. Johnston and other members of the MITA LRD

20. GC Exhs. 5-7; Tr. 285-287, 322, 325-326, 328, 1149, 1154, 1429-1430, 1440. Falsetta made the same error with respect to a different collective-bargaining agreement, the distribution agreement, between MITA and the Union covering gas line work. (U. Exh. 6.)

21. Tr. 1440-1441, 1655-1658.

negotiating committee were carbon copied on the email. Stockwell did not respond to this communication.[22]

On April 26, Stockwell discovered on MITA's website the road agreement reopener letter that Falsetta mistakenly sent to MITA on February 21. He immediately told his executive assistant, Andrea LaLonde, to terminate Falsetta. LaLonde did so that same day. At no point thereafter did Stockwell notify MITA that the reopener letter had been sent in error.[23]

Then on May 2, Stockwell sent a letter to Nystrom which stated:

> I am in receipt of your letter sent February 19th, 2018 terminating the Agreement. International Union of

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22. C. Exh. 27; Tr. 1441, 1530.

23. Tr. 317-318, 902-905, 1151-1154, 1215-1216. I credit Stockwell's frank and reliable testimony that he terminated Falsetta for sending reopener letters as to both the road and distribution agreements. His testimony reflected genuine, continuing anger over Falsetta's error. I reject Rieth-Riley's argument that Stockwell did not rely upon the road agreement reopener when terminating Falsetta. The fact that the Union sent termination letters to all road agreement contractors corroborates Stockwell's testimony that the same letter was supposed to be sent to MITA. I also credit Andrea LaLonde's testimony that the termination letter she sent to Falsetta erroneously referenced only the mistaken reopener letter for the distribution agreement, because she was in a rush to get the letter out that day. That is understandable given Stockwell's angry reaction to Falsetta's error. In addition, LaLonde's testimony appeared trustworthy. (Tr. 1225; C. Exh. 145.)

> Operating Engineers Local 324 accept the same. Further, we hereby withdraw from multiemployer bargaining with MITA for road.

On that same date, Stockwell emailed the same text to Johnston and the other MITA LRD representatives.[24]

On May 14, Johnston sent Stockwell an email expressing confusion about Stockwell's May 2 letter stating the Union was withdrawing from multiemployer bargaining. He questioned the efficiency of negotiating individual contracts with the more than 50 signatory union contractors represented by MITA. He asked what had changed since Stockwell sent the reopener letter on February 21. He asked Stockwell to reconsider his position and to meet with the MITA LRD representatives to start contract negotiations.[25]

On May 18, Nystrom sent a letter to Stockwell stating that he had not received a response from Stockwell to his April 11 email requesting bargaining dates. He then said that the MITA LRD "offers the attached first proposal to initiate negotiations" while referencing the Union's February 21 reopener letter which was sent in error. This was the first contract proposal that MITA made to the Union. The proposal was a one-page document offering a contract term of 5 years and wage increases each year. The signature page indicated the parties to the contract proposal were MITA and the Union. Nystrom's

24. GC Exh. 12.

25. C. Exh. 30.

letter made no mention of Stockwell's May 2 notification to Nystrom that the Union was withdrawing from multiemployer bargaining with MITA. Nonetheless, also on May 18, MITA advised its POA signatory contractors on the road agreement that the Union had refused multiple requests to meet and bargain for a successor contract and had informed MITA that it was withdrawing from multiemployer bargaining.[26]

On May 23, Nystrom provided Stockwell with a list of 57 union contractors who had signed a POA with MITA to negotiate the road agreement, along with copies of all of the POA forms. Again, no mention was made of the Union's notification that it was withdrawing from multiemployer bargaining.[27]

On May 31, the road agreement expired. At that time, the MITA POA contractors employed over 2,000 operating engineers in Michigan, including about 130 at Rieth-Riley.[28]

IV. The Union Refuses to Provide Operating Engineers or Apprentices to Contractors Without a Collective-Bargaining Agreement

In the summer of 2018 following expiration of the road agreement, Union Representative Salisbury spoke

26. C. Exhs. 27, 32; Tr. 135. MITA's communication with the contractors was a post on a MITA website that only contractors could access. (GC Exh. 63; Tr. 192-194.)

27. GC Exh. 47.

28. Tr. 1450, 1538.

to Dan Eriksson, the general superintendent and an owner of Hoffman Brothers. Eriksson also served as a member of the MITA LRD at the time. The company is a road construction contractor located in Battle Creek, Michigan, that employs 75 to 90 workers represented by the Union. Eriksson asked Salisbury about getting operators for his jobs. Salisbury responded he could not help Eriksson right now because they did not have a collective-bargaining agreement. Salisbury said the Union was not going to have an agreement with MITA and, until Eriksson signed a contract outside of MITA, he would not get any operators. Eriksson also spoke to Joe Shippa, another union representative, during this same timeframe. Eriksson asked for workers on a project in the Grand Rapids area of Michigan. Shippa told him he could not send anyone until Hoffman Brothers got away from MITA and signed a contract.[29] At the time of these conversations, Hoffman Brothers was a member of MITA and had executed a POA with MITA for bargaining the road agreement. The company also was a signatory to the all-for-one agreement prohibiting it from bargaining individually with the Union. Moreover, Eriksson only was aware of MITA bargaining for a group of employers, not individual contractors. He also knew that MITA was taking the position that it only would bargain with the

29. The General Counsel's complaint in Case 07-CB-226531 alleges that Salisbury's and Shippa's statements violated Sec. 8(b)(1)(B) of the Act, because they were verbal notifications to employer-members of MITA that the Union would not negotiate a new collective-bargaining agreement with the contractor if MITA was their bargaining representative. (GCCB Exh. 1(c), complaint pars. 10(b) and 10(e).)

Union as a group and, conversely, the Union would only bargain with contractors individually.[30]

In July 2018, Union Apprenticeship Coordinator John Hartwell had a conversation with Remi Coolsaet, the president of R.L. Coolsaet Construction, a gas pipeline and distribution company located in Romulus, Michigan. Hartwell was in charge of union apprentices and Coolsaet was on the board as a MITA representative for the Union's joint apprenticeship training center. Coolsaet asked Hartwell if any apprentices were available. Hartwell responded that he did have apprentices but, because the company no longer had a contract with the Union and MITA had its POA, Coolsaet could not get any. Hartwell added that, if Coolsaet signed a new contract that the Union had drafted, Hartwell could give him apprentices.[31] At the time of this conversation, the company was a member of MITA, had a POA with MITA, and was signatory to a different collective-bargaining agreement between MITA and the Union which had expired. The company also was a signatory to the all-for-one agreement. Coolsaet took Hartwell's reference to MITA to mean multiemployer bargaining and knew the Union was not willing to do that. Coolsaet also was aware that the Union was trying to obtain individual agreements with the contractors.[32]

30. Tr. 664-665, 668-675, 678-687.

31. The General Counsel's complaint in Case 07-CB-226531 alleges that Hartwell's statements violated Sec. 8(b)(1)(B) of the Act. (GCCB Exh. 1(c), complaint par. 10(d).)

32. Tr. 1276-1288, 1291-1292, 1297-1301. During his initial testimony, Coolsaet did not state that Hartwell told him one of the

V. The Union Ceases to Allow Out-of-State Operating Engineers to Work in Michigan

In Wisconsin, Operating Engineers Local 139 (IUOE Local 139) represents over 7000 operating engineers statewide. Terry McGowen has been IUOE Local 139's president and business manager since 2004. Prior to June 1, 2018, IUOE Local 324 historically permitted IUOE Local 139 operators to cross the state line and work in Michigan. The Wisconsin operating engineers were required by the Union's constitution to "clear in" before doing so, meaning they were supposed to call IUOE Local 324 and get permission to work in the jurisdiction. In practice, this requirement was not strictly followed. Instead, McGowen worked out "traveling customs" with neighboring locals, including IUOE Local 324. In

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reasons he could not get apprentices was because MITA had the company's POA. Instead, he testified that Hartwell said Coolsaet could not get apprentices because MITA did not have a contract with the Union and he could get them if the company signed an agreement the Union had drafted. Thereafter, Coolsaet was asked three times whether Hartwell said anything else to him and answered no. After reviewing his affidavit, he stated that he told the Board agent at the time that Hartwell said he could not give apprentices to Coolsaet because he no longer had a contract and MITA had his power of attorney. Although his recall was poor, I credit the testimony because other witnesses testified to similar statements by union agents to contractor representatives in this timeframe including, as described above, Eriksson. In addition to Coolsaet, Hartwell had a conversation in the same timeframe with Eric Rau, a heavy highway coordinator for Dan's Excavating, another road construction contractor that had a POA with MITA. When Rau asked for operators, Hartwell similarly told him that Dan's did not have a contract with the Union. (Tr. 695-700, 715-717.)

Michigan, this resulted in what McGowen viewed as an "open border." Nonetheless, for decades, most, but not all, IUOE Local 139 members called in to IUOE Local 324 out of courtesy once they arrived to work at a Michigan jobsite.[33]

Once the road agreement expired, IUOE Local 324 no longer allowed the IUOE Local 139 operating engineers to work on Michigan jobsites for employers that did not have a contract with IUOE Local 324. When McGowen learned of this in early June, he spoke to Stockwell, who told him it was a contract year and he was devising a means to negotiate individually with contractors. He also said that IUOE Local 139 had such a large workforce in the upper peninsula of Michigan, he could get the attention of contractors up there if he sent the operators home to Wisconsin. During a second conversation between the two in June, McGowen asked Stockwell if any progress had been made and he could get his people back into Michigan. Stockwell responded that McGowen could help by keeping his guys at home in Wisconsin. At some point in their summer 2018 discussions, Stockwell reiterated that his preference was to negotiate with employers on an individual basis and MITA did not work very well with him.[34]

The Walbec Group is a family of Wisconsin-based road construction companies with common ownership. The companies include Payne & Dolan, Zenith Tech,

33. Tr. 982, 998-999, 1002-1003.

34. Tr. 967-974, 983-991.

and Northeast Asphalt. The companies perform work in Wisconsin and Michigan, the latter often in the upper peninsula. For their Michigan work, all three companies were signatory to the 2013-2018 road agreement with IUOE Local 324 covering Michigan. In 2018, all three also were members of and had a signed POA with MITA. Payne & Dolan employs approximately 65 to 75 IUOE Local 324 operating engineers on its projects in Michigan. Prior to June 2018, it also employed IUOE Local 139 operating engineers at Michigan jobsites. The Payne & Dolan operating engineers were among those who did not check in with IUOE Local 324 prior to working at Michigan jobsites.[35]

In the summer of 2018, Payne & Dolan was performing paving and related work for a power plant which was being constructed in Negaunee, Michigan. Its project manager there was Paul Johnson. He had 6 to 10 employees onsite, all of whom were represented by IUOE Local 324 except for Shawn Galkowski, a Northeast Asphalt employee represented by IUOE Local 139.[36]

Galkowski reported to the jobsite on June 1. Thereafter, he had multiple conversations with Union Representative Dan Kroll. During the first two, Kroll told him he needed to leave Michigan and was not going to be allowed to work up there. Kroll and union business representative George Edwardson also visited Galkowski

35. Tr. 368, 405-406, 432-434, 451, 480-481, 512, 1001, 1337-1338, 1704-1707.

36. Tr. 370-372.

at the jobsite on two occasions and spoke to him. During the second conversation on July 31, Kroll told Galkowski he could be fined if he did not leave the jobsite. Prior to June 2018, Galkowski had never been asked to leave a jobsite in Michigan. He also was unaware of clearing in before this job and had not cleared in to the power plant jobsite.[37]

Also on July 31, Galkowski called John Bartozek, the vice president of multiple companies in the Walbec Group, and told him about his conversations with the union representatives. Galkowski then asked Bartozek if he could leave the jobsite and return to Wisconsin because he did not feel safe. Thereafter, Edwardson spoke to Bartozek as well, telling him Galkowski had to leave the jobsite. Bartozek disagreed. Edwardson also asked Bartozek to sign the AGC contract and said the Union was not going to negotiate with MITA.[38] At the time of this conversation, Bartozek was aware that MITA negotiated contracts on a multiemployer basis; both Payne & Dolan and Zenith Tech engaged in multiemployer bargaining; and Payne & Dolan wanted to bargain on a multiemployer basis with the Union.[39]

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37. Tr. 1118-1130.

38. The General Counsel's complaint in Case 07-CB-226531 alleges that Edwardson's statement regarding MITA violated Sec. 8(b)(1)(B) of the Act. (GCCB Exh. 1(c), complaint par. 10(c).)

39. Tr. 1704-1705, 1738-1746, 1758-1766. Kroll also called Bartozek and told him Galkowski could not be on the jobsite and had to go back to Wisconsin because he had not cleared in. Bartozek responded that he was not playing the game of the Union trying to starve them of operators. Kroll said that if Zenith

In June 2018, Zenith Tech was working on a new bridge construction project in Escanaba, Michigan. Travis Sonnentag was the construction manager onsite, along with three or four operating engineers from both IUOE Local 324 and IUOE Local 139. Following expiration of the road agreement, Kroll called and spoke to Sonnentag and Valentine Augustine, one of the IUOE Local 139 operators onsite. Kroll said the contract was up, Zenith Tech no longer had an agreement with the Union, and the IUOE Local 139 operating engineers needed to leave the jobsite because they could not run equipment without a contract. Kroll also said that he was not telling the operators they could not work but, if they did not leave, they could be subject to a $10,000 fine. Kroll added that Zenith Tech needed to drop its POA with or not go through MITA and instead deal directly with the Union.[40]

Tech signed the Union's contract with AGC, everything would go away and the Union was not going to negotiate with MITA. Bartozek said he would not sign that contract because they had a national maintenance agreement which covered that jobsite. Kroll's statement regarding MITA is not alleged as unlawful in the General Counsel's complaint in Case 07-CB-226531. (Tr. 1740-1744.)

In addition, prior to visiting Galkowski on the jobsite, Kroll and Anderson also called Project Manager Johnson. Kroll asked Johnson if he had Galkowski on the jobsite. After Johnson said he did, Edwardson said Galkowski had to leave because he had not been cleared in by IUOE Local 324. He added that the Union would bring charges against Galkowski if he did not leave the job. Prior to this date and back to the spring of 2017, Johnson did not have any issues bringing in employees represented by IUOE Local 139 onto Michigan jobsites. (Tr. 373-379, 385-387, 399-402.)

40. Tr. 1339-1350, 1376-1379. The General Counsel's complaint in Case 07-CB-226531 similarly alleges Kroll's

In a subsequent conversation, Kroll told Augustine he could stay there and not be subject to a fine, because he had cleared into IUOE Local 324 before the road agreement expired. However, Kroll told him, anyone who had not cleared in before the contract expiration had to leave. On June 26, Kroll and Salisbury visited the jobsite. They told Augustine that Matt Harder, an IUOE Local 139 operator working there that day, had to leave the jobsite because he had not cleared in before the contract expiration. Salisbury also told him the Union was pulling the IUOE Local 324 engineers off the jobsite. When Augustine asked him how he was supposed to finish the job, Salisbury responded "checkmate." Harder left the jobsite that day. Zenith Tech was supposed to set beams on July 5, but was unable to do so after the operating engineers left. Sonnentag shut down the job for 2 months.[41]

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statement concerning MITA violated Sec. 8(b)(1)(B) of the Act. (GC Exh. CB1(c), complaint par. 10(a).)

41. Tr. 1079-1085, 1094-1095. Kroll had five additional conversations with representatives of Walbec Group companies where he informed them that IUOE Local 139 operators could no longer work in Michigan because the companies did not have a contract with the Union. At times, Kroll told IUOE Local 139 operating engineers that he could not require them to leave a jobsite, but IUOE Local 324 might pursue charges with the international union if they did not leave. All of the employees he spoke with decided to leave. Their departures caused delays for some projects. (Tr. 407-409, 411-417, 421-423, 427-428, 480-489, 493-494, 520, 524-530; C. Exhs. 36 and 37.) I do not credit the testimony of Eric Anderson, a foreman for Northeast Asphalt, that Kroll told him he would take away Anderson's pension benefits if he continued to work in Michigan. (Tr. 1136-1142.) I credit Kroll's denial, as I find it more plausible given that Kroll had no ability to

After the job was shut down, Sonnentag spoke to Edwardson and asked him what he could do to get the Escanaba bridge job rolling again. Edwardson responded that they could get operators back as soon as they dropped the MITA POA and negotiated directly with the Union for a contract.[42]

I. The Union Fringe Benefit Funds' Decision To Accept But Not Credit Contributions From MITA POA Contractors

The expired road agreement provided a variety of benefits to unit employees through monthly contributions from contractors to the appropriate IUOE Local 324 fund. Those funds include health care, pension, and vacation and holiday (vacation fund). For that last fund, contributions are added on to an employee's base pay, deducted, and then transmitted to the fund by the contractor. The vacation

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effect Anderson's pension in any way. (Tr. 2264-2265.) Moreover, Kroll's demeanor throughout his testimony about his conversation with Anderson was reflective of reliable testimony. Kroll also candidly admitted that he told Anderson he could be fined if he continued to work on the jobsite. (Tr. 2261-2264.)

I also give almost no weight to the testimony of Dan Ekstrom a human resources manager for a Walbec Group company, concerning his conversation with Kroll. (Tr. 524-528.) Ekstrom exhibited poor recall during his testimony and often gave nonspecific, vague answers to questions.

42. Tr. 1362-1367. The General Counsel's complaint in Case 07-CB-226531 also alleges that Edwardson's statement concerning MITA violated Sec. 8(b)(1)(B) of the Act. (GC Exh. CB1(c), complaint par. 10(f).)

pay was 15 percent of base pay. As a result, vacation pay is included in employees' earnings for computing all payroll withholdings and is taxable wages. At the end of the construction season, employees then can withdraw money from the vacation fund when they are not working. The road agreement also established that each fund would have an equal number of trustees from the Union and the MITA contractors. In 2018, each fund had five or six union trustees and five or six contractor trustees. Any fund action required a majority vote of the trustees, each of whom had one vote. Stockwell served as a trustee on all of these funds. He also was the chairman of the pension and vacation funds, as well as the secretary of the health care fund. Nystrom was a trustee on the pension and health care funds. Each fund also has separate legal counsel. Trustees have a fiduciary duty to the fund they sit on and must protect the participants in the fund.[43]

Returning now to June 1, the day after the road agreement expired, MITA's Nystrom sent Union Business Manager Stockwell a letter with a proposal from the MITA LRD to extend the expired road agreement, in order to protect employees working under the contract from having their benefits suspended.[44] Stockwell responded via

43. GC Exh. 2, pp. 26-28; Tr. 200-201, 283, 350-351, 1311, 1327-1328.

44. At this time, both MITA and the Union were under the impression that all of the union contractors which MITA represented for bargaining had Sec. 8(f) bargaining relationships with the Union. In a Sec. 8(f) relationship, either party could repudiate the relationship upon the expiration of the road agreement. *John Deklewa & Sons*, 282 NLRB 1375 (1987),

letter the same day, stating: "As we have communicated to you previously, we accepted your letter to terminate. We no longer will have a relationship with MITA. The contract is terminated." On that same date, MITA sent a notification to its contractors which stated that they could use an attached form if the Union requested to "sit down independently" with a contractor. According to the letter, the form would officially notify the Union that MITA was bargaining on behalf of the company.[45] Via letter dated June 6, Nystrom proposed to Stockwell a limited contract extension of just the health fund contributions provision. The Union did not agree to the proposal.[46]

On June 18, Stockwell sent a letter to Nancy Pearce, counsel for the IUOE Local 324 fringe benefit funds (the "funds"). Stockwell stated:

> As you may be aware, the MITA Road Agreement was timely terminated by MITA. Local 324 accepted that termination and there is no current Road contract in place. Moreover, Local 324 has withdrawn from multiemployer bargaining. Local 324 does not desire to have a Collective Bargaining Agreement with MITA. Therefore, Local 324 is not negotiating

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enforced sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied, 488 U.S. 889 (1988).

45. GC Exh. 64. Although the letter is in the record, the attached form is not. Thus, it is not possible to determine the exact language in the form regarding MITA's representation of the contractor.

46. GC Exhs. 16-17, 64-65; C. Exh. 34; Tr. 291.

> with MITA and there will not be any negotiations in the future to enter into a multiemployer Road Collective Bargaining Agreement.

Stockwell then listed the contractors whom the Union understood had POAs with MITA. He concluded:

> Since we have determined it is not in Local 324's members best interest to multiemployer bargain with MITA and/or to have a contract with MITA, there are no ongoing or planned negotiations with these employers. However, Local 324 plans to bargain with all of the other [non-POA] road contractors.

Thereafter, the Union refused to bargain on a multiemployer basis with any MITA-POA contractor. As of the expiration of the contract, the Union also had 135 independent/non-MITA-POA contractors who had signed on to the prior road agreement. Following expiration of the road agreement, the Union began negotiations for a successor contract with certain of those individual contractors. In this same timeframe, the Union and an unspecified contractor negotiated a successor highway, bridge, and airport agreement (the "airport agreement"). Thereafter, a portion of the independent contractors signed on to the airport agreement as a successor road agreement.[47]

Also in June, the Union held a meeting for its membership. Stockwell told the group that the MITA road agreement had expired. He added that he did not

47. C. Exh. 159, fund pgs. 0216-0217; Tr. 780-781, 976-978.

want to have another multiemployer contract, including with MITA, but instead wanted to bargain one on one with each contractor to reach a contract.[48]

On June 19, a specially-called meeting occurred for all of the union's funds with 12 trustees attending. As the chairman, Stockwell ran the meeting. It began with review of a letter from MITA to Pearce, the funds' attorney, stating that, although no successor contract had been reached, contractors continued to work and MITA believed the funds should accept contributions from those contractors. MITA asked for a trustee vote on this if no past precedent existed. The trustees also reviewed Stockwell's June 18 letter to Pearce. Thereafter, Stockwell stated that the Union would not negotiate with MITA or any contractor which had a POA with MITA. The trustees then discussed how, in 2016, the Union's contract with AGC expired and the fund trustees accepted and held fund contributions from contractors who signed a POA with AGC. Stockwell stated that the current situation was different because the road agreement had been terminated and no contract negotiations were occurring with MITA POA contractors. The trustees also discussed the difference between a Section 8(f) and 9(a) bargaining relationship. Stockwell said the difference did not matter in the current situation, because the contract had expired. (Again, at the time, the trustees believed that all of the road agreement contractors had a Section 8(f) relationship with the Union.) The management trustees then discussed what should be done with contributions submitted by

48. Tr. 1179, 1187, 1194-1196.

contractors. Noting that the best interest of participants was to continue receiving benefits, the management trustees questioned whether the trustees owed those benefits to the participants. A management trustee asked whether the road agreement had been timely terminated. Stockwell provided the trustees with MITA's February 2018 letter to the Union stating the contract had been terminated. He also provided them with the Union's May 2018 letter stating it was withdrawing from multiemployer bargaining. At that point, Dombrow, the union's president and a trustee, moved that the funds accept contributions from contractors who did not have a POA with MITA. The motion passed by a count of 10-2. Management trustees asked whether they owed the same action to MITA POA contractors. Stockwell responded they could not accept those contributions, leading the management trustees to caucus. Following the caucus, a management trustee, Glenn Bukoski, moved that the funds also accept contributions from MITA POA contractors. Speaking over the trustee, Stockwell loudly responded "On what basis? Give me the legal basis." The trustees vote resulted in a tie and the motion not passing. Thereafter, Stockwell commented to Pearce that he was concerned about MITA remaining a fund sponsor, the number of trustee positions MITA held, and how to remove them as trustees. At the end of the meeting, the trustees directed the funds to accept and hold contributions from MITA POA contractors, without a formal vote on a motion.[49]

49. In reaching these findings of fact, I rely upon Bukoski's detailed and credible testimony, as well as the meeting minutes, and do not credit any conflicting testimony. (Tr. 2030-2040; C. Exh. 159.) That determination also applies to subsequent trustee meetings.

As a result of the trustees' decision to hold contributions, unit employees faced the prospect of losing their health insurance and other contractual benefits. However, apparently unbeknownst to MITA or Rieth-Riley, the Union thereafter paid for the health insurance of any employee of a MITA POA contractor who would have lost their insurance. The payments were made from the Union's strike fund.[50]

II. Rieth-Riley's July 23 Wage Increase to Employees

On July 16, the union's fringe benefit funds office sent notification to Rieth-Riley of the trustees' decision and the office's inability to credit any contributions. The letter also stated that the funds were disclaiming any liability resulting from the nonpayment by a contractor of the vacation fund contributions, which were considered "wages."[51]

On July 18, MITA notified all MITA POA contractors of the funds' action and set forth suggestions on how the contractors should respond. After noting that the funds were holding and not crediting submitted contributions, the notification said the contractors should continue submitting the contributions until further notice. It went on to describe an issue specific to the vacation fund contributions, because the contributions were treated as income to employees. MITA suggested that the employers cease the 15-percent pay deduction and instead pay that

50. Tr. 820-822, 826; C. Exhs. 138, 167.

51. GC Exh. 20.

money to the employees. The notification then stated that the contractors should cut each road agreement employee a retroactive check for vacation fund contributions back to June 1.[52]

On July 20, Stockwell sent a letter to Loney at Rieth-Riley to "clarify some misconceptions" about the MITA road agreement. Stockwell said that MITA terminated the agreement, the Union accepted the termination, and the Union withdrew from multiemployer bargaining. He noted the Union sent timely contract termination letters to all of the road agreement contractors. Stockwell then advised that members had been calling the Union and reporting that some companies were telling them that there were or would be negotiations for a multiemployer MITA contract. Stockwell said "[t]his is false."[53]

On July 23, Rose and Loney sent a letter to all Rieth-Riley employees represented by the Union. The letter first informed them that vacation fund contributions would now be paid in their checks (without being simultaneously deducted and sent to the fund) to be compliant with Federal law, "as a result of Local 324's refusal to credit fringe payments." The letter also stated:

> Due to the inconvenience to employees, created by Local 324, the company will proceed with an economic increase even though a new contract is not yet in place. Beginning with the current pay period,

52. GC Exh. 76.

53. GC Exh. 21.

> your base wage will be increased by $2 per hour until a new contract is in place. Once a new contract is in place, from that date forward, your base wage and fringes will be adjusted to the new rates.

Following the announcement to employees, Rieth-Riley implemented the wage increase retroactive to June 1.[54] The company did not provide the Union with notice of or an opportunity to bargain over the increase. Consistent with MITA's suggestions, the company also ceased deductions from employees' paychecks to fund contributions to the vacation fund. After the cessation, employees retained that portion of their pay. Rieth-Riley took these actions due to a concern that not doing so would result in the company being non-compliant with the federal Davis-Bacon Act. That law requires contractors working on publicly funded projects to pay a total prevailing wage and benefit rate to employees or risk not being paid for work on the projects. A majority, but not all, of the work Rieth-Riley performs in a given construction season is covered by the Davis-

54. The total compensation increase was $2.80 per hour. The wage increase resulted in a $0.30 per hour increase to vacation fund contributions (15 percent of the wage increase, per the road agreement). In addition, Rieth-Riley increased its contribution to the pension fund for each employee by $0.50 per hour. Back in 2011, the funds adopted a "rehabilitation plan" as a result of underfunding which put the funds in critical status. The plan had a 10-year duration and called for increases in contributions each year. The increased payments were necessary to comply with the Employee Retirement Income Security Act (ERISA). (GC Exh. 2, contract p. 28, Art. V, Sec. 4(a); C. Exhs. 212, 214; Tr. 2357-2359. 2365-2366.)

Bacon Act. Rieth-Riley also pays operating engineers the same total compensation for non-Davis-Bacon Act work.[55]

THE ROAD AGREEMENT CONTRACTORS RESCIND THEIR POWERS OF ATTORNEY WITH MITA

On July 31, the fund trustees held a second specially-called meeting, which Stockwell again ran as chairman. The meeting began with review of a letter from Nystrom to the funds again advocating for accepting contributions from MITA POA contractors because their employees continued to work under the terms of the expired road agreement. MITA proposed a fund participation agreement to do so. After review of the correspondence, Nystrom stated that the trustees had a fiduciary responsibility to protect plan participants' interests and it was wrong to treat contractors in the same industry differently. Stockwell responded that perhaps the trustees should discuss the difference between the definition of "expiration" and "termination." The trustees first voted on whether to return contributions from MITA POA contractors and the vote tied. Then MITA made a motion

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55. GC Exh. 22, C. Exhs. 3, 88, 214; Tr. 1542-1543, 1633, 1640, 2364-2366, 2381, 2385-2386, 2390, 2405-2406, 2411-2412. Rose testified that Rieth-Riley "historically" had given its operating engineers a wage increase each June of "plus or minus a dollar per hour" and that this $2-per-hour base pay increase was higher than in years past. (Tr. 1544-1545.) The 2013-2018 road agreement called for annual compensation increases of $1.40 per hour the first 3 years and $1 per hour the last 2 years. The agreement also gave the Union the right to allocate the increases between wages and fringe benefit fund contributions. (GC Exh. 2, contract pp. 8-11.)

to accept the contributions and the vote tied. Finally, a third motion sought to allow employees to self-pay or use their hours banks to maintain health insurance. (Hours banks are hours employees earn and then can use to pay for health care during off season in the construction industry.) That vote likewise tied.[56]

On August 7, Johnston, from Ajax, requested a meeting with Stockwell which also would be attended by Tom Stover, the president of another road construction contractor, Toebe Construction. On August 8, Stockwell responded that he was busy until September 1, but willing to sit down for "coffee or something" after that date.[57]

Later that same day, Nystrom sent a letter to Stockwell stating:

> This letter shall serve as formal notice to you that [MITA] rescinds Power of Attorney (Road) authority for the attached list of contractors.
>
> Each of these contractors now expects that fringe checks will now be accepted, cashed and credited to the appropriate employees, based on the resolution that was approved at the OE 324 Special Board of Trustees Trust Fund meeting on June 19, 2018.

Rieth-Riley, Ajax, and Hoffman Brothers were contractors on the attached list. MITA decided to have the contractors

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56. Tr. 2041-2044; C. Exh. 160; see also Tr. 1317-1319, 1455-1456.

57. C. Exh. 46.

rescind their POAs in the hopes that the funds would reverse course and accept such contributions, as they were doing for independent contractors who did not have a POA with MITA.[58]

That same day, Nystrom notified the MITA POA contractors of MITA's rescission of those POAs for companies working under the road agreement. Nystrom stated that the action was taken so that the Union would resume accepting fund contributions. He suggested the contractors revert back to making fund contributions as they had before the road agreement expired, including ceasing to pay vacation fund contributions directly to employees. He also told them that a group of contractors would reach out to other, individual contractors to discuss

58. GC Exh. 23; Tr. 1462-1463. I do not credit Nystrom's self-serving testimony that another purpose of the POA rescissions was for the contractors to have the opportunity to negotiate independently with the Union. Nystrom's letter to Stockwell made no mention of successor contract negotiations. In particular, the letter did not state that a contractor now would seek to bargain with the Union on an individual basis with MITA as its bargaining representative. Moreover, this testimony is not corroborated by any other witness or stated in any of the numerous communications between MITA and the contractors in this time period. In fact, Eriksson testified to the contrary. (Tr. 678, 687-688.) Furthermore and as will be discussed below, Johnston was the only contractor representative who talked to Stockwell in August after the POA recissions and Johnston never asked the Union to bargain on an individual basis. At most, Johnston suggested that Ajax and another group of contractors were interested in forming a different association and multiemployer bargaining with the Union. Finally, Nystrom's demeanor when providing this testimony was not indicative of trustworthiness.

potential contract negotiations. He stated that, if the Union communicated with a contractor directly, the contractor should feel free to contact the MITA office. That afternoon, Johnston emailed Stockwell, noted that Ajax and other union contractors had dropped their POAs with MITA that day, and offered September 4 as a date to "meet with a group of contractors to discuss a path forward." He also told Stockwell that he and a representative from one other contractor wanted to meet before that date "to lay out our thoughts to get us all back at the bargaining table" and get Stockwell's input.[59]

Following receipt of Nystrom's letter, Stockwell sent another letter to Pearce, dated August 8, copying Nystrom. Stockwell told Pearce that, despite what Nystrom said, the Union had no proof that individual contractors revoked their POAs as required by the POA's terms. He further stated that the Union had no evidence the contractors would enter into anything but an association agreement, suggesting MITA's action was some sort of "ruse." Stockwell concluded by telling Pearce that the union's position continued to be that the funds could not accept contractor contributions and that the contributions submitted (after June 1) had to be returned.[60]

On that same date, the fund trustees held a third specially-called meeting. At the start, the trustees reviewed an August 2 letter from the Union stating that MITA POA contractor employees could utilize their hours

59. GC Exh. 67; C. Exhs. 43, 47.

60. GC Exh. 24.

banks or self-pay to obtain health insurance on an interim basis. Dombrow then moved to return all contributions from MITA POA contractors which the funds had accepted and held. Although the trustees' vote on the same motion tied at the July 31 meeting, this time the motion passed. Two management trustees, James Oleksinski and Milford Woodbeck, changed their votes from no to yes.[61]

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61. Tr. 1853-1854, 1857-1861; C. Exh. 162. I credit Oleksinski's testimony concerning why he changed his vote. Oleksinski testified that, over the course of the three specially-called meetings, the trustees had numerous discussions concerning whether the funds could accept contributions when a contractor and the Union did not have a collective-bargaining agreement in place. He stated that, as of the August 8 meeting, he finally concluded that such contributions could not be accepted, finding the explanation given by the funds' counsel to be more persuasive than that from MITA's attorney. Moreover, Oleksinski testified that his vote change was influenced by the Union agreeing to allow employees to obtain health insurance through their hours banks or self-paying. In particular, Oleksinski stated the move put "meat on the bone" and insured employees would not be harmed by the funds' refusal to accept contractor contributions. Oleksinski was assured and detailed when providing this testimony and his demeanor was indicative of the testimony being reliable.

I likewise credit Woodbeck's testimony that he changed his vote because he finally became convinced at the August 8 meeting that the Union and MITA were not going to enter into a new collective-bargaining agreement and, without one, the funds could not legally accept contractor contributions. (Tr. 1879-1881.) Woodbeck testified consistently concerning his rationale and appeared sincere when doing so.

Given these facts, I conclude that the fund trustees were not acting as agents of the Union when they voted on the various proposals involving fringe benefit fund contributions for MITA POA contractors. In that regard, the factors to consider are

On August 9, Nystrom posted again on the contractors' website and requested that each contractor individually rescind its POA with MITA. Nystrom said the Union was insisting on it. Rieth-Riley and the other contractors then did so.[62]

On that same date, the funds sent out a letter to road agreement contractors, including Rieth-Riley, stating that, on August 8, the trustees directed it to return fund contributions submitted after June 1. Any such contributions were returned to the contractor with the letter. The representative stated the trustees "determined that there is no legal basis for accepting contributions without a written agreement between your Company and IUOE Local 324." Stockwell sent a second letter to Pearce on August 10, in which he reiterated that MITA had terminated the road agreement, as well as that the Union had accepted the termination, timely terminated the road agreement with each individual contractor, and had withdrawn from multiemployer bargaining. He further stated the Union had not negotiated or reached

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whether the trustees' actions were directed by union officials; their actions were undertaken in their capacities as union officials rather than trustees; and a collective-bargaining agreement removed the discretion to administer the funds solely for the benefit of employees. *Service Employees Local 1-J (Shor. Co.)*, 273 NLRB 929, 932 (1984). The record evidence is insufficient to establish that Stockwell directed the trustees' votes or the trustees were acting as union officials during their three special fund meetings. The expired road agreement also contained no provision allowing the funds to be administered for anything but the benefit of employees.

62. GC Exhs. 60, 68; C. Exh. 54.

out to the POA contractors under the terminated road agreement.[63]

On August 16, Nystrom posted a third time on the contractors' website, informing them that the Union had "moved the goal posts" by returning all of their fund contributions even though they had rescinded their POAs with MITA. Nystrom suggested the contractors reverse course and again start paying vacation fund contributions directly to employees.[64]

From August 8 to 22, Stockwell and Johnston sent numerous emails to each other bickering about what had occurred and trying to set up a future meeting. Stockwell said he believed MITA pulled the POAs because it thought the funds then would accept contributions if MITA was not the contractors' bargaining representative. Stockwell then opined that MITA failed to see that the fringe funds could not accept contributions because MITA had terminated the collective-bargaining agreement. He also stated that

63. GC Exh. 26.

64. GC Exh. 69; Tr. 1469. Nystrom's comment that Stockwell "changed the goalposts" by claiming after the POA rescissions that the funds still could not accept contributions missed the mark. The evidence establishes that the funds accepted contributions from non-POA contractors because the Union was negotiating with them for a successor contract. Moreover, Stockwell's position in his role as trustee from the first meeting in June 2018 on was that MITA terminated the contract, the Union accepted the termination and withdrew from multiemployer bargaining, and the funds could not accept contributions from MITA POA contractors because no contract was in place.

the Union had never bargained with MITA. Initially, Stockwell and Johnston both were willing to sit down with each other "to have a coffee" or "talk about a path forward," but not to negotiate. At one point, the two agreed to meet on August 22. However, Stockwell cancelled that meeting, because of "MITA's recent move and filing a lawsuit" against the Union.[65] Stockwell also refused Johnston's repeated requests thereafter to reconsider his decision to not meet with Johnston and Stover, citing concern that he would be setting himself up for another MITA lawsuit if he did so. At one point, Johnston assured Stockwell that MITA would not be involved in the new contract negotiations. Nonetheless, the two did not meet on August 22. That evening, Johnston asked Stockwell if he was available to meet on either of the next two days with Johnston, Stover, and Rick Becker, the president of Michigan Paving, a company which did not have a POA with MITA. Stockwell responded, "You sir can hug my nuts" and told Johnston he and MITA had severed their relationship with the Union and needed to figure out how to fix it. On August 23, Johnston responded and again expressed a desire to meet, acknowledging the meeting "is not a negotiation but to come to an understanding how we go forward together." Johnston then identified

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65. Certain employees represented by the Union, including one who worked for Rieth-Riley, filed a lawsuit on August 2 against the trustees of the funds who voted not to accept contributions from the road agreement contractors following the contract expiration. The lawsuit alleged those trustees breached their fiduciary duties under ERISA. The attorney who filed the lawsuit on behalf of the employees previously represented MITA and MITA paid the attorney to represent the employees in the lawsuit. (Tr. 247-251.)

11 companies that wanted to form a new contractor association without MITA's involvement. He said the contractors wanted to discuss with Stockwell "how we set up a union contractor association for purposes of negotiating [a] multiemployer bargaining agreement for road construction." Most of those companies had been a part of the MITA LRD committee, including Rieth-Riley. Stockwell responded the same day, telling Johnston to "[h]old on to that list and call me back in three years."[66]

From August 9 to 28 when contractors did not have a POA with MITA, none of those contractors, including Rieth-Riley, requested to the Union that it engage in contract negotiations on an individual basis, either directly with the contractor or with MITA as its bargaining representative. As a result, no contract negotiations took place in that time period between the Union and any individual road agreement contractor which had rescinded the POA.[67]

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66. C. Exhs. 51, 52, 55-58, 60-75; Tr. 139.

67. likewise do not credit Nystrom's testimony that he did not think the all-for-one agreement prohibited individual contractors from bargaining with the Union. (Tr. 1464-1465.) The plain language of the all-for-one agreement unquestionably prohibited signatory contractors from bargaining individually with the Union. The agreement was in effect for all the signatory contractors in August 2018. As noted, no contractor reached out to the Union during the POA rescission period asking to negotiate a contract individually with the Union. Moreover, Nystrom gave two nonresponsive answers during direct examination when asked to explain why he thought the all-for-one agreement did not prohibit

individual bargaining. The first was: "The goal from the beginning was to get a contract. We had requested to get together with the Union from the beginning. The contractors obviously are in the business to construct roadways across the state and their goal was to get a contract with this union and so from the beginning, that was the goal, to get a contract." The second was: "You know, as the summer wore on, this was very difficult, the labor dispute and the contractors knew throughout the conversation that everyone's goal was to get a contract. So in the end, the contractors did end up going off on their own and negotiated a separate agreement away from MITA and ultimately, this all-for-one agreement began to water down, if you will, over the course of the summer." The all-for-one agreement watered down only after the then governor of Michigan intervened and the Union and contractors agreed to end the lockout and negotiate individually going forward. I find that the MITA POA contractors rescinded their POAs in August 2018 solely for the purpose of getting the funds to finally accept their contributions and did not pursue individual bargaining due to the all-for-one agreement.

I also note that Nystrom testified that, in the past, MITA had "worked on a variety" of collective-bargaining agreements which were negotiated on an independent basis. (Tr. 1406-1407.) Although identifying certain contractors as examples, no specifics were provided. Then when pressed on cross examination, Nystrom conceded that the examples included situations where MITA handled an introduction or reviewed a proposed contract, but did not meet directly with the Union to negotiate. (Tr. 1961-1969.) The one example where MITA did meet with the Union for an individual contractor resulted in a multiemployer agreement with MITA. Again, this testimony appeared to be exaggerated and designed to conform to Rieth-Riley's legal theory. In any event, nothing in the record establishes that the Union, including Stockwell, was aware that MITA previously negotiated for individual contractors.

Finally, Rose testified in response to a leading question that Rieth-Riley was willing to negotiate individually with the Union, despite Rieth-Riley being signatory to the all-for-one agreement

IX. The Conduct of Union Representatives at an Ajax Paving Jobsite on August 25

In the summer of 2018, Ajax Paving was contracted to perform a paving job on an interstate highway in the Detroit metropolitan area. The highway was completely closed in the section Ajax was to repave (the "jobsite"). Ajax also set up a nearby staging yard for its equipment. David Marshall is the vice president of asphalt operations and Timothy Hay is a project manager for Ajax. On the job, Ajax operated a morning shift starting between 6:30 a.m. and 7 a.m. and lasting between 10 and 12 hours. It also operated a night shift starting at 6 p.m. lasting between 12 and 14 hours. For the morning shift, about 6 operators represented by the Union were scheduled to work. For the evening shift, that number rose to approximately 20 to 25 operators.[68]

On August 25, all Ajax employees represented by the Union reported on time for work at the jobsite for the morning shift. Marshall and Hay also were on the jobsite. They observed roughly 6 to 12 picketers, including Stockwell and Salisbury, walking with signs. The picketers walked along the shoulder of the closed highway. Their signs stated, "Operating Engineers Local 324" and "No contract with Lois Kay" or "No contract with Elmers."

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prohibiting such bargaining. (Tr. 1553.) But Rose never reached out to Stockwell to pursue that individual bargaining. Thus, I do not credit that testimony.

68. Tr. 555-557, 610, 620-622.

Lois Kay and Elmers were separate, nonunion companies performing milling work on the job.[69]

When Hay subsequently went to the staging yard, he observed a half dozen picketers there walking in a tight group back and forth at the entrance carrying the Elmers signs. Hay pulled up to within 10 feet of the entrance, but the picketers did not stop their activity. He stayed there for a minute and decided not to attempt to enter, because he did not want to run into anybody. An unidentified individual yelled at Hay "good luck working today without any equipment." Hay also observed Shawn Doris, an employee of Collins Heavy Haul, parked on the shoulder near the staging yard and standing outside his truck. Doris was supposed to deliver equipment to Ajax that day. Hay asked Doris what was going on. Doris responded that he did not feel comfortable dropping off the equipment on his truck at that time.[70] Hay told Doris to sit tight, then turned around and went back to the jobsite. When Hay got there, the half dozen operators represented by the Union were working and the picketers still were present.[71]

Later that morning, Marshall drove back to the staging yard with Hay as a passenger. Picketers again

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69. Tr. 558-562, 610, 623-632; C. Exhs. 80 (pp. 2, 3, 4), 82.

70. Over the union's objection, I admit the testimony regarding why Doris did not make his delivery pursuant to the FRE 803(3) state of mind exception to the hearsay rule. (Tr. 567-568, 570-571.) See *International Business Systems*, 258 NLRB 181 fn. 6 (1981).

71. Tr. 561-570, 576-577.

were walking back and forth at the entrance to the yard. Rather than risk a confrontation, Marshall declined to try and proceed in. They waited a few minutes, then turned around and left. About 15 to 20 minutes later, Marshall returned to the staging yard and was able to access it then and multiple times thereafter. During his returns, the picketers still were present, but not in front of the entrance. Hay likewise returned to the staging yard just before noon and was able to enter. Doris eventually delivered his equipment as well. The Elmers and Lois Kay contractors' employees also were able to access the staging yard without incident.[72]

Sometime between 11 a.m. and noon, the picketers left the jobsite and staging yard. Marshall got the paving equipment moved from the staging yard to the jobsite, approximately 100 yards away from where the work was to be done.[73]

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72. Tr. 578-579, 606, 610, 628-631. I do not credit Hay's conclusory testimony that he observed picketers that morning sometimes letting vehicles through and sometimes not. He offered no specifics and, as described in the next footnote, otherwise was not a reliable witness.

73. Tr. 627, 633. Both Marshall and Hay testified at the hearing. Where both individuals testified about the same events and where conflicts exist, I rely solely on Marshall's reliable testimony. Hay's testimony in this regard was inconsistent. (Tr. 581-582.) More critically, Hay had almost no recall of the August 25 events and frequently needed his memory refreshed with his affidavit. By the end of his testimony, he essentially was reading his affidavit into the record. (Tr. 570-583.)

That afternoon, all of the Union's operators showed up to work for the night shift and arrived at the jobsite at 4:30 p.m. This matched their typical arrival time of about 1 to 2 hours before the 6 p.m. shift start time. Other Ajax employees likewise were onsite. In addition, employees from a street sweeping company also arrived at that time to clean the highway before the paving work could begin. Finally, a dozen picketers likewise returned, locating themselves between the paving equipment that was parked on the closed roadway and the jobsite 100 yards away. They walked back and forth across the closed freeway holding signs that said, "No contract Ajax." Upon seeing them, Marshall told the operators and the street sweepers to put things on hold and let him get the situation straightened out. Hay also spoke to Johnston, Ajax's president, who instructed him that he could not tell the operators they had to work. The street sweeping employees did not start their work. Both Marshall and Hay saw picketers, including Stockwell, speaking to the operators and street sweepers. When the operators' shift started, they would not move the equipment. When Hay asked one of the operators why he was not working, the operator told him they did not feel comfortable crossing the picket line; another operator told Marshall he was afraid to keep working because one of the picketers jumped in front of his machine.[74] An engineer from the Michigan

74. Again, Hay's testimony concerning what the operators told him is admitted pursuant to the 803(3) state of mind exception, but not to prove the truth of the matters asserted, i.e. that a picketer jumped in front of an operator's machine. The rule excludes statements of memory or belief to prove the fact remembered or believed.

Department of Transportation arrived at the jobsite and questioned Hay if they were going to work. Hay advised him of the situation and that they were at a standstill. Thereafter, state police likewise came on the jobsite and spoke with the engineer and union representatives. Following that visit, the union representatives left the jobsite. When Stockwell did so, he told Marshall and Hay "say hi to Mark Johnston and tell him to hug his nuts and fuck himself."[75] He added that they should tell Johnston this was strike one and he would remember this. Stockwell also gave Marshall the middle finger, which made Marshall laugh. The start of the overall work that night was delayed roughly 2 hours, while the operators work was delayed for less than an hour. The union's operators worked and were paid for the entire day. All of the Ajax employees were able to work a full day despite the delay because their work shifts fell into a range of hours, rather than being a fixed schedule.[76]

X. MITA Obtains New POAs From Contractors and Initiates A Lockout

In August 28, three days after the Union's picketing, MITA held an emergency meeting of the full MITA LRD

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75. Marshall testified that Stockwell's comments were typical for the construction industry and that he hears it every day. (Tr. 651.) Hay concurred, testifying that swearing is a daily occurrence in the industry. (Tr. 598.)

76. Tr. 579-583, 601-605, 611-616; 633-641, 652-656, 660-661; C. Exh. 80 (pp. 9-13), 84. Hay heard someone say to employees that they got their wish and could go to work, but again could not identify the individual who said it. (Tr. 583, 601.)

committee with 50 representatives of road agreement contractors in attendance. The representatives discussed their all-for-one bargaining agreement from January 2018. They also discussed supporting each other against whipsaw strike actions to prevent the Union from playing divide and conquer. A representative from Grand River Construction discussed what happened with the Union and AGC in 2016. Ultimately, the full committee approved the lockout of employees beginning on September 4. MITA solicited and obtained new POAs from the 50 contractors again designating MITA as their bargaining representative with the Union. Rieth-Riley and Ajax were among the contractors that executed new POAs.[77]

On August 29, Nystrom sent a letter to Stockwell. He accused Stockwell of blocking fund contributions for employees and refusing to accept contributions, even

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77. Tr. 211, 1556, 1567-1570, 1623-1625; GC Exhs. 61, 70-71. I correct the transcript at p. 1624, ln. 9 to read "whipsaw" instead of "wood straw." At the time of the decision to lock out employees, Nystrom had received reports from contractors throughout the summer after the road agreement expired concerning the Union's conduct discussed above. (Tr. 1472-1482; C. Exh. 202.) The reports included that the Union had not provided additional operating engineers when requested by MITA-represented contractors; not allowed operating engineers from out of state to work in Michigan for MITA-represented contractors and threatened them with fines for doing so; set up picket lines at MITA-represented contractors' jobs sites which union members would not cross; and asked road agreement contractors to sign the union's previously negotiated collective-bargaining agreement with AGC. I have not relied on any of these reports, based upon Nystrom's hearsay testimony, to establish the truth of the matters asserted. Again, I allowed the testimony only to show Nystrom's state of mind.

after the individual contractors all rescinded their POAs with MITA. He also accused Stockwell of refusing to negotiate with individual contractors who were MITA members, again even after the individual contractors all rescinded their POAs with MITA. Nystrom wrote that it appeared the union's objections to MITA were a pretext to avoid bargaining and accepting fund contributions. Then Nystrom stated:

> Knowing your true intentions, it is time to move on. Because of your actions, the MITA contractors have now chosen to resign MITA powers of attorney. A list of those companies is attached. Effective today, MITA is once again the designated collective bargaining representative for these road contractors.
>
> The first order of business is that Operating Engineers, Local 324 initiated a strike against Ajax Paving Inc. on Saturday, August 25, 2018. Your strike action, and other related activities, has resulted in the initiation of a defensive lockout in response to the union strike activity. This defensive lockout is scheduled to start on Tuesday, September 4, 2018 with the shift beginning at 7:00 am and will apply to the work sites across the state. The lockout will end when the union ratifies the statewide road agreement with MITA on the terms set forth in the attached proposal.

Nystrom attached a draft letter to employees announcing the lockout, which likewise stated the lockout would end when the Union ratified a statewide labor contract. He also attached that proposed statewide labor contract—between MITA and the Union. The contract contained the same wage increases that MITA proposed back in May.[78]

On August 29, Stockwell responded. He wrote to Nystrom that the Union was not obligated to bargain with any employers with whom it had an 8(f) bargaining relationship or to engage in any bargaining on a multiemployer basis. Stockwell denied the Union had engaged in any strike action, saying its conduct was "permissible informational picketing." He also denied that any labor dispute existed. Stockwell ended by saying

78. GC Exhs. 28, 74; Tr. 217-218. I likewise do not credit Nystrom's self-serving testimony, given in response to leading questions, that he was open to a union counterproposal that the contract would be on an individual contractor basis rather than on a multiemployer one. (Tr. 1483-1484.) Again, he did not include this alleged openness in any contemporaneous communication with the Union. Instead, he offered a complete collective-bargaining agreement between MITA and the Union, despite the Union having provided him with the May 2 letter withdrawing from multiemployer bargaining. His demeanor when providing this testimony was entirely unconvincing. Moreover, the testimony is belied by the discussion of the all-for-one agreement during the MITA LRD meeting on August 28. It is also belied by MITA's instruction to contractors in the August 29 and 30 letters that any contractor which signed the all-for-one agreement was expected to lock out its employees. I likewise do not credit Rose's similar testimony that Rieth-Riley did not care if bargaining was on a multiemployer or individual contractor basis. (Tr. 1570-1572.) Rieth-Riley never communicated this information to the Union during the August 2018 period when it had rescinded its POA with MITA. Rieth-Riley also never made a request to the Union to bargain individually.

that, if employers refused to allow employees to work on September 4, they effectively would be laying them off.[79]

On August 29, MITA notified the road agreement contractors, including Rieth-Riley, of the lockout. The notice stated that the purpose of the lockout was to "achieve a new labor contract with the union." It went on to say that, in support of the industry bargaining position and to protect against whipsaw strikes, each contractor that signed on to the all-for-one agreement was expected to lock out IUOE Local 324 employees working under the road agreement. Finally, the notice again stated that the lockout would end once the Union ratified MITA's contract proposal.[80]

On August 31, MITA informed Rieth-Riley that several contractors had received a deficiency notice from the Michigan Department of Transportation, which MITA suspected was related to the refusal of the funds to accept contributions. The communication described several potential methods for contractors to pay the contributions and comply with the state's prevailing wage law. On that same date, Rieth-Riley informed its IUOE Local 324 employees of the lockout utilizing a template MITA provided.[81]

On September 4, Rieth-Riley locked out approximately 129 employees represented by IUOE Local 324. Some 50

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79. GC Exh. 29.

80. GC Exhs. 49, 51, 72.

81. GC Exhs. 30, 73.

other MITA POA contractors did the same. The lockout was estimated to affect a total of 2500 employees, including operating engineers and other trades that could not work due to the operators' absence from construction sites.[82]

On September 9, MITA posted on its website an update on the lockout, which stated: "In its lockout notice to OE 324, MITA informed the union that the lockout will end when the union ratifies the industry-proposed contract . . . and also notified them that the industry is available for talks at any time."[83]

On September 14, Nystrom was quoted in a newspaper article on the lockout that the road construction industry was concerned the union's tactics could spread nationwide. It was further reported that he then referenced the union's attempt to negotiate separate agreements with individual contractors rather than a multiemployer collective-bargaining agreement. Finally, it was reported that Nystrom again indicated the lockout would end when the union accepted and ratified the industry proposed contract.[84]

On September 20, MITA issued a press release in which Nystrom reiterated "MITA member companies

82. GC Exhs. 31-32; Tr. 261-262, 1485.

83. GC Exhs. 28(d) and 81.

84. GC Exh. 82. Nystrom testified that he could not recall his interview with the reporter who wrote the story, but that the story did not contain any information that was inconsistent with MITA's position at the time. (Tr. 1934-1938, 1972-1974.)

are more unified than ever, and I will say it again: This defensive lockout will end as soon as the union ratifies the industry-proposed contract."[85]

At some point during the lockout, both MITA and the Union met with Rick Snyder, then the governor of Michigan, following a request from Snyder's office. They negotiated an end to the lockout, ultimately agreeing on September 25 that the operators would return to work and complete as many jobs as possible before the winter. The two sides also agreed that, once the construction season ended, the Union would negotiate with individual contractors for successor collective-bargaining agreements using federal mediators.[86]

V. The Discovery of a Section 9(a) Bargaining Relationship Between Rieth-Riley and the Union and Rieth-Riley's Claw Back of Vacation Fund Pay From Employees

At some time in August prior to the lockout beginning, Rose learned that Rieth-Riley had a Section 9(a), not 8(f), bargaining relationship with the Union. The company found a recognition agreement from the early 1990s. The agreement, executed by representatives from Rieth-Riley and the Union on November 2, 1993, set forth that Rieth-Riley recognized the Union as the exclusive collective-bargaining representatives of all operating engineer

85. GC Exh. 83. Nystrom again testified that nothing in the post was inconsistent with MITA's position at the time. (Tr. 1974.)

86. Tr. 269-270, 310, 1485.

employees within the State of Michigan. In addition, the agreement stated:

> The Employer on or about the date of this Agreement, has been shown written evidence that a majority of its employees performing building construction work, underground construction work, and/or heavy, highway and airport construction work, within the jurisdiction of the Union in the State of Michigan, have designated the Union as their exclusive representative for the purposes of collective bargaining with respect to rates of pay, wages, hours and other conditions of employment in accord with Section 9(a) of the National Labor Relations Act.

Rose informed Nystrom of the discovery prior to the lockout. Stockwell learned of Rieth-Riley's 9(a) status during the lockout in September.[87]

On October 3, Pearce, the funds' counsel, advised Stockwell, Nystrom, and the other trustees that the funds had learned of the Section 9(a) relationship between the Union and Rieth-Riley. She also said the funds recommended that fringe benefit contributions from Rieth-Riley be accepted and credited, retroactive to the June 1 termination date of the road agreement.[88]

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87. Tr. 188-189, 214-215, 242-244, 252-258, 343, 976, 1597, 1602, 1608-1611, 1626; GC Exh. 3. Both Nystrom and Rose were somewhat evasive about the exact timing of when they learned of the Sec. 9(a) relationship between Rieth-Riley and the Union.

88. GC Exh. 34.

On October 11, Rose sent Stockwell a letter advising that Rieth-Riley would resume making all fund contributions for its operating engineers. He noted that the company had paid all vacation fund contributions from June to September directly to employees, rather than to the fund. To address the fund contribution shortfall, Rose proposed a claw back pursuant to which Rieth-Riley would deduct the required contributions from employees' paychecks and pay the funds no later than December 2018, as called for in the expired road agreement. Rose also proposed the deductions would begin during the first full payroll period after October 15 and would not be greater than 15 percent of an employee's gross wages each pay period. In the alternative, Rose said Rieth-Riley was amenable to working out an arrangement with the Union and the funds to allow employees to retain the vacation fund money they had been paid and then give the company credit from the funds for the direct payments to employees. Rose closed the letter by saying Rieth-Riley planned on finalizing its plan on October 15. He asked Stockwell to respond before then if the Union wished to discuss the matter.[89]

On that same date, Rose sent a second letter to Stockwell noting the Section 9(a) relationship between Rieth-Riley and the Union and requesting bargaining dates. This was the first communication from Rieth-Riley to the Union concerning bargaining. Rose went on to say that Rieth-Riley "intends to engage in coordinated

89. GC Exhs. 35 and 2, contract p. 28, Art. 5, Sec. 4(c); Tr. 914-915, 1578-1581.

bargaining with other employers." He named 12 other contractor representatives who would participate. Seven of the 12 representatives previously were part of the eight-member MITA LRD bargaining committee. Rose added that each employer was free to make its own bargaining decisions and that none of the other individuals would speak on Rieth-Riley's behalf. Finally, he said that any collective-bargaining agreement reached by the Union with Rieth-Riley was not contingent on agreement with the other employers.[90]

On October 15, Stockwell responded to both letters. He began by stating the Union was not interested in coordinated bargaining, which Stockwell erroneously thought was equivalent to multiemployer bargaining. Stockwell did say the Union would bargain individually with Rieth-Riley. He said the federal mediator would contact Rieth-Riley for negotiation dates. Regarding the fund contributions, Stockwell said that Rieth-Riley needed to make all the fringe funds whole immediately. He also stated, "if any deductions are taken from the employee's pay that are in violation of Federal and/or State law and/or the contract, the same will be pursued by all means permitted under the law." Rose responded via letter the same day, expressing confusion about Stockwell's comment on the fund contributions. He wrote that it appeared the Union was rejecting his offer to bargain over the vacation fund payroll deduction plan. He asked Stockwell to contact him by close of business on October

90. GC Exh. 36; Tr. 304-306. Rose conceded that Rieth-Riley did not make a request to bargain with the Union for a successor contract before this. (Tr. 1616.)

17, if his interpretation was incorrect. Via letter dated October 16, Stockwell informed Rose that "we did not understand your letter regarding the vacation fund to be a request to negotiate that matter." He told Rose that the Union already stated its position regarding payroll deductions and the fund contributions, but Rose was free to bring up the subject in contract negotiations.[91]

On October 18, Rieth-Riley notified IUOE Local 324 employees that it was implementing payroll deductions to repay the vacation fund contributions from June through September. In the notification, the company described the October 11 proposal it made to the Union, then asserted that Stockwell rejected the proposal twice thereafter. The company stated it was implementing the deduction program as a result of those rejections. On October 26, Rose advised Stockwell that Rieth-Riley implemented the vacation fund deduction program. Stockwell responded on October 29, telling Rose again that the payroll deductions violated federal labor and state wage and hour law, as well as that the Union would pursue the matter.[92]

At a meeting on November 1, the fund trustees voted to accept employer contributions from the contractors,

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91. GC Exhs. 37-39; Tr. 915-918. I credit Stockwell's testimony, which appeared reliable, that he initially misunderstood Rose's reference to "coordinated bargaining" to mean multiemployer bargaining. Stockwell also made the comment in his letter about payroll deductions violating the law based upon his understanding that such deductions only could be made if an employee authorized them. (Tr. 307.)

92. GC Exh. 40, 42-43.

including Rieth-Riley, who were discovered to have a 9(a) bargaining relationship with the Union. The funds sought those contributions retroactive to June 1.[93]

On November 20, the Union and Rieth-Riley held their first bargaining session for a successor contract. The session was conducted on a coordinated bargaining basis, with other contractors there to observe. After two coordinated sessions, bargaining continued on an individual basis between Rieth-Riley and the Union. MITA was not involved in any of the negotiations. At no point from January 9 to November 20 did Rieth-Riley rescind the all-for-one agreement it signed with MITA.[94]

THE UNION'S SUBSEQUENT BARGAINING ON MULTIEMPLOYER AND INDIVIDUAL BASES

In November, Johnston, Ajax's president, began informal discussions with representatives of four other unionized contractors about forming what eventually would become the Michigan Union Contractors Group (MUCG) the following April. Rieth-Riley was not one of the contractors. The initial group consisted of certain unionized contractors who wanted to bargain with the Union on a multiemployer basis. When Johnston first raised the idea with Stockwell around this same time, Stockwell said he wanted to bargain with individual contractors, as he had told Johnston throughout 2018. Johnston rejected that idea and said the contractor group

93. C. Exh. 163; Tr. 926-928.

94. Tr. 1512, 1576, 1605-1606.

wanted to stay together. However, shortly thereafter, Stockwell agreed to bargain on a multiemployer basis with that group.[95]

On April 15, 2019, the Union and MUCG executed their airport agreement, effective from April 1, 2019, through May 31, 2024. More than 60 individual contractors signed onto the agreement between April 24, 2019, and September 30, 2019. An additional 26 contractors signed POAs with MUCG making MUCG their bargaining representative. Thus, those contractors likewise were bound to the agreement. Some of the contractors bound to the MUCG agreement had representatives on the MITA LRD in 2018.[96]

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95. Tr. 961-963, 1041-1042, 1047-1049. I credit Stockwell's testimony that he agreed to bargain on a multiemployer basis with the contractor group which became MUCG because he was "wore out" from the events preceding his agreement to do so. Stockwell exhibited a trustworthy demeanor when testifying repeatedly that that he wanted to bargain with individual contractors because they did the work. His initial response to Johnston's request to multiemployer bargain was exactly that. Only later did he agree to multiemployer bargain with MUCG. His demeanor when he testified to being worn out likewise appeared reliable. Moreover, the events in the dense recitation of facts to this point understandably could wear anyone out. Beyond being worn out, Stockwell's willingness to multiemployer bargain with MUCG undoubtedly had something to do with the association having all union contractors, as opposed to MITA's membership being heavily nonunion. (See C. Exh. 139, p. 6.)

96. C. Exhs. 103, 142; Tr. 955-961.

VII. Rieth-Riley's Wage Increase to its Operating Engineers in 2020

Effective June 1, 2020, Rieth-Riley again raised the hourly wage rate of its operating engineers, this time by $1 per hour.[97] As in 2018, Rieth-Riley implemented the increase without providing the Union with notice and an opportunity to bargain. When Rieth-Riley provided the increase, the company and Union still were negotiating for an individual successor contract, wage increases were an open issue, and no overall agreement had been reached. Again, Rieth-Riley implemented the 2020 wage increase to comply with the Davis-Bacon Act.[98]

97. As in 2018, this increase resulted in a corresponding increase to the vacation fund contribution of $0.15 per hour. In addition, effective June 1, 2019 and June 1, 2020, Rieth-Riley also unilaterally increased its contribution to the pension fund by $0.50 per hour, in accordance with the aforementioned rehabilitation plan. (Tr. 2370; C. Exhs. 212, 214.)

98. Tr. 2391, 2400; C. Exh. 214, GC Exh 2., contract p. 28, artt. 5, sec. 4(a). The General Counsel's original complaint alleged only that Rieth-Riley unilaterally provided its operating engineers with a wage increase on July 23, 2018, in violation of Sec. 8(a)(5) and (1). On the 10th day of hearing in this case, Rieth-Riley's CEO Rose testified that the 2018 increase was given in line with MITA's May 2018 contract proposal to the Union and also because it was consistent with past practice. (Tr. 1631-1632.) Rose also testified that it was his understanding Rieth-Riley gave similar wage increases to its operating engineers in June 2019 and June 2020. Shortly thereafter, the General Counsel moved to amend the complaint and allege the two subsequent wage increases also were unlawful unilateral changes. On April 9, 2021, after full briefing, I granted the General Counsel's motion. Then on the 15th day of hearing, Rieth-Riley's Regional Vice

VIII. The Union's Strike Against Rieth-Riley[99]

On May 29, 2019, the General Counsel issued the complaint against Rieth-Riley in Case 07-CA-234085, based upon the unfair labor practice charge filed by the Union. As previously noted, the complaint originally alleged that Rieth-Riley unlawfully locked out its employees in September 2018; unilaterally granted a wage increase to its employees in July 2018; unlawfully insisted that the Union engage in multiemployer bargaining; and

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President Loney contradicted Rose and testified that Rieth-Riley had not given its operating engineers a wage increase in 2019. I credit Loney's testimony in that regard. Loney is in charge of all the company's operations in Michigan and is responsible for ensuring that contractual wage rates are properly paid. (Tr. 2369.) Furthermore, Loney's testimony was corroborated by Katelyn Zonker, a payroll manager for Rieth-Riley, as well as payroll records. (Tr. 2414, 2422; C. Exhs. 208, 210, and 211.) Those two individuals had more direct knowledge of employees' pay than Rose did.

99. At the same time as the unilateral wage increase complaint amendments, the General Counsel also moved to amend the complaint to include an allegation that the Union engaged in an unfair labor practice strike beginning about July 31, 2019, as a result of the alleged unlawful conduct by Rieth-Riley in Case 07-CA-234085. As a remedy, the General Counsel sought an open ended order requiring the reinstatement, upon application, of all qualified strikers and backpay. In my same April 9, 2021 order, I granted the General Counsel's motion. On April 21, 2021, Rieth-Riley filed with the Board a request for special permission to appeal my order granting the motion to amend as to the ULP strike. On June 22, 2021, the Board denied Rieth-Riley's request.

unilaterally deducted monies from unit employees' pay related to vacation fund contributions.

About 2 months later on July 25, 2019, the Union held a meeting with about 100 of its 180 members who worked as operating engineers for Rieth-Riley. Stockwell and Dombrow spoke at the meeting. Stockwell talked about the lockout, what had transpired between the Union and Rieth-Riley since the lockout, and the potential for an upcoming strike. He described the status of negotiations with all road contractors, then specifically about negotiations with Rieth-Riley. Stockwell also discussed unemployment benefits with the members and the Union's position that employees had been laid off, not locked out, and were entitled to those benefits. Finally, Stockwell told the members that a strike was a last resort. Dombrow principally discussed the General Counsel's complaint in Case 07-CA-234085, reading and talking about many of the allegations. He also told the members that the General Counsel's office had made a settlement offer to Rieth-Riley of $1.8 million to resolve the complaint allegations, but Rieth-Riley rejected it. Like Stockwell, Dombrow touched on the lockout and the potential for an upcoming strike. Dombrow also told the members that a strike was a last resort and something to be avoided at all costs. He added that Rieth-Riley seemed completely uninterested in resolving the issues caused by the lockout. Multiple members spoke about their desire to go on strike. They also asked questions about the NLRB case, including how long it would take. They also inquired about unemployment benefits. At the end of the meeting, Stockwell told the attendees that the Union would let them know what it decided about a strike and would notify them the night before if they went on strike. No strike vote was taken by the members at the meeting.[100]

At the time of the meeting, the negotiations for an individual successor road agreement between Rieth-Riley and the Union were ongoing. Subcontracting remained one of the sticking points to the parties reaching overall agreement. The Union's proposed subcontracting clause required contractors to subcontract work only to subcontractors who would comply with the rates, terms and conditions—and fringe benefit fund contributions—of the agreement. Contractors generally would not be liable for subcontractor violations. As discussed earlier, Rose and Rieth-Riley opposed this provision to the extent it required subcontractors to pay fund contributions. On July 29, 2019, Rieth-Riley provided the Union with a subcontracting counterproposal in which it would agree to the Union's language with respect to seven counties within the State of Michigan, but not for the remaining counties. The Union rejected the proposal. At that time, the other contract provisions which remained open in bargaining were profit sharing, a hiring hall, wages, jurisdiction, and fringe benefits.[101]

On either the same day or July 30, 2019, Stockwell decided that the Union should go on strike against Rieth-Riley. Stockwell decided to call a strike for a number of

100. Tr. 2447-2449, 2490, 2523-2529, 2541-2543, 2586-2590, 2598-2599; GC Exhs. 92, 94, 108.

101. Tr. 2558-2661; C. Exhs. 219, 223.

reasons. He wanted the members to get paid the $1.8 million in lost wages and fund contributions from the lockout. He was concerned about the difficulties members were having in obtaining unemployment benefits for that time period. He was worried about the lack of progress in reaching a collective-bargaining agreement. And he was troubled by the company's vacation fund claw back. As to his authority to make the decision, the Union places responsibility in its business manager to call a strike. Stockwell also relied upon a vote taken of all the operating engineers who worked for MITA POA contractors in the summer of 2018. That group included Rieth-Riley operating engineers. The vote authorized the Union to call a strike going forward. On July 30 at 4 p.m., Stockwell, via email, notified the Union's business representatives of his decision to go on an "unfair labor practice strike" against Rieth-Riley at midnight that night. Then at 9 p.m., the Union sent a text notification to the Rieth-Riley unit employees advising them they would be on an "unfair labor practice" strike at midnight.[102]

On July 31, 2019, the Union went on strike against Rieth-Riley. Early that morning, the Union established picket lines at 13 Rieth-Riley asphalt plants throughout the State of Michigan. During its picketing, the Union utilized two signs at all of the facilities. The first said "Operating Engineers Local 324 ON STRIKE against Rieth-Riley Unfair Labor Practices." The second stated "Operating Engineers Local 324 NO CONTRACT against

102. Tr. 2544-2546, 2549, 2561-2562, 2594-2595, 2599; GC Exhs. 105, 107.

Rieth-Riley Unfair Labor Practices." That day, the Union posted an announcement of the strike against Rieth-Riley for "unfair labor practices" on its Facebook page. Stockwell was quoted in the post that "Our workers have negotiated in good faith and the National Labor Relations Board has offered Rieth-Riley a settlement to avoid a trial over unfair labor practice charges."[103]

Within the first 3 months after initiation of the strike, the press published numerous articles about it. In most of the articles, including some containing quotes from union officials like Stockwell, the union's justifications for going on strike were reported as both the unfair labor practices that Rieth-Riley was alleged to have committed and the lack of progress in negotiations, in particular on subcontracting. The Union's communication director, Daniel McKernan, was responsible for communications with the press concerning the articles. In the same time period, the Union issued numerous press releases about the strike which McKernan drafted. The press releases set forth that both the unfair labor practices and the lack of a successor contract were the reasons for the strike. Beyond that, McKernan also wrote a speech to give at a fundraiser for striking employees of General Motors who were represented by the United Auto Workers (UAW) union. In the speech, McKernan wrote that one of the reasons the Union struck Rieth-Riley was due to its subcontracting of work to nonunion contractors. He also mentioned the lockout and the vacation fund claw back.

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103. Tr. 2462-2471, 2529-2537, 2591-2593, 2614-2618; GC Exhs. 93, 96, 98, 99, 101, 110, 120, 132.

Finally, he wrote that many other contractors already had signed a contract with the Union and, if Rieth-Riley got its desired subcontracting language, all of those contracts would get the same language. (McKernan did not end up giving the speech.) In that same vein, Stockwell posted an article on the Union's Facebook page on September 26, 2019, concerning the UAW strike at General Motors and stated the article might help "some understand why subcontracting . . . is so important to us."[104]

On August 2, 2019, and September 23, 2019, the Union sent letters with Stockwell's signature to the international union requesting strike benefits for the striking Rieth-Riley employees. In the letters, Stockwell referenced the subcontracting language dispute as the explanation for the requests. He did not mention the unfair labor practices complaint.[105]

In a September 4, 2019 letter to Rieth-Riley employees, Stockwell explained the Union's issue with subcontracting and a favored nations clause in the road agreements already entered in to by numerous other road agreement contractors. That clause meant that any agreement with Rieth-Riley to limit the union's subcontracting language to certain Michigan counties would apply to all the other road agreement contractors.[106]

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104. Tr. 2445, 2502-2511, 2515-2518; C. Exhs. 225-229; GC Exhs. 90(b)-(e), 91(a)-(g).

105. C. Exhs. 221, 222.

106. C. Exh. 224.

As of May 27, 2021, the last hearing day in this case, Rieth-Riley and the Union had not agreed to a successor contract and the Union's strike remained ongoing.

ANALYSIS

I. Did the Union Properly Withdraw From Multi-employer Bargaining?

The General Counsel's complaint against Rieth-Riley in Case 07-CA-234085 presents a variety of legal issues, the principal one being the lawfulness of Rieth-Riley's lockout of its employees in September 2018. But the threshold issue from which the rest of the legal dominos fall is not contained in the complaint. That issue is whether the Union properly withdrew from multiemployer bargaining.

Multiemployer bargaining is consensual. Neither an employer nor a union can require the other party to bargain on a multiemployer basis. *Walnut Creek Honda*, 316 NLRB 139, 142 (1995). A party's withdrawal from multiemployer bargaining is effective only if it is timely and unequivocal. See, e.g., *Haas Electric, Inc.*, 334 NLRB 865, 866-867 (2001), enf. denied 299 F.3d 23 (1st Cir. 2001); *Retail Associates, Inc.*, 120 NLRB 388, 393 (1958). In order to be timely, a withdrawal requires adequate written notice given prior to the date set by the contract for modification or to the agreed-upon date to begin the multiemployer negotiations. *Retail Associates*, 120 NLRB at 395. Where actual bargaining negotiations based upon the existing multiemployer unit have begun, withdrawal from that multiemployer bargaining is permissible only upon the mutual consent of the parties absent unusual circumstances. Ibid. In order to be unequivocal, the withdrawal must be unambiguous and contemplate a sincere abandonment, with relative permanency, of the multiemployer unit and an intent to bargain on an individual basis going forward. *District Council of Plasterers and Cement Masons of Northern California (Marina Concrete Co.)*, 312 NLRB 1103, 1105 (1993). If a party subsequently acts inconsistently with its stated intent to withdraw, such conduct nullifies the withdrawal. *Dependable Tile Co.*, 268 NLRB 1147, 1147 (1984), enfd. in pertinent part 774 F.2d 1376, 1383-1384 (9th Cir. 1985).

Here, the Union sent a written notice to MITA on May 2, 2018 that it "hereby withdraw[s] from multiemployer bargaining with MITA" for the road agreement.

That notice was timely because the Union and MITA had not agreed upon a date to begin multiemployer negotiations. Although Nystrom and Johnston asked Stockwell on February 19, April 11, and May 1 for dates to bargain a successor contract, Stockwell never responded. Thus, no negotiation dates were set and actual negotiations had not begun. The Union's withdrawal also was unequivocal. The text of the written notice is unambiguous concerning the Union's withdrawal from multiemployer bargaining in the unit represented by MITA. After sending the notice, union representatives repeatedly communicated to MITA, contractors, employees, and the funds its desire to negotiate individually with contractors and its rejection of multiemployer bargaining. The Union did not alter that stance prior to the lockout.

In defense to these allegations, Rieth-Riley first argues that the Union's withdrawal from multiemployer bargaining was not timely, because it was not sent to MITA prior to the date set by the road agreement for modification. This is factually correct, but legally irrelevant. The road agreement's termination provision required that any party intending to terminate or make changes to the agreement was required to provide notice at least 60 days prior to the end of the contract's term. With a May 31, 2018 expiration date, such notice was due by April 1, 2018. The Union's withdrawal from multiemployer bargaining was not sent until May 2, 2018. Nonetheless, the conditions the Board set in *Retail Associates* for a timely withdrawal from multiemployer bargaining were in the disjunctive. To timely withdraw, a party either had to provide notice prior to the date set for modification in the contract *or* the agreed upon date to begin multiemployer negotiations. Admittedly, the first condition was not met here.

However, and despite Rieth-Riley's argument to the contrary, the second condition was met. The company contends that, at the time of the Union's withdrawal letter, actual negotiations on a successor contract between the MITA LRD and the Union already had begun. I do not agree. The Union did meet with Rieth-Riley in May 2016 and twice with multiple contractor representatives in June 2016 and January 2017. For the latter two meetings, not all of the contractor representatives were part of the MITA

LRD responsible for negotiating the road agreement. Nystrom also did not attend the meetings. At all of these meetings, the groups discussed the issues of subcontracting and a hiring hall. The Union previously raised the subcontracting issue back in 2014 with MITA. It raised the hiring hall issue in response to Michigan's passage of a right-to-work law in 2012. None of the discussions at the meetings or written communications between the Union and contractor representatives ever indicated that the meetings were for the purpose of beginning negotiations for a successor road agreement. In fact, the opposite is true. Johnston specifically told Stockwell that he wanted to have a discussion "from the 10,000 foot viewpoint" and discuss their futures, not bargain a contract. In the final meeting in January 2017, the group discussed the need to start negotiations on a successor agreement, thereby indicating that bargaining had not yet begun. When Nystrom sent the contract termination letter to Stockwell on February 19, he also requested dates "for negotiations on a successor agreement," not to continue negotiations which already had begun. The prior meetings all occurred well before Nystrom's request for dates to bargain a new agreement. Finally, the Union's submission of an existing hiring hall agreement to the groups, standing alone, establishes nothing more than that Stockwell wanted the contractors to sign onto the agreement. That could have been as a mid-term modification to the existing road agreement or as part of a successor contract. None of the communications establish which one it was. For all these reasons, the meetings did not constitute the start of actual negotiations for a successor road agreement, and the Union's withdrawal from multiemployer bargaining was timely. *Patterson-Stevens, Inc.*, 316 NLRB 1278, 1278 fn. 3, 1285-1286 (1995) (meeting between employer association and union to discuss union-proposed modifications to current contract, agreement to which was a pre-condition to begin early negotiations for successor contract, did not constitute negotiations for a new contract and did not render employer's subsequent withdrawal from association untimely); *Dependable Tile Co.*, 288 NLRB 710, 712, 714 (1988) (informal meeting between three members of employer association's negotiating committee and union negotiators to raise specific successor contract provisions in need of modification did not constitute formal negotiations and did not render subsequent withdrawal from multiemployer bargaining ineffective).

Rieth-Riley also argues that the Union did not clearly and unequivocally withdraw from multiemployer bargaining. On clarity, the company contends that the Union was refusing to bargain on a multiemployer basis solely with MITA, not withdrawing from multiemployer bargaining in any form, because Stockwell wrote "we hereby withdraw from multiemployer bargaining *with MITA*" for the road agreement. I find this argument to be splitting hairs. Prior to Stockwell sending his letter, the existing bargaining relationship was between the Union and MITA, the latter serving as the multiemployer bargaining representative for contractors who had POAs with MITA. Stockwell's statement is nothing more than a clear reflection of that fact. In any event, the Union was not required to withdraw from multiemployer bargaining in any form. It was required to clearly withdraw from multiemployer bargaining in the unit represented by MITA and Stockwell's letter did so.

On unequivocal withdrawal, Rieth-Riley similarly points to the fact that the Union subsequently negotiated a multiemployer agreement with MUCG. But the sequence of events leading to the MUCG agreement was not inconsistent with the Union's withdrawal from multiemployer bargaining in the unit represented by MITA. In November 2018, seven months after Stockwell's withdrawal letter, a handful of representatives from union contractors decided on their own to form MUCG. When Johnston first asked Stockwell to bargain with the group, Stockwell refused. He told Johnston, as he had consistently told numerous others before then, that he wanted to bargain on an individual basis with contractors. Ultimately, Stockwell reversed course and went forward with multiemployer bargaining with MUCG, having been worn down by the prior events in 2018 and being more amenable to an association made up of solely union contractors. The MUCG multiemployer unit was distinct from the one represented by MITA. Thus, Stockwell was not attempting to get the best of both worlds by withdrawing from multiemployer bargaining in the unit represented by MITA and subsequently continuing to negotiate in that same unit. With MUCG, he was multiemployer bargaining in an entirely different world. Cf. *Dependable Tile Co.*, 268 NLRB at 1147 (employer did not unequivocally withdraw from multiemployer bargaining where it claimed to have withdrawn but then continued to participate in multiemployer negotiations *in the same multiemployer unit*). The Union never equivocated regarding its unwillingness to bargain in the multiemployer unit represented by MITA. It also was free to consent to multiemployer bargaining with MUCG in a different bargaining unit.

Accordingly, I conclude that the Union's withdrawal from multiemployer bargaining was valid.

II. Did Rieth-Riley Unlawfully Lock Out its Michigan Operating Engineer Employees in September 2018?

The General Counsel's complaint in Case 07-CA-234085 alleges that, from about September 4 to 27, 2018, Rieth-Riley insisted, as a condition of reaching any collective-bargaining agreement, that IUOE Local 324 agree to engage in multiemployer bargaining, a permissive subject of bargaining, by executing a multiemployer contract. The complaint further alleges that, during that same time period, Rieth-Riley locked out its operating engineer unit employees who were employed at various jobsites throughout the State of Michigan in furtherance of its unlawful bargaining objective. The complaint alleges this conduct violates Section 8(a)(5) and (1) of the Act.

The General Counsel asserts the following legal theory to support these allegations. Rieth-Riley and the Union had a Section 9(a) bargaining relationship going back to 1993. In February 2018, MITA terminated the road agreement and, in May 2018, the Union properly withdrew from multiemployer bargaining for that agreement. Given the 9(a) relationship, Rieth-Riley was required to maintain the status quo following the road agreement's expiration on May 31, 2018, until a successor agreement or impasse was reached in bargaining. When Rieth-Riley locked out its employees on September 4, 2018, it conditioned the end of the lockout upon the Union's execution of a multiemployer agreement with the MITA LRD. That condition was unlawful because Rieth-Riley's insistence upon multiemployer bargaining was a permissive subject of bargaining.

It is a violation of the statutory obligation to bargain in good faith for either an employer or union to insist to impasse on a permissive, or nonmandatory, subject of bargaining, i.e., a subject that does not concern the terms and conditions of employment in the bargaining unit to which the recognitional obligation extends. *Don Lee Distributor, Inc.*, 322 NLRB 470, 471 (1996) (citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958)). Change in the scope of a bargaining unit, including compelling a party to join or leave multiemployer bargaining, is a nonmandatory subject of bargaining. *Sheet Metal Workers' Intl. Assn., Local 104* (*Ernest Ongaro & Sons)*, 323 NLRB 227, 231 (1997); *Utility Workers Local 111 (Ohio Power)*, 203 NLRB 230, 238 (1973), enfd. 490 F.2d 1383 (6th Cir. 1974). If an employer locks out unit employees in support of a proposal to change unit scope, the lockout is unlawful. *Technocap LLC*, 368 NLRB No. 70, slip op. at 1 fn. 2, 12 (2019).

The starting point here to analyzing the lawfulness of the lockout is the all-for-one agreement. In that regard, the Board's decision in *Don Lee Distributor*, supra, is instructive. There, the respondents were six beer distributors who formerly were members of various multiemployer associations that had successive contracts with the union. Following their resignations from the associations, the group signed a "mutual aid pact" in which they agreed to numerous objectives for a collective-bargaining agreement. The pact required a majority vote of the six companies to change those objectives. It also subjected any company which breached the pact, including by negotiating directly with the union concerning the objectives, to a penalty fee of $400,000 to each of the other companies. During bargaining with the union, the companies did not disclose their pact with one another. The Board concluded that, by entering the secret pact, the companies lost their freedom to make the ultimate decision as to provisions in its individual contract. By doing so, the companies were engaged in multiemployer bargaining. The employers' secret agreement to engage in such bargaining without the union's knowledge or consent violated Section 8(a)(5) and (1).

The all-for-one agreement here is strikingly similar to the unlawful mutual aid pact in *Don Lee*, but goes even further. By executing the agreement, Rieth-Riley explicitly committed itself to multiemployer bargaining (not just bargaining objectives) and ceded its bargaining authority to the MITA LRD. The agreement prohibited Rieth-Riley from bargaining individually with the Union and subjected the company to damages if it did so. The agreement obligated Rieth-Riley to report to MITA any attempt by the Union to negotiate individually with the company. It required Rieth-Riley to keep the existence of the agreement confidential. The agreement mandated that, in order for a multiemployer contract reached by MITA and the Union to be effective, a majority of the contractors had to ratify it. Finally, Rieth-Riley gave MITA the authority to decide that the company had to lock out its own employees. As a result, the all-for-one agreement bound Rieth-Riley to multiemployer bargaining, including at the initiation of the lockout on September 4, in a unit of all employees of road agreement contractors who had POAs with MITA. However, once the Union timely and unequivocally withdrew from multiemployer bargaining on May 2, Rieth-Riley could not insist that the Union bargain in that format and instead had to bargain on an individual or coordinated basis in a unit of Rieth-Riley operating engineers. By entering into the agreement, Rieth-Riley lost its freedom to bargain individually with the Union and retain the ultimate decision on what a contract would include.

MITA's and Rieth-Riley's conduct between the Union's withdrawal from multiemployer bargaining and the initiation of the lockout reflects adherence to the all-for-one agreement and insistence that the Union bargain on a multiemployer basis. After receiving notification from the Union that it had withdrawn from multiemployer bargaining, both MITA and Rieth-Riley flat out ignored it. Nystrom's immediate response in May 2018 was to send a multiemployer contract proposal to the Union. He also sent the Union a list of all contractors who signed POAs with MITA. He offered to extend the 2013-2018 multiemployer road agreement and the health care provisions therein. Although Nystrom informed the contractors of the Union's withdrawal letter, all of his communications to contractors thereafter were framed as if the multiemployer bargaining relationship continued to exist. Regarding Rieth-Riley, at no time did the company ask to bargain with the Union individually, either directly or with MITA as its representative. This included the August 8-28, 2018 time period when Rieth-Riley had rescinded its POA with MITA. It also included the time period in August prior to the lockout after Rieth-Riley discovered it had a Section 9(a) bargaining relationship with the Union. In that same time period of POA rescissions, Nystrom also did not tell Stockwell that MITA would be representing individual contractors in contract negotiations going forward. Then, after the contractors re-signed POAs, MITA invoked its authority in the all-for-one agreement to lock out the contractors' employees, including those at Rieth-Riley. When Nystrom notified Stockwell of the planned lockout, he included a complete contract proposal between the MITA LRD and the Union. Nystrom told Stockwell the lockout would end when the Union signed that agreement. In subsequent communications with the contractors, MITA stated the purpose of the lockout was to achieve a new contract with the Union. He acknowledged the Union's "attempt" to negotiate separate agreements with individual contractors, rather than a multiemployer agreement. He said that the "industry" was available for talks at any time. And he reiterated numerous times that the lockout would end when the Union signed the multiemployer agreement. Those facts establish that the goal of the lockout was to force the Union to return to bargaining on a multiemployer basis, as required by the all-for-one agreement.

Because MITA and Rieth-Riley used the lockout as an offensive, not defensive, tactic to force the Union back into multiemployer bargaining and thereby change the scope of the bargaining unit, the lockout was unlawful. *Great Atlantic & Pacific Tea Co.*, 145 NLRB 361, 365 (1963) (employer lockout that was used to force a change from single to multiemployer bargaining to which the union had not consented was an unlawful offensive tactic); *Greensburg Coca Cola Bottling Co.*, 311 NLRB 1022, 1023-1024 (1993), revd. on other grounds 40 F.3d 669 (3d Cir. 1994) (employer lockout in furtherance of bargaining proposal to exclude part-time employees from the bargaining unit was unlawful). See also *American Stores Packing Co.*, 158 NLRB 620, 623 (1966) (employer lockout used as coercive pressure to compel a union to agree to exclude certain mandatory subjects of bargaining from negotiations was unlawful).

To avoid this conclusion, Rieth-Riley advances numerous arguments that all lack merit. The principal one is that, following the Union's coercive conduct in the summer of 2018 culminating in its whipsaw strike at Ajax Paving on August 25, the lockout was lawfully initiated as a defense to further whipsaw strikes by the Union against other road agreement contractors. The U.S. Supreme Court has approved of such defensive lockouts. See *NLRB v. Truck Drivers Local 449*, 353 U.S. 87 (1957). However, the purpose of the lockout must be to preserve multiemployer bargaining from the disintegration threatened by whipsaw strikes. Id. at 97. Again, the Union here lawfully withdrew from multiemployer bargaining. Thus, the lockout could not preserve multiemployer bargaining which no longer existed.

Even if it could, the conduct MITA and Rieth-Riley relied upon to initiate the lockout was not a strike or otherwise unlawfully coercive. On August 25, the Union established a picket line at a highway construction jobsite and staging yard where Ajax Paving and two nonunion contractors, Elmers and Lois Kay, were performing work. The picket signs all stated: “No contract” and one of the three contractors’ names. Assuming arguendo that such language establishes that the picketing had a recognitional or organizational object,[107] the publicity proviso of Section 8(b)(7)(C) of the Act comes into play. In part, that proviso permits informational picketing for the purpose of truthfully advising the public that an employer does not have a contract with a labor organization, unless an effect of such picketing is to induce a work stoppage or interruption of deliveries. However, any work stoppage or interruption of deliveries will not render picketing unlawful. Rather, the actual impact of the work stoppage or interruption of deliveries on the picketed business must be ascertained. See *Retail Clerks Local 324 (Barker Bros.)*, 138 NLRB 478, 491 (1962). Here, the picketing occurred for only one day. During the morning picketing at the staging yard, one delivery was delayed by the picketing and no work stoppage occurred. The start of work on the evening shift was delayed for one to two hours because Marshall, Ajax’s representatives, directed the employees not to work upon seeing the picketers. Nonetheless, the operating engineers ended up working their full shift after the delay. This almost non-existent impact on the business of Ajax and

107. See *Teamsters Local 203 (Union Interiors)*, 298 NLRB 315, 323 (1990).

the other contractors is insufficient to render the picketing unlawful. Ibid (over 12 weeks of picketing, three delivery stoppages, two work delays, and several delivery delays were insufficient to establish 8(b)(7)(C) violation); *Retail Clerks Local 1404* (*Jay Jacobs Downtown, Inc.*), 140 NLRB 1344, 1346-1347 (1963) (over 5 months of picketing, three refusals by employees to make deliveries or provide services did not render picketing unprotected). Rather, the Union's conduct was informational picketing privileged by the 8(b)(7)(C) publicity proviso, not a strike against Ajax which permitted Rieth-Riley to lock out its employees.

What is apparent from the sequence of events is that MITA and the road contractors seized on the Union's August 25 conduct and framed it as a strike to invoke their plan to lock out employees. A little over 2 weeks prior to that date, the fund trustees voted to reject any contributions from MITA POA contractors and return the contributions already submitted after June 1. MITA then had the contractors revoke their POAs, but doing so did not alter the funds' stance as to the contributions. Johnston's attempts, the last one on August 22, to get Stockwell to meet with a group of contractors were unsuccessful. As a result, MITA utilized the Union's conduct on August 25 to invoke an economic weapon—the lockout—which could alter this course of events and get the Union back to the bargaining table on a multiemployer basis.

Rieth-Riley also relies on the Union's conduct during the summer of 2018 following expiration of the road agreement to justify its lockout decision. On multiple occasions, the Union did refuse to provide operators or apprentices to contractors without a collective-bargaining agreement. It also blocked IUOE Local 139 operating engineers from working in Michigan. These tactics were lawful, not coercive, attempts to put pressure on the road contractors to accede to the Union's bargaining demands in individual successor contract negotiations. *Allied Mechanical Services, Inc.*, 332 NLRB 1600, 1608 (2001); see also *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 489 (1960) ("The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."). Stockwell himself conveyed that message when speaking to IUOE Local 139 President McGowen about why he wanted that local's operators to remain in Wisconsin.

Finally, Rieth-Riley contends that the all-for-one agreement is rendered irrelevant by the Board's decision in *Iron Workers Local 625 (Construction Industry Bargaining Association of Hawaii)*, 211 NLRB 128 (1974). In that case, both the Ironworkers and Boilermakers historically bargained with construction employers either on an individual or multiemployer basis. Prior to negotiations on successor contracts in 1972, a number of employers designated a new association—the Construction Industry Bargaining Association of Hawaii (CIBA)—as their bargaining representative. CIBA's bylaws barred employer members from individually negotiating with the unions absent approval from CIBA. Following notification to the unions of this designation, the Ironworkers demanded continuation of association bargaining, but refused to negotiate with CIBA. The

Boilermakers likewise refused to bargain with CIBA on a multiemployer basis. The Boilermakers also rejected CIBA's proposal that bargaining could proceed on an individual contractor basis and further suggestion that the individual negotiations be consolidated and conducted concurrently. The Board adopted the judge's finding that the unions' refusals to bargain with CIBA violated Section 8(b)(3) and 8(b)(1)(B). The judge found that the employers had the right to select whatever representative they chose and the union had a duty to bargain with that chosen representative. As to the Ironworkers, the judge noted that the union had the ability to withdraw from multiemployer bargaining prior to the commencement of bargaining, but did not do so. Thus, the Ironworkers insistence that multiemployer bargaining continue without CIBA representing the employers was unlawful. As to the Boilermakers, the judge found that the union may have demanded individual bargaining, but CIBA offered to act as the bargaining representative on an individual basis. The judge rejected the Boilermakers' argument that CIBA could not engage in individual bargaining, because its bylaws restricted it to multiemployer bargaining. In doing so, the judge relied upon the Board's decision in *Mayfair Industries, Inc.*, 126 NLRB 223, 224 fn. 1 (1960): "The Employer moved to dismiss the petition on the ground that the constitution of the Petitioner's International Union prohibits the Petitioner from representing the Employer's employees. We find no merit to this contention. *It is the Petitioner's willingness, rather than its constitutional ability to represent these employees which is the controlling factor*." (Emphasis added.)

I find this case distinguishable from *Ironworkers Local 625*. Unlike the Ironworkers, the Union here properly withdrew from multiemployer bargaining. Unlike the Boilermakers, MITA never offered to bargain on an individual contractor basis with the Union like CIBA did. Unlike CIBA, MITA was not willing to represent any contractor, including Rieth-Riley, on an individual basis. Under these circumstances, the Union did not unlawfully refuse to bargain with MITA as a representative of an individual contractor. MITA could have been designated such on either an individual or coordinated basis and the Union would have had to bargain with it. *Teamsters Local 705*, 210 NLRB 210, 211 (1974) (union violated Section 8(b)(1)(B) and 8(b)(3) by refusing to bargain with a multiemployer association which had been designated as an individual gas dealer's bargaining representative). But no such designation ever occurred here and no contractor, including Rieth-Riley, requested that the Union bargain with MITA as its representative in either of these formats prior to the lockout.

As a result, I conclude that Rieth-Riley's lockout of its operating engineers from September 4 to 27, 2018, was for the purpose of forcing the Union to return to multiemployer bargaining, a permissive subject. Thus, the lockout violated Section 8(a)(5) and (1).

III. Did Rieth-Riley Give Operating Engineer Employees Unlawful Unilateral Wage Increases in 2018, 2019, and 2020?

The General Counsel's complaint in Case 07-CA-234085 alleges that Rieth-Riley violated Section 8(a)(5) and (1) of the Act by unilaterally granting wage increases to unit employees on July 23, 2018, June 1, 2019, and June 1, 2020. All of the alleged wage increases occurred following the expiration of the road agreement.

The law is well settled that an employer violates Section 8(a)(5) and (1) when it unilaterally changes represented employees' wages, hours, and other terms and conditions of employment without providing their bargaining representative with prior notice and a meaningful opportunity to bargain over the changes. *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962). Following the expiration of a collective-bargaining agreement, an employer must maintain the status quo of all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. Richfield Hospitality, Inc., 368 NLRB No. 44, slip op. at 3 (2019) (citing Triple A Fire Protection, Inc., 315 NLRB 409, 414 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999)). Changes to employees' wages are a mandatory subject of bargaining. Columbia University, 298 NLRB 941, 941 (1990).

On July 23, 2018, Rieth-Riley provided employees with a wage increase of $2 per hour, with a corresponding $0.30 per hour increase to the vacation fund contribution. It also increased the contribution to the pension fund by $0.50 per hour. On June 1, 2019, Rieth-Riley granted a second $0.50 per hour increase to the pension fund contribution. (The company did not raise wages in 2019.) On June 1, 2020, Rieth-Riley provided a second wage increase of $1 per hour, with a corresponding $0.15 per hour increase to the vacation fund contribution. It again provided a $0.50 per hour increase to the pension fund contribution. The company admittedly did not advise the Union of these increases prior to implementing them. Having made unilateral changes to employees' wages, Rieth-Riley bears the burden of establishing that the changes were in some way privileged. *Fresno Bee*, 339 NLRB 1214, 1214 (2003).

Beginning with the 2018 wage increase, Rieth-Riley first argues that the Union waived its right to bargain over it. The company contends that it gave prior notice of the wage increase to the Union when, on May 18, MITA submitted its initial contract proposal. That proposal contained a $2-per-hour wage increase effective June 1, 2018. I find this contention nonsensical. The May 18 contract proposal was not notification of a planned wage increase to be implemented on July 23. It was, as Nystrom himself called it, a "first proposal to initiate negotiations" for a successor contract. In addition, the proposal was a multiemployer contract even though the Union had properly withdrawn from multiemployer bargaining. Rieth-Riley was not privileged to unilaterally implement the 2018 wage increase based upon the Union's waiver of its right to bargain.[108]

Next, Rieth-Riley argues that, once the union's fringe benefit funds office stopped accepting contributions, Rieth-Riley made those same contributions to employees directly in the form of a wage increase. The record evidence fails to establish that link. Rose and Loney's letter to employees

108. C. Exh. 32.

announcing the wage increase stated that the company now would pay vacation fund contributions directly to employees as a result of Local 324's refusal to credit fringe payments. Rose also announced that, due to the "inconvenience to employees" created by the Union, the company also was giving the employees a separate wage increase of $2 per hour. Presumably that inconvenience was the funds' refusal to accept contributions, but the $2 per hour increase was but a small fraction of the total fringe benefit cost per hour under the road agreement. The wage increase was not the equivalent of paying employees all of those contributions directly. Even if it had been, Rieth-Riley still was obligated to bargain with the Union before paying contributions directly to employees. The status quo under the road agreement was for those contributions to be made to the funds.[109]

Finally as to the 2018 increase, the company claims that the Union's bad faith bargaining in violation of Sec. 8(b)(1)(B) and 8(b)(3) privileged Rieth-Riley to act. Specifically, Rieth-Riley argues that the Union refused to bargain with Johnston from Ajax Paving (not with Rose from Rieth-Riley) during the time period from August 8 to 28 when its POA with MITA had been rescinded. I do not agree, because Johnston never made an actual request to bargain. Without a doubt, Johnston repeatedly asked Stockwell during that time period for a meeting. However, Johnston carefully worded all of those requests to avoid any suggestion that he wanted a meeting to negotiate a

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109. C. Brf., p. 65; GC Exhs 2 (contract pp. 8-25), 22; C. Exh. 215.

contract. Johnston said the purpose of the meeting was to "lay out [contractors] thoughts to get us all back to the bargaining table"; "not to negotiate" but to "discuss the path forward"; look at the "big picture" and "solving all our problems"; and "not a negotiation at this time but to come to an understanding how we go forward together." The most specific he got was when he told Stockwell he wanted to discuss how they could set up a union contractor association for purposes of negotiating a multiemployer bargaining agreement. Sorely lacking from his communications is any request that clearly indicates a desire to negotiate and bargain on behalf of Ajax's operating engineers concerning their terms and conditions of employment in a successor contract. *Crittenton Hospital*, 343 NLRB 717, 740 (2004); *Marysville Travelodge*, 233 NLRB 527, 532 (1977). The proposed topics of discussion had nothing to do with employees' terms and conditions of employment, but rather the format for future bargaining. Moreover, a bargaining demand, whether written or verbal, must contain more than merely a suggestion that the parties should meet to discuss representation; if a party's demand does not state its purpose explicitly, it must at least include some indicia of a demand, such as a suggested meeting place and time, proposed topics, and a method for reply. *Williams Enterprises, Inc. v. NLRB*, 956 F.2d 1226, 1233-1234 (D.C. Cir. 1992) (union representative's statement that "he would like to have an opportunity to discuss, perhaps negotiate" was not a request to bargain, but his statements that "we demand you bargain with us in good faith to reach a new agreement and . . . we stand ready to negotiate in good faith with you for a new collective bargaining agreement at any time. A prompt reply would be appreciated." were a valid request). See also *K & S Circuits, Inc.*, 255 NLRB 1270, 1297 (1981); *Sheboygan Sausage Co., Inc.*, 156 NLRB 1490, 1500-1501 (1966). The proposed topics here specifically excluded negotiations. The Union cannot be charged with a refusal of that which is not proffered. *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297-298 (1939). The Union did not engage in unlawful bad-faith bargaining.

The 2020 unilateral wage increase involved slightly different circumstances. By June 1, 2020, Rieth-Riley and the Union were negotiating a successor contract, wage increases still were an open issue, and no agreement on a complete contract or an impasse in bargaining had been reached. Where parties are engaged in contract negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter. It encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). Again, Rieth-Riley must establish a privilege for unilaterally implementing the 2020 wage increase.

Relying solely on the Board's decision in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), the company contends that its 2020 wage increase was justified based on the parties' dynamic status quo. It points to the annual wage increases agreed to by Rieth-Riley and the Union in both the 2008-2013 and 2013-2018 collective-bargaining agreements. Those contracts called for hourly wage increases between $1 and $1.40 on June 1 of each year. Rieth-Riley argues that the $1 per hour increase in 2020 was in adherence to that status quo of annual wage increases in that range.

The concept of dynamic status quo has been described, with Board approval, as follows:

> [T]he case law (including the Katz decision itself) makes clear that conditions of employment are to be viewed dynamically and that *the status quo against which the employer's "change" is considered must take account of any regular and consistent past pattern of change.* An employer modification consistent with such a pattern is not a "change" in working conditions at all.

Robert A. Gorman, Matthew W. Finkin, *Labor Law Analysis and Advocacy*, at 720 (Juris 2013), quoted in *Raytheon*, slip op. at 5. The dynamic status quo doctrine requires an employer to provide a union advance notice and the opportunity for bargaining over an action only when the action differs from a pattern of prior changes that have become an employer's past practice. Applying that doctrine, the Board repeatedly has found that employers unlawfully discontinued, post contract, a status quo providing wage increases where contractual provisions required such increases based upon an employee's anniversary date with the company.[110] See, e.g., *Encino Hospital Medical Center*, 364 NLRB 1791, 1799-1800 (2016); *Wilkes-Barre General Hospital*, 362 NLRB 1212, 1216-1218 (2015), enfd. 857 F.3d 364 (D.C. Cir. 2017). The same holds true for merit-based wage increases. See *Michigan Consolidated Gas Co.*, 261 NLRB 555, 559-562 (1982). However, when a contract includes past wage or benefit increases that are limited to specified years, the post contract status quo does not include automatic annual increases going forward. *Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3 (2019) (no dynamic status quo requiring continued annual increases to health care contributions, where expired agreement explicitly limited increases to 2 specified years).

In this case, the contractual wage increases which Rieth-Riley relies upon to establish a dynamic status quo were annual increases tied to specific years. In both prior contracts, the wages provision set out increases on June 1 of each specific year. The increases were not based upon longevity or any other criteria not limited to a specified year. Thus, when the road agreement expired in 2018, the status quo on wages was the hourly rate paid at the time of the expiration, not a dynamic status quo requiring the increases. Rieth-Riley could not unilaterally change that status quo, which it did by increasing the hourly wage rate $1 in 2020.[111]

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110. Such increases also have been referred to as "longevity" or "experience" based ones.

111. In its answer to the General Counsel's complaint, Rieth-Riley pled the dynamic status quo defense only as to its 2020 wage

Rieth-Riley also suggests at varying points that it was privileged to unilaterally grant the 2018 and 2020 wage increases because it had to be compliant with the Davis-Bacon Act. The record evidence, in particular Loney's testimony, does establish that some sort of compensation increase was necessary in those two years in order for the company to be compliant with Davis-Bacon. However, the law did not specifically require that Rieth-Riley grant a wage increase in order to do so. The company had options, including different benefit increases, to ensure its compliance with Davis-Bacon. Where, as here, an employer has discretion in determining how to comply with a law, the employer must bargain with the union over that issue. See, e.g., *Frontier Communications Corp.*, 370 NLRB No. 131, slip op. at 11-12 (2021); *Trojan Yacht*, 319 NLRB 741, 743 (1995). But Rieth-Riley failed to do so.[112]

Accordingly, Rieth-Riley's 2018 and 2020 unilateral wage increases to its employees violated Section 8(a)(5).[113]

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increase. It also similarly pled that its past practices permitted unilateral wage increases, without limitation as to year. Rose also testified that the 2018 wage increase was made in compliance with past practice. Thus, my legal conclusion regarding the lack of a dynamic status quo/past practice privileging unilateral action applies to the 2018 wage increase as well.

112. I further note that the General Counsel's complaint alleges that Rieth-Riley failed to bargain over both the decision to increase wages and the effects of that decision.

113. Because the increases in vacation fund contributions in 2018 and 2020 were due to the unlawful wage increases, no need exists to independently evaluate whether those contribution increases were unlawful. In the unlikely event the Union requests

IV. Did Rieth-Riley Unilaterally Change the Paychecks of Operating Engineer Employees in October 2018?

The General Counsel's complaint in Case 07-CA-234085 also alleges that Rieth-Riley violated Section 8(a)(5) and (1) of the Act by unilaterally deducting money from the paychecks of unit employees beginning October 27, 2018, related to the vacation fund.

When Rieth-Riley notified employees on July 23, 2018, that it was giving them a compensation increase retroactive to June 1, 2018, it also advised them that vacation fund contributions would no longer be deducted from their paychecks and instead would be paid to the employees directly. Rieth-Riley took this action after the funds refused to credit contractor contributions and because vacation fund contributions are treated as income. The company did not inform the Union of this change to the payment of vacation fund contributions. On

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rescission of the wage increases, the vacation fund contributions likewise must be rescinded. As to the pension fund contribution increases in 2018, 2019, and 2020, I conclude that those increases were consistent with a dynamic status quo/established past practice. The union fringe benefit funds adopted the pension rehabilitation plan back in 2011, as required by ERISA. The plan required Rieth-Riley to increase contributions each year. It had a 10-year duration, meaning the plan still was in effect at the time of the 2018, 2019, and 2020 increases and would not expire until 2021. This obligation was outside of the parties' collective-bargaining agreement. The record does not establish that Rieth-Riley had any discretion in complying with the rehabilitation plan. Thus, the pension fund contribution increases were lawful. See *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964).

October 3, after learning of the Section 9(a) relationship between Rieth-Riley and the Union, the funds advised both entities that fund contributions now would be accepted and credited, as well as that Rieth-Riley owed fund contributions retroactive to June 1. Now having to pay the funds after paying those contributions directly to employees, Rieth-Riley faced the prospect of paying twice. To avoid that outcome, Rieth-Riley implemented payroll deductions for its operating engineer employees beginning the pay period ending October 27, 2018, to claw back the prior direct payments it made to them. Again, because this change impacted employees' wages, it was a mandatory subject of bargaining and the company was required to provide the Union with notice and an opportunity to bargain over the change prior to implementation, unless Rieth-Riley was privileged to act unilaterally.

Rieth-Riley first contends that the Union waived its right to bargain over the claw back.

Waiver of a statutory right must be clear and unmistakable. *Harley-Davidson Motor Co.*, 366 NLRB No. 121, slip op. at 2 (2018); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708-710 (1983). Establishing waiver is a heavy burden, not to be lightly inferred. *American Medical Response of Connecticut, Inc.*, 361 NLRB 605, 605 (2014), affg. 359 NLRB 1301, 1302 (2013); *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998). Although waiver can occur in three ways, Rieth-Riley relies here solely on the conduct of the parties (including past practices, bargaining history, and action or inaction). *American Diamond Tool*, 306 NLRB 570, 570 (1992).

The record evidence establishes that Rose proposed the contribution claw back to Stockwell on October 11 and asked Stockwell to let him know if the Union wanted to "discuss" the matter. On that same date, Rose also asked Stockwell for dates to begin contract negotiations. Stockwell responded on October 15, saying the Union expected Rieth-Riley to make the funds whole and suggested that the claw back proposal would violate Federal and/or State law, as well as the contract. That same day, Rose asked Stockwell if he was refusing to bargain, to which Stockwell later replied that Rose was free to bring up the subject in contract negotiations. Stockwell's conduct does not amount to a waiver. After Rose notified Stockwell of the proposed change, Stockwell objected to it and suggested they address the issue in contract negotiations. Asserting such an opposition prevents a waiver finding. See *Intermountain Rural Electric Assn.*, 305 NLRB 783, 787 (1991); *Cf. American Diamond Tool*, supra. Furthermore, because of the Section 9(a) relationship between Rieth-Riley and the Union, the company had to maintain the status quo while successor contract negotiations were ongoing. The status quo under the expired road agreement required Rieth-Riley to make vacation fund contributions for employees from June 1, 2018 forward. What Rose was proposing was a modification to that status quo which the Union was free to reject, as Stockwell did.

Rieth-Riley also argues that an economic exigency existed permitting it to unilaterally implement the money claw back. An employer may lawfully make a unilateral change "when economic exigencies compel prompt action."

Bottom Line Enterprises, 302 NLRB at 374. The Board has limited this exception to "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action."' *RBE Electronics of S.D., Inc.*, 320 NLRB at 81 (quoting *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995)). A loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages are not economic exigencies. *Harmon Auto Glass*, 352 NLRB 152, 154-155 (2008); *Pleasantview Nursing Home, Inc.*, 335 NLRB 961, 962-963 (2001), enfd. in relevant part 351 F.3d 747, 755-756 (6th Cir. 2003). The burden is on the employer to prove that it experienced such dire and unforeseen circumstances, and that burden is "heavy." Alpha Associates, 344 NLRB 782, 785 (2005).

I conclude that Rieth-Riley did not meet its burden. To begin, Rose did not move with urgency after learning of the claimed exigency. In August, Rose discovered that Rieth-Riley had a Section 9(a) bargaining relationship with the Union. Given that relationship, the company was required to maintain the status quo following expiration of the road agreement. That status quo included deducting vacation fund contributions from employees' paychecks and remitting them to the union fringe benefit funds office. Once the 9(a) relationship was established, the company immediately could have notified the funds and resumed making contributions. That the funds office also eventually would come calling for retroactive contributions back to June 1 was reasonably foreseeable. Yet Rose waited for official notification from the funds, which came more than a month later on October 3, before notifying the Union of the proposed claw back. The length of time that elapsed before Rose acted contradicts the claim that time was of the essence and an economic exigency existed. *Metro Mayaguez, Inc.*, 356 NLRB 1204, 1214-1215 (2011).

Next, Rieth-Riley claims that the claw back had to be expediently implemented, because all the fund contributions had to be made by the end of 2018 pursuant to the road agreement, and because Michigan law only permits gradual deductions of employee paychecks. However, no specific evidence was introduced to substantiate that those conditions could be met only by implementing the claw back by October 27. And Rose did not contemporaneously inform Stockwell of these claimed reasons for seeking the almost immediate implementation of the claw back.

Finally, the evidence also fails to establish that not recouping the amount in question would have a "major economic effect" on Rieth-Riley's finances. The company simply relies upon the need to make a double payment of $800,000. That amount obviously is nothing to sneeze at and amounts to a material change. However, without further context, it fails to satisfy the required burden. Standing alone, the amount is akin to a loss of significant accounts or a competitive disadvantage. The desire to save money in business operations also does not amount to an economic exigency. *Wendt Corp.*, 369 NLRB No. 135, slip op. at 6 (2020).

Having not established a privilege to imposing the vacation fund claw back, Rieth-Riley's unilateral action violated Section 8(a)(5) and (1).[114]

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114. On July 18, 2019 and following the issuance of the General Counsel's complaint in Case 07-CA-234085, Loney notified Stockwell that Rieth-Riley was rescinding its decision to claw back the vacation fund contributions from employees and that it would repay employees all the monies that had been deducted from their paychecks. (C. Exh. 104; Tr. 918-921, 1580.) Loney also sent a memo to employees with the same notification, including that Rieth-Riley was double paying them as a result of the rescission. The memo to employees further stated:

> We recognize Local 324 as your exclusive bargaining representative. Therefore, under the National Labor Relations Act, Local 324 has the right to notice and the opportunity to bargain about changes to terms and conditions of your employment. We will not interfere with any of your rights to engage in, or refrain from engaging in activities authorized by the National Labor Relations Act.
>
> We will give Local 324 notice and the opportunity to bargain regarding any future changes about vacation pay and will bargain collectively and in good faith with the Union as your exclusive collective-bargaining representative concerning wages, hours, rates of pay, and other terms and conditions of employment. As a: reminder, federal law gives you the right to:
>
> - Form, join, or assist a union;
> - Choose a representative to bargain with us on your behalf;
> - Act together with other employees for your benefit and protection;
> - Choose not to engage in any of these protected activities.

V. Are Rieth-Riley's Operating Engineers Engaging In an Unfair Labor Practice Strike?

The last General Counsel complaint allegation in Case 07-CA-234085 is that certain Rieth-Riley unit employees represented by the Union went on strike on July 31, 2019, at various locations throughout the State of Michigan. The complaint further alleges that the strike was caused by the unfair labor practices in that case discussed above.

When a strike is caused, "in whole or in part", by an employer's unfair labor practice, it is an unfair labor practice strike. *Precision Concrete*, 337 NLRB 211, 213 (2001) (citing *Citizens National Bank of Willmar*, 245 NLRB 389, 391 (1979), enfd. mem. 644 F.2d 39 (D.C. Cir. 1981)). The unfair labor practices need not be the sole or major cause or an aggravating factor; they need only be a contributing factor. *RGC (USA) Mineral Sands, Inc.*,

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> Rieth-Riley will NOT interfere with, restrain or coerce you in the exercise of the above rights.
>
> Prior to providing this Memorandum to you we have notified via email Doug Stockwell and Ken Dombrow from the Union of the Company's decision.

I find Rieth-Riley's actions are insufficient under *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978), to repudiate its unlawful claw back of the vacation fund contributions. The actions were untimely as they occurred roughly 9 months after the unlawful conduct and about 2 months after the General Counsel issued the complaint in Case 07-CA-234085. Rieth-Riley also did not provide its letter and the monetary remedy for its unfair labor practice to all of its operating engineer employees. (Tr. 1660-1661, 1676-1677.)

332 NLRB 1633, 1633 (2001) (citing *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990)). In determining whether the General Counsel has met the burden of establishing that an employer's unfair labor practices caused the employee's decision to go on strike, the Board looks to the employees' motivations for striking, considering both objective and subjective evidence. See, e.g., *Chicago Beef*, 298 NLRB 1039, 1039 (1990), enfd. 944 F.2d 905 (6th Cir. 1991); *C-Line Express*, 292 NLRB 638, 638 (1989). "Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable employees in the relevant context." *C-Line Express*, supra, quoting *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1980). "Applying subjective criteria, the Board and court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice." Ibid. The causal connection between unfair labor practices and a strike may be inferred from the record as a whole. *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145, 1145 (1995), enfd. 77 F.3d 461 (3d Cir. 1996).

Beginning with the objective evidence, the Union sought the authority to authorize the initiation of a strike at a general membership meeting in June 2018. The members were from all road agreement contractors, not just Rieth-Riley. They voted in favor of granting that authorization to the Union. At the time, the road agreement had expired but none of the alleged unfair labor practices in Case 07-CA-234085 had occurred. In particular, the alleged unlawful lockout did not take place until September 4 through 27, 2018. Thus, the members' vote authorizing a strike could not have been motivated by then nonexistent unfair labor practices.

On July 25, 2019, the Union held a membership meeting of just Rieth-Riley employees. At the meeting, Stockwell discussed the status of negotiations overall and with Rieth-Riley. Members also were provided with copies of the General Counsel's complaint in Case 07-CA-234085. The General Counsel issued that complaint on May 29, 2019, which was premised on an unfair labor practice charge the Union filed on January 11, 2019. Thereafter, Dombrow went over the allegations and advised the group that Rieth-Riley rejected a $1.8 million settlement proposal from the government. According to Dombrow, multiple members insisted on going on strike and asked questions about the NLRB case and how long it would take to get resolved.[115] However, it is unclear in the record what the sequence of those statements was, i.e., whether members insisted on going on strike before or after learning of the complaint. The meeting ended with officials telling the members that the Union would let them know what the Union decided concerning a strike. The Union did not have members vote on whether to strike. During a negotiation session 4 days after this meeting, the Union rejected Rieth-Riley's subcontracting proposal which would have applied the Union's desired language to only seven counties in Michigan. Stockwell decided either that day or the next to initiate the strike and relied upon the strike vote taken in June 2018. While on strike, picketers

115. Tr. 2587-2590.

carried signs stating: "unfair labor practice" and Rieth-Riley's name, along with the Union either being on strike or having no contract with the company.

Rieth-Riley's employees may very well have gone on strike, in part, to protest the company's unfair labor practices, but this objective evidence is insufficient to establish that fact. Most critically, the Union did not call for a strike vote by the Rieth-Riley operating engineers at the July 25, 2019 meeting or any other time prior to Stockwell initiating the strike. The Union's failure to do so is confounding. Moreover, had the employees voted to strike after the discussion of the General Counsel's complaint, then it would be possible to infer that the strike was an unfair labor practice strike. See *Citizens Publishing and Printing Co.*, 331 NLRB 1622, 1623 (2000) (after being advised that the General Counsel intended to issue a complaint against an employer for subcontracting unit work to non-unit individuals, members voted to strike and engaged in unfair labor practice strike); *Lifetime Door Co.*, 179 NLRB 518, 523 (1969) (employees engaged in unfair labor practice strike when they voted to strike after being advised of employer's refusal to provide information which was later found to be unlawful). Instead, in initiating the strike, the Union relied upon a general strike authorization vote of members of all road agreement contractors taken back in June 2018, prior to any of the alleged unfair labor practices. At that time, the only reason for authorizing such a strike was to increase the Union's bargaining leverage in successor contract negotiations.

What remains in this record is Dombrow's and Stockwell's hearsay testimony which, if relied upon, establishes nothing more than that, at the July 25, 2019 meeting, an unidentified number of employees insisted on going on strike, as well as asked questions about the NLRB case and how long it would take to get resolved. If employees had insisted on going on strike *after* learning about the General Counsel's complaint and Rieth-Riley's rejection of the $1.8 million settlement offer, then it likewise could be inferred that the strike was an unfair labor practice strike. But neither Dombrow nor Stockwell testified about the sequence of those events.

As to timing, the unlawful lockout occurred back in September 2018, 10 months before the strike. The Union first alleged it as unlawful in an unfair labor practice charge filed in January 2019, 6 months before the strike. The General Counsel's complaint issued at the end of May 2019, 2 months before the strike. At no point in that sequence did the Union initiate a strike. Rather, it waited until a day or 2 after Rieth-Riley submitted a subcontracting proposal that was wholly unacceptable to the Union. Thus, timing also does not support the conclusion that the strike was caused by Rieth-Riley's unfair labor practices. Cf. *Citizens Publishing and Printing Co.*, supra at 1634, fn. 42 (strike called 3 (not 10) months after the ULP was committed and 3 days (not 2 months) after union learned that the General Counsel would issue a complaint against the employer was unfair labor practice strike).

As to the picket signs used by strikers, the text did indicate that Rieth-Riley's unfair labor practices were to blame for the strike. Nevertheless, the language on a picket sign is not controlling in determining what caused a strike, when other evidence indicates a different object. *SCA Services of Georgia, Inc.*, 275 NLRB 830, 858 (1985) (citing *Happ Bros. Co.*, 90 NLRB 1513, 1516 (1950), enf. denied on other grounds 196 F.2d 195 (5th Cir. 1952)).Thus, the objective facts do not support a finding of an unfair labor practice strike.

As to subjective evidence, the record is devoid of any because neither the General Counsel nor the Union called any employees to testify concerning their reasons for striking prior to the initiation of the strike. Although not a per se requirement, such employee testimony often has been a component of past findings of unfair labor practice strikes. See, e.g., *RGC (USA) Mineral Sands*, supra at 1633-1634; *Precision Concrete*, supra at 212-213. The General Counsel did call three union officials to establish the cause of the strike. Stockwell testified that he initiated the strike (on his own) in part because he wanted the members to recoup the $1.8 million lost due to the unlawful lockout. Dombrow and McKernan likewise testified that the lockout was one of the reasons for the strike. However, the three union officials' reasons for initiating the strike are irrelevant as a matter of law. *C-Line Express*, supra at 638 (citing *Soule Glass*, supra at 1080) (a union official's testimony about what caused a strike, standing alone and uncorroborated by employees, is self-serving and insufficient to demonstrate causation). Finally, certain types of unfair labor practices by their nature will have a reasonable tendency to cause or prolong a strike and therefore afford a sufficient and independent basis for finding an unfair labor practice strike. *C-Line Express*, supra. Examples include an unlawful withdrawal of recognition; an unlawful discharge of strikers; and unlawful threats to relocate unit work due to a strike. Id. at 639; *Gloversville Embossing Corp.*, 297 NLRB 182, 183 (1989); *Titan Tire Corp.*, 333 NLRB 1156, 1157 (2001). These unfair labor practices fall into two categories. They either put an end to, strike at the very heart of, or otherwise burden the collective-bargaining process, or they put an end to strikers' employment. *Titan Tire Corp.*, supra; *Vulcan-Hart Corp.*, 262 NLRB 167, 168 (1982), enf. denied on other grounds 718 F.2d 269 (8th Cir. 1983).

The unfair labor practices here included an unlawful lockout to require the Union to engage in multiemployer bargaining; two unlawful unilateral wage increases; and the unlawful deduction of money from employees' paychecks to pay vacation fund contributions, which ultimately Rieth-Riley repaid to employees. These are significant unfair labor practices. What is missing, though, is any impact on the collective-bargaining process or employees' long-term job security. All of the unfair labor practices occurred prior to the Union and Rieth-Riley beginning contract negotiations. The failure to reach overall agreement on a contract is due to disagreements over subcontracting and other terms and conditions of employment, including wages, fringe benefits, profit sharing, a hiring hall, and jurisdiction. The unfair labor practices have not burdened the collective-bargaining process. In addition, the lockout, while costly to employees, was temporary.[116] Employees ultimately returned to work. Unlike a withdrawal of recognition, a discharge from employment, or relocation of unit work, the lockout did not put an end to the workers' employment or to the bargaining relationship between the Union and Rieth-Riley.

For all these reasons, I conclude that the record evidence is insufficient to establish that Rieth-Riley's unfair labor practices caused the Union's strike against it. Therefore, the complaint allegation in paragraph 12(b) is dismissed.[117]

VI. Did Union Agents' Statements to Representatives of Various Contractors Following Expiration of the Road Agreement Violate Section 8(b)(1)(B)?

The General Counsel's complaint in Case 07-CB-226531 alleges that the Union violated Section 8(b)(1)(B) of the Act on six occasions in June and July 2018, when union agents verbally notified employer-members of MITA that the Union would not negotiate a new collective-bargaining agreement with them if MITA was their bargaining

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116. Tr. 2577. Taking the $1.8 million settlement offer from the General Counsel and dividing by 129 locked out employees, each employee would be owed just short of $14,000.

117. Many of the legal principles described here arose in cases dealing with whether an economic strike had been converted to an unfair labor practice strike. Nonetheless, the same principles apply in determining whether a strike at its inception is an unfair labor practice strike. See *3D Enterprises Contracting Corp.*, 334 NLRB 57, 76 (2001).

representative. One of the six occasions also is alleged as a Section 8(b)(3) violation, because the union agent's statements were made to a representative of Payne & Dolan, a Section 9(a) contractor. The General Counsel's original theory was that, although the Union properly withdrew from multiemployer bargaining and could refuse to bargain in that format, the Union did not have the right to refuse to negotiate on a single employer basis with MITA, if a contractor chose MITA as its bargaining representative.

Prior to addressing the substance of these allegations, a preliminary matter must be discussed. On March 29, 2021, during an adjournment of the hearing, the General Counsel filed with me a motion to sever Case 07-CB-226531 from this proceeding and to approve the General Counsel's withdrawal of the complaint in that case. The motion was premised upon the General Counsel's reconsideration of the complaint allegations in light of evidence adduced at the hearing. In particular, the General Counsel was unaware until subpoenaed document production from MITA of the existence of the all-for-one agreement between MITA and numerous contractors. That agreement bound the contractors to multiemployer bargaining. Via order dated April 9, 2021, I denied the motion, principally because the hearing already had proceeded for 13 days and evidence had been presented by MITA in support of the General Counsel's complaint allegations in Case 07-CB-226531. In the posthearing brief, the General Counsel renews the motion. I again deny it for the reasons stated in my April 9, 2021 order and instead will rule on the merits of the complaint allegations. In that regard, the General

Counsel now moves to dismiss the complaint allegations in Case 07-CB-226531. This puts MITA, as the Charging Party in that case, in the rare position of assuming the responsibility of proving the government's complaint allegations.

Section 8(b)(1)(B) of the Act prohibits unions from restraining or coercing employers in their selection of representatives for the purposes of collective bargaining. *Writers Guild of America West, Inc.* (*Universal Network Television, LLC*), 350 NLRB 393, 399 (2007). The proscribed conduct may be applied directly against the employer to force the employer to select or replace an 8(b)(1)(B) representative or indirectly against the employer's 8(b)(1)(B) representative to adversely affect the manner in which the representative performs the covered functions of collective bargaining, grievance processing, or related activities. Ibid. This case falls into the first category of direct conduct against employers to replace a bargaining representative. A primary concern of Congress in enacting Section 8(b)(1)(B) was to "prevent unions from trying to force employers into or out of multiemployer bargaining units." *Florida Power & Light Co. v. IBEW Local 641*, 417 U.S. 790, 803 (1974). Section 8(b)(3) makes it an unfair labor practice for a union to refuse to bargain collectively with an employer, provided the union is a Section 9(a) representative of the employer's employees. A union's refusal to meet with a Sec. 9(a) employer's lawful representative to bargain collectively violates both Section 8(b)(1)(B) and 8(b)(3). *Asbestos Workers Local 27 (Master Insulators)*, 263 NLRB 922, 923 (1982).

Appendix B

To summarize the record evidence, the statements in question all occurred in conversations between union representatives and contractor project managers during June and July 2018, after the road agreement expired. Union Representative Kroll told Sonnentag, a construction manager at Zenith Tech, that the company needed to sign off the POA with MITA and deal directly with the Union. Second, Sonnentag asked Union Agent Edwardson what he could do to get the Escanaba job going again. Edwardson responded that, as soon as Zenith Tech signed off the POA with MITA for the road agreement and negotiated directly with the Union, he could get his operators back to work. Third, Union Agent Hartwell told Coolsaet, the president of R.L. Coolsaet Construction, that the Union no longer had a contract, MITA had his POA, and he could not give Coolsaet any apprentices. He also said that, if Coolsaet signed the contract which the Union had drafted, he could get apprentices. Fourth, Union Agent Salisbury told Eriksson, Hoffman Brothers' general superintendent, that the Union would not have an agreement with MITA and that, until Hoffman Brothers signed a contract outside of MITA, it would not get any operators. Fifth, union agent Shippa told Eriksson that Hoffman Brothers needed to get away from MITA and sign the contract. Finally, Union Agent Edwardson asked Payne & Dolan vice president Bartozek to sign on to the Union's agreement with AGC and the Union was not going to negotiate with MITA.

The test of whether a statement is unlawful is whether the remark can reasonably be interpreted to threaten, restrain, or coerce. See, e.g., *Consolidated Bus Transit,* *Inc.*, 350 NLRB 1064, 1066 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); *Flagstaff Medical Center, Inc.*, 357 NLRB 659, 663 (2011). In the Section 8(b)(1)(B) context, the prohibition is on statements which restrain or coerce employers in their selection of a bargaining representative. What the union agent subjectively intended by the comment and the subjective state of mind of the person who heard the statement is not determinative. *United Steel Workers of America Local 1397, AFL-CIO (United Steel Corp.)*, 240 NLRB 848, 849 (1979). In addition, the statement itself cannot be viewed in a vacuum but rather in context, in order to determine if under all the circumstances it would have a tendency to restrain and coerce. *American Postal Workers Union, AFL-CIO*, 328 NLRB 281, 282 (1999) (citing *Letter Carriers Local 233* (*Postal Service*), 311 NLRB 541, 545 (1993)).[118]

Under the totality of the circumstances, I conclude that none of the statements restrained or coerced the contractors from selecting MITA as their bargaining representative for individual or coordinated negotiations. At the time the statements were made, the Union properly had withdrawn from multiemployer bargaining and

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118. The Board has utilized this test to find violations of Sec. 8(a)(1) and 8(b)(1)(A), which prohibit coercive statements by employers and unions to employees. To my knowledge, the Board has not addressed allegations that a union representative's direct statements to an employer representative to select or replace its bargaining representative violated Sec. 8(b)(1)(B). Nonetheless, because all three sections of the Act prohibit restraint and coercion by employers or unions, I find it appropriate to apply the same standard to the Sec. 8(b)(1)(B) allegations here.

instead wished to bargain with contractors individually. The Union had every right to insist that bargaining not be on a multiemployer basis. In their statements, the union representatives repeatedly said that they wanted the contractors to deal or negotiate directly with the Union. Consistent with that desire, certain representatives also stated that they wanted the contractor to sign an individual agreement. Those statements are noncoercive because the Union was not trying to get the employers out of multiemployer bargaining. It already had properly withdrawn from multiemployer bargaining.

The more difficult issue is the union representatives' repeated statements that the contractors needed to either sign off their POAs with MITA or sign a contract outside of MITA, as well as that the Union was not going to negotiate or have an agreement with MITA. The context of the statements is key because it reflects that the individuals to whom the statements were made objectively would equate MITA with multiemployer bargaining. At the time the statements were made, the involved contractors still were members of MITA and had executed the all-for-one agreement. That agreement prohibited them from negotiating individually with the Union and subjected them to damages for doing so. The Union also had withdrawn from multiemployer bargaining with MITA. Unsurprisingly then, the contractor managers knew that their employers wanted to bargain as a group and the Union wanted to bargain individually. What they did not know is that the Union could not refuse to bargain with the individual contractor, if the contractor designated MITA as its bargaining representative. None of the contractor representatives were labor law attorneys familiar with the legal distinction between the ability of a union to withdraw from multiemployer bargaining but not to refuse to bargain with a contractor's chosen bargaining representative, even if that representative was the same multiemployer bargaining association. Given that context, the representatives reasonably and objectively would understand MITA to mean multiemployer bargaining, especially given that, to their knowledge, MITA only had bargained on a multiemployer basis. Thus, when the union agents referenced MITA in these statements, the objective meaning was that the Union would not engage in multiemployer bargaining with the contractors.

Accordingly, I conclude that the record evidence fails to establish that the Union violated Section 8(b)(1)(B) and 8(b)(3) based upon the statements alleged to be unlawful in the CB complaint. The CB complaint is dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent Rieth-Riley Construction Co., Inc. (Rieth-Riley) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Charging Party Michigan Infrastructure and Transportation Association, Inc. (MITA) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Charging Party/Respondent Local 324, International Union of Operating Engineers, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

4. The Union is, and at all material times was, the exclusive collective-bargaining representative of the following appropriate unit: operating engineers employed by Rieth-Riley in the State of Michigan in building construction, underground construction, and/or heavy, highway and airport construction, at the site of construction, repair, assembly and erection, including equipment operators, field mechanics, oilers, apprentices, and on the job trainees; but, excluding employees represented by other labor organizations, and professional, office and clerical employees, guards and supervisors as defined under the Act.

5. Rieth-Riley violated Section 8(a)(5) and (1) by locking out union members in support of a demand that the Union agree to bargain on a multiemployer basis, thereby changing the scope of the bargaining unit, a permissive subject of bargaining.

6. Rieth-Riley violated Section 8(a)(5) and (1) by unilaterally granting employees a wage increase in 2018 and 2020, as well as by unilaterally deducting money from employees' paychecks related to vacation fund contributions in 2018, without having reached a collective-bargaining agreement or a good-faith impasse in bargaining with the Union for a successor contract.

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

8. Rieth-Riley has not violated the Act in any of the other manners alleged in the amended complaint in Case 07-CA-234085.

9. The Union has not violated the Act in any of the manners alleged in the complaint in Case 07-CB-226531.

REMEDY

Having found that Rieth-Riley engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Rieth-Riley unlawfully locked out unit employees from September 4 to 27, 2018, I order Rieth-Riley to make those employees whole for any loss of earnings and other benefits incurred by them as a result of the unlawful lockout, less any net interim earnings. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *King Soopers, Inc.*, 364 NLRB 1153 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), I also order Rieth-Riley to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Having found that Rieth-Riley unilaterally changed the terms and conditions of employment of unit employees on July 23, 2018, October 27, 2018, and June 1, 2020, I order it, on request, to bargain with the Union as the exclusive collective-bargaining representative of unit employees, before implementing any changes to their wages, hours, or other terms and conditions of employment. I also order it to retroactively restore any unilaterally modified terms and conditions of employment (but not if a change improved employees' terms and conditions, unless the Union so requests), until such time as Rieth-Riley and the Union reach an agreement for a new collective-bargaining agreement, or a lawful impasse based on good-faith negotiations. Rieth-Riley also must make whole the unit employees for any loss of wages or other benefits suffered as a result of the unilateral changes in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra.

For all backpay awards received by unit employees, I order Rieth-Riley to compensate the employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 7 allocating the backpay award to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In addition, I order Rieth-Riley to file with the Regional Director for Region 7 a copy of unit employees' corresponding W-2 form(s) reflecting the backpay award. *Cascade Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[119]

ORDER

Rieth-Riley, of Goshen, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Locking out union members in support of a demand that the Union agree to multiemployer bargaining (a change in the scope of the bargaining unit), a permissive subject of bargaining.

(b) Unilaterally changing unit employees' terms and conditions of employment, without first providing the

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

Union with notice and the opportunity to bargain over the changes.

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

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

(a) Make whole those employees who were locked out from September 4 to 27, 2018, for any loss of earnings and other benefits they suffered as a result of its unlawful lockout, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful lockout as it pertains to each affected employee, and within 3 days thereafter, notify the employees in writing that this has been done and that the lockout will not be used against them in any way.

(c) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> Operating engineers employed by Rieth-Riley in the State of Michigan in building construction, underground construction, and/or heavy, highway

> and airport construction, at the site of construction, repair, assembly and erection, including equipment operators, field mechanics, oilers, apprentices, and on the job trainees; but, excluding employees represented by other labor organizations, and professional, office and clerical employees, guards and supervisors as defined under the Act.

(d) Upon the Union's request, restore the bargaining-unit employees' terms and conditions of employment to the status quo that existed prior to the implementation of the unlawful unilateral changes on July 23, 2018, October 27, 2018, and June 1, 2020, and continue them in effect until the parties reach an agreement or good-faith impasse in bargaining, but not cancel any unilateral changes that benefited unit employees unless the Union requests it.

(e) Make whole the unit employees for any losses suffered by reason of the unlawful changes in terms and conditions of employment on July 23, 2018, October 27, 2018, and June 1, 2020, in the manner set forth in the remedy section of this decision.

(f) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(g) File with the Regional Director for Region 7 a copy of unit employees' corresponding W-2 form(s) reflecting the backpay award.

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

(i) Within 14 days after service by the Region, post at its Goshen, Indiana facility and all of its facilities in the State of Michigan copies of the attached notice marked "Appendix."[120] Copies of the notice, on forms provided by

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120. If a facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Rieth-Riley customarily communicates with its employees by electronic means.

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 the Regional Director for Region 7, after being signed by Rieth-Riley's authorized representative, shall be posted by Rieth-Riley and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Rieth-Riley customarily communicates with its employees by such means. Reasonable steps shall be taken by Rieth-Riley to ensure that the notices are not altered, defaced, or covered by any other material. If Rieth-Riley has gone out of business or closed the facilities involved in these proceedings, Rieth-Riley shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Rieth-Riley at any time since July 23, 2018.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Rieth-Riley has taken to comply.

Dated, Washington, D.C., January 21, 2022.

Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully lock out union members in support of our demand that Local 324 of the International Union of Operating Engineers (the Union) agree to multiemployer bargaining (a change in the scope of the bargaining unit), a permissive subject of bargaining.

WE WILL NOT make unilateral changes to unit employees' terms and conditions of employment, without first providing the Union with notice of and the opportunity to bargain over the changes.

We will not, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

We will make whole those employees who were unlawfully locked out from September 4 to September 27, 2018, for any loss of earnings and other benefits they suffered as a result of our unlawful lockout, less any net interim earnings, plus interest, and We will also make those employees whole for reasonable search-for-work and interim employment expenses, plus interest.

We will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful lockout as it pertains to each affected employee, and we will, within 3 days thereafter, notify each of you in writing that this has been done and that the lockout will not be used against you in any way.

We will, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit, before implementing any changes to your wages, hours, or other terms and conditions of employment:

> Operating engineers employed by Rieth-Riley in the State of Michigan in building construction, underground construction, and/or heavy, highway and airport construction, at the site of construction, repair, assembly and erection, including equipment operators, field mechanics, oilers, apprentices, and on the job trainees; but, excluding employees

> represented by other labor organizations, and professional, office and clerical employees, guards and supervisors as defined under the Act.

WE WILL, on the Union's request, restore all terms and conditions of employment for our unit employees that existed prior to the unilateral changes we implemented on July 23, 2018, October 27, 2018, and June 1, 2020, and continue them in effect until the parties reach an agreement or a good-faith impasse in bargaining, but we will not cancel any unilateral changes that benefited our unit employees unless the Union asks us to do so.

WE WILL make you whole, with interest, for any losses you suffered by reason of the unlawful changes in terms and conditions of employment we made on July 23, 2018, October 27, 2018, and June 1, 2020.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 7 copies of all affected employees' corresponding W-2 forms reflecting the backpay awards.

RIETH-RILEY CONSTRUCTION CO., INC.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED JUNE 17, 2026

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 24-2123/25-1082

RIETH-RILEY CONSTRUCTION CO., INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Intervenor (24-2123).

Filed June 17, 2026

ORDER

BEFORE: MOORE, COLE, and MATHIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX D — RETAIL ASSOCIATES DECISION

OPINION

May 27, 1958

On April 11, 1958, the Board[1] issued a Decision and Direction of Election in the above-entitled proceeding[2] overruling its *Loewenstein* doctrine,[3] finding appropriate a single unit, of certain employees of the members of Retail Associates, Inc., hereinafter referred to as the Association, and directing an election among those employees. However, the Board expressly provided that an opinion in this matter would issue at a later date. That opinion and the facts upon which it is based as follows:

The Association consists of department stores named the LaSalle & Koch Company, the Lamson Brothers Company, and the Lion Dry Goods Company, Inc. For nearly 20 years, the Association has represented these and other employers in labor relations matters. Since 1945, Retail Clerks International Association, Locals Nos. 128 and 633, hereinafter referred to as the Union, as member of a council, has been party to contracts with the Association. The Union has had contracts with the Association since 1955. The last of these contracts expired June 1955.

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1. Member Bean dissented.

2. 120 NLRB 388.

3. 75 NLRB 375.

The Association and the Union commenced informal exploratory negotiations in February 1957 looking towards a new contract. Formal negotiations began in April 1957 and continued until October 31, 1957. On and after November 4, 1957, the Union joined together for negotiating purposes with other labor organizations with whom the Association had a bargaining relationship in what was designated as the Central Labor Union Joint Committee. Negotiations continued on this basis until approximately the middle of November 1957, but the parties were unable to reach an agreement.

On November 15, 1957, the Union announced publicly that it had called a strike against the Association, but would actually picket only one of the member stores. The store selected was Tiedtke's, Division of Kobacher Stores, Inc., which up to that time was a member of the Association. The Union picketed Tiedtke's on November 16, 1957. On the same day, Tiedtke's wrote a letter to the Association resigning its membership as of that date and revoking and withdrawing any authority the Association had to act for it. On November 17, 1957, Tiedtke's entered into a separate bargaining agreement with the Union. The Association replied to Tiedtke's letter on November 22, 1957, accepting its withdrawal and resignation as of November 16, 1957. Meanwhile, on November 20, 1957, the Association filed the instant petition.

Although not completely free from doubt, the record on balance appears to support the conclusion that during the period after Tiedtke's withdrawal and November 22, 1957, there were some further negotiations between the Association and the Union on the then existing associationwide basis. In any event, on November 22, 1957, the Union announced that in furtherance of its strike against the Association it would commence picketing the LaSalle & Koch Company store the next day. Accordingly, early in the morning of November 23, 1957, the Union began to picket LaSalle & Koch. Later the same day the Union notified the Association by telegram that it no longer wished to bargain with the Association as representative of the department stores in an associationwide unit, but at the same time indicated a willingness and desire to negotiate with the management of each of the stores on an individual basis. The picketing of LaSalle & Koch was still continuing at the time the Decision and Direction of Election herein was issued.

The Association in its petition and at the hearing asserts that only a three-store associationwide unit is appropriate. The Union for its part claims to represent the employees of each individual store but contends that only single store units are appropriate. More specifically, the Union maintains that it had, upon notice to the Association, withdrawn from the existing three-store unit; that consequently its disclaimer of representation as to such unit, alleged as appropriate in the petition, was effective; that its compliance with the Act's filing requirements had lapsed and therefore as a noncomplying union it cannot be placed on the ballot; and that for these reasons the Association's petition for an election should be dismissed. Maintaining the affirmative on a plea of equality and equity, the Union insists that this representation proceeding must turn on the central issue of whether a union under the Act has the same right as an employer to withdraw from a multiemployer bargaining unit and pursue bargaining in separate employer units. We disagree that this broad issue need be reached in the circumstances involved here. Under well known Board precedents and policies of the Act, it is fully sufficient, and we hold, that the Union by its conduct here could not and did not effect a change in the appropriateness of the historical multiemployer bargaining unit, nor effectively remove itself from the processes of the Board election machinery, authorized under Section 9(c)(1)(B) of the Act, by the simple expedient of a disclaimer of representation. Nor, as will be explicated *infra*, can it prevent an election, by deliberately permitting its compliance status to lapse.

1. Reference should be made to certain established Board principles with regard to union disclaimers in a representation matter as involved here. A disclaimer to be effective must be unequivocal and must have been made in good faith.[4] A union's "bare statement" of disclaimer is not sufficient to establish that it has abandoned its claim to representation, if the surrounding circumstances justify an inference to the contrary.[5] The union's conduct must not be "inconsistent" with its alleged disclaimer.[6]

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4. *Mississippi Valley Structural Steel Company*, 115 NLRB 1288, 1289; *Standard Automotive Manufacturing Company*, 109 NLRB 726; *International Brotherhood of Electrical Workers, AFL-CIO and Local 59 etc. (Texlite, Inc)*, 119 NLRB 1792.

5. 3 *Beall Brothers 3 et al.*, 110 NLRB 685, 687; *The Johnson Bros. Furniture Co.*, 97 NLRB 246.

6. *H. A. Rider & Sons*, 117 NLRB 517, 518; *McAllister Transfer, Inc.*, 105 NLRB 751.

For many years the Union has represented and bargained for the employees of the association members in an associationwide unit. This same historical bargaining pattern was renewed and reaffirmed in February 1957 when the Union embarked upon the bargaining negotiations with the Association and, indeed, the Union was in the very midst of such multiemployer bargaining in November 1957 when the events took place which it asserts in opposition to this election. Significantly, the Union declared in its strike call of November 15, 1957, that the strike was directed specifically against the Association. Thus, at a time when the Union admittedly was seeking associationwide bargaining, it implemented its objective of obtaining a common contract from all the members of the Association by the "whipsaw" strategy of picketing Tiedtke's and thereby threatening the other employers with future picketing if all of them did not accept the contract terms demanded by the Union. After Tiedtke's signed a separate contract, there is an indication in the record that further negotiations took place between the Union and the Association. There were no negotiations between the Union and any of the Association members on an *individual* employer basis.[7]

On November 20, 1957, the Association filed a petition alleging the propriety of a three member store associationwide unit. On November 22, 1957, the Union stated that it was seeking to bargain on an associationwide basis by saying that it would strike the Association by

7. Tiedtke's withdrew as a member of the Association before it negotiated separately with the Union

picketing LaSalle & Koch the next day. The Union's picketing of LaSalle & Koch was initiated manifestly for the purpose of achieving the same objective as its earlier picketing of Tiedtke's. Only later in the day on November 23, 1957, did the Union for the first time declare that it wished to substitute individual member bargaining for associationwide bargaining, but even then its representation claims included, as they do now, exactly the same employees of all the present members of the Association.

None of the Union's conduct prior or subsequent to the filing of the Association's petition—other than its naked statement of a desire to represent them on a different basis—has been in derogation of its consistent claim to representation of the employees of all the member stores alleged as appropriate in the petition.[8] The direct causal connection between the filing of the petition by the Association and the Union's asserted change in position is obvious. Premises considered, it is clear that as the

8. Contrary to the Union's contention in its brief, the resignation of Tiedtke's from the Association and its signing of a separate contract with the Union did not, in the circumstances here, destroy the associationwide bargaining pattern, or affect the propriety of the three-store associationwide unit in which the election is sought. Indeed, as shown herein, subsequent to Tiedtke's withdrawal and separate contract the Union by positive acts displayed its adherence and consent to the associationwide bargaining pattern. Withdrawal of one member of an association has never been held sufficient to preclude a determination of a unit of the remaining employers to be appropriate particularly when, as here, such withdrawal is aquiesced in by all parties, including the Union

Union has not abandoned its original objective of seeking associationwide bargaining and obtaining a contract with the Association, the Union has not renounced in good faith its representation rights in the associationwide unit.[9] Hence, its alleged disclaimer must perforce be regarded as a tactical maneuver designed to avoid a Board finding that the appropriate unit is the associationwide unit and to thwart the holding of an election therein.

The Union's purported withdrawal on November 23 from the existing three-store bargaining unit was patently for the same reason it deliberately went out of compliance with the filing requirements of the Act—to avoid the Board election sought in the Association petition filed on November 20. Up to that point it continued to press its bargaining demands on the multiemployer basis, demonstrating its acquiescence in the three-store bargaining unit. The right of withdrawal by either a union or employer from a multiemployer unit has never been held, for Board purposes, to be free and uninhibited, or exercisable at will or whim. For the Board to tolerate such inconstancy and uncertainty in the scope of collective-bargaining units would, be to neglect its function in delineating appropriate units under Section 9, and to ignore the fundamental purpose of the Act of fostering and maintaining stability in bargaining relationships. Necessarily under the Act, multiemployer bargaining units can be accorded the sanction of the Board only insofar as they rest in principle on a relatively stable foundation.

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9. See *N. L. R B.* v *Spalding Avery Lumber Company*, 220 F. 2d 673 (C. A. 8) cited with approval in *N. L. R. B.* v. *Truck Drivers Local 449 (Buffalo Linen Supply Co.)*, 353 U. S. 87.

While mutual consent of the union and employers involved is a basic ingredient supporting the appropriateness of a multiemployer bargaining unit, the stability requirement of the Act dictates that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted from an established multiemployer bargaining unit. Thus, the Board has repeatedly held over the years that the intention by a party to withdraw must be unequivocal, and exercised at an appropriate time.[10] The decision to withdraw must contemplate a sincere abandonment, with relative permanency, of the multiemployer unit and the embracement of a different course of bargaining on an individual-employer basis. The element of good faith is a necessary requirement in any such decision to withdraw, because of the unstabilizing and disrupting effect on multiemployer collective bargaining which would result if such withdrawal were permitted to be lightly made. The attempted withdrawal cannot be accepted as unequivocal and in good faith where, as here, it is obviously employed only as a measure of momentary expedience, or strategy in bargaining, and to avoid a Board election to test the union majority.

When the Supreme Court's decision in the *Buffalo Linen* case[11] is considered, another reason appears for the Board's refusal to accept as valid the Union's attempted disclaimer. In that case the Court held that the nonstruck members of an association did not violate the Act when

10. See, e. g., *McAnary & Welter, Inc.*, 115 NLRB 1029; *Jahn-Tyler Printing and Publishing Company*, 112 NLRB 167.

11. See footnote 9, *supra*.

they temporarily locked out their employees as a defense to the Union's "whipsaw" strike against one of their members. Thus, when the Union involved herein picketed Tiedtke's and particularly any time during the period in which the Union has been picketing La-Salle & Koch, the present association members could have retaliated by shutting down their operations. However, instead of resorting to the remedy of exercising their defensive right to lockout, they elected to pursue the lesser remedy of having the Association file a petition and requesting the Board to hold an election in the associationwide unit. The Union by its alleged disclaimer is seeking to deprive the association members of any of these remedies. Thus, if the Board were to find the Union's disclaimer effective and valid, the Union would then be placed in the enviable position of enjoying the benefits of its "whipsawing."

In these circumstances to give controlling significance to the Union's naked disclaimer and to allow the Union thereby-to render moot the question concerning representation in the associationwide unit would be to permit not only a flagrant abuse of the Board's processes, but a subversion of the employers' right, as enunciated in the Supreme Court's *Buffalo Linen* decision, under certain circumstances, to preserve the integrity of associationwide bargaining. For all the reasons given above the associationwide unit is appropriate.

As concerns the issue of the Union's disclaimer and purported withdrawal from the associationwide bargaining unit, we rely exclusively upon the foregoing grounds. However, the Union argues strongly that under the Board's rules it may *never* be given the opportunity to withdraw from multiemployer bargaining although such a right is accorded employers. While, as indicated above, this extreme question does not arise in this case, we believe it reasonable to establish in appropriate future cases, where such issues are squarely presented, specific ground rules, resting upon existing principles and policies under the Act, to govern questions of representation in multiemployer bargaining units. Among other things, the timing of an attempted withdrawal from a multiemployer bargaining unit, as Board cases show, is an important lever of control in the sound discretion of the Board to ensure stability of such bargaining relationships. We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances. It is clear that under the ground rules to be promulgated, we would reach the same result as found in the present case.[12]

12. Member Jenkins considers it inappropriate to express, as his colleagues are doing here, a view with respect to ground rules which, in his opinion, are inapplicable to this case. To do so is to disregard the well-entrenched policy of the courts and this Board of uttering no abstract generalizations unnecessary to a concrete decision.

2. Shortly after the close of the hearing of this case, the Union permitted its compliance with the filing requirements of the Act to lapse and the Board was administratively advised that the Union had no present intention of seeking renewal. The Union contended that application of the Board's *Loewenstein* doctrine required dismissal of the Association petition on the ground that there was no labor organization claiming to be recognized as bargaining representative which was in compliance with the filing requirements of the Act and thus qualified to appear on the ballot, if an election was directed.

In the *Loewenstein* case, the Board held that in these circumstances it was neither as a matter of law authorized to, nor as a matter of policy should it, proceed to an election on an employer's petition. The Board has now concluded that the *Loewenstein* doctrine should be reversed.[13] The reasons therefor will be detailed hereinafter.

The Board in *Loewenstein* construed Section 9(c)(1)(B) and 9(f) and (h) of the Act as precluding it from directing an election on an employer's petition where the only union which makes a claim of majority representation is not in compliance.

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13. Other cases applying the "*Loewenstein* doctrine" and which, of course, are also overruled are: *Staten Island Cleaners, Inc.*, 93 NLRB 396; *The Federal Refractories Corpora*tion, 100 NLRB 257; *Law Tanning Company*, 109 NLRB 268; *Darling and Company*, 116 NLRB 374; *Mine and Mill Supply Company*, 118 NLRB 1536; *Sprouse-Reitz Co., Inc.*, 119 NLRB 644.

Section 9(c)(1)(B) prescribes that a petition filed with the Board by an employer shall allege "that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a)."

As originally enacted, and as they appeared when *Loewenstein* was decided, Section 9(f) and (h) provided, in pertinent part, that:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10 . . . [unless such labor organization shall have complied with the filing requirements of said sections as prescribed therein.][14]

In interpreting the above subsections, the Board reasoned that : the question concerning representation referred to in Section 9(f) and (h), although brought to the Board's attention by the employer's own petition under Section 9(c)(1)(B), is—in the words of Section 9(f) and (h)—"raised by a labor organization"; the question is raised by the affirmative claim made by the union that it represents

14. 'The language "no petition under section 9(e)(1) shall be entertained" has since been eliminated from Section 9(f) and (h). Section 9(e)(1) referred to union petitions for authority to execute union-security agreements.

a majority of the employees of the employer within an appropriate unit and, absent such claim, the Board would be without jurisdiction to proceed with its investigation under Section 9(c)(1)(B); although it is the employer's petition in such a case that sets the Board's machinery in motion, it is an individual's or a labor organization's initial claim for recognition that makes it possible for the employer to invoke that machinery; it is therefore the claiming individual or labor organization that raises the question concerning representation, not the employer; as subsections (f) and (h) of Section 9 speak in terms of questions raised, rather than of petitions filed, by unions, the statutory language supports the application of these subsections to proceedings instituted by petitions filed by employers; and, in view of the foregoing, an employer's petition must be dismissed if the union claimant is not in compliance with Section 9(f) and (h).

Members Jenkins and Fanning, who have not had a previous opportunity to pass upon this question, agree with and adopt Member Rodgers' construction of the language of Section 9(f) and (h) as expressed by him in his dissent in the *Darling* case.[15] In the opinion of these three members, the Board in *Loewenstein* misinterpreted and misapplied the pertinent statutory language. For, the words of Section 9(f) and (h) do not refer to employer petitions, but merely prohibit the investigation of questions concerning representation "raised by a labor organization under subsection (c) of this section,"—words which, in their context, have application only to representation

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15. See footnote 13, *supra.*

petitions filed by unions. Thus, as originally enacted, the words "raised by a labor organization under subsection (c) of this section" in the first clauses of Section 9(f) and (h) were followed directly by the language:

> No petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10. . . .

The language of these latter clauses clearly refers to procedural steps taken by labor organizations under the Act—that is, the filing with the Board of a union-security authorization petition, or a charge. The direct conjunction of these clauses with the words "raised by a labor organization under subsection (c) of this section," demonstrates that these latter words also refer to a procedural step taken by a labor organization—that is, the filing of a representation petition. In its context, therefore, these members do not think it material that the first clauses of Section 9(f) and (h) speak of questions raised rather than petitions filed and the emphasis that the Board in *Loewenstein* placed on this fact seems to them to be unwarranted. Accordingly, they find no legal or statutory impediment to placing a union claimant's name on the ballot and directing an election on an employer's petition where the union is not in compliance with the filing requirements of the Act.

With respect to the policy question, the Board in *Loewenstein* held that it should not entertain an employer's petition where recognition is requested by a noncomplying union. The Board reasoned that : a fundamental objective Congress sought to achieve in Section 9(f) and (h) was to prevent a noncomplying union from being beneficiary of any Board investigation of a question concerning representation by withholding the processes of the Act from such labor organization; if a noncomplying union were placed on the ballot and won the election, the Board would not issue a certification to it, but a victory at the polls—even without a later certification—would confer certain moral and practical advantages on the union which the basic policy of Congress appeared to discountenance ; while this conclusion might sometimes result in depriving an employer of information which the Act would permit him to secure if only a complying union was affirmatively claiming representative status, conflicting policy considerations were before the Board; and, the exclusion of a noncomplying union from the ballot in a case where the employer was the petitioner was more nearly consistent with the supervening policy of denying the imprimatur of Government to such a labor organization.

Chairman Leedom and Members Rodgers, Jenkins, and Fanning interpret the recent decision of the Supreme Court in the *Bowman* case[16] as effectively undermining the policy basis for the *Loewenstein* doctrine.[17] In that case,

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16. *N L R B* v *District 50, UMW (Bowman Transportation, Inc)*, 355 U S 453

17. Chairman Leedom also finds in the Supreme Court's decision very persuasive reasons for agreeing, as he does, with the rejection of the legal basis for the *Loewenstein* doctrine. Member

the Board had issued a Decision and Order[18] finding that the employer had rendered-illegal support and assistance to District 50, United Mine Workers of America—a noncomplying union—thereby violating Section 8(a)(2) of the Act. In accord with the Board's standard remedy, the employer was ordered to cease recognizing District 50 and to withdraw and withhold recognition from it unless and until it shall have been certified by the Board as the exclusive bargaining representative of the employees.

The Supreme Court held that the Board's Order conditioning the future recognition of an assisted noncomplying union on a Board certification constituted an abuse of the Board's discretionary power in that a noncomplying assisted union is not eligible for a Board certification and therefore employees might never have an opportunity to select it as their representative. The Court concluded, however, that the Board did have the power to condition such recognition upon an election not followed by a certification. An election, the Court stated, "would properly reconcile the objectives of eliminating improper employer interference and preserving the employees' full choice of a bargaining representative." It would "achieve the Board's prime objective in these cases, *viz.*, to 'demonstrate that . . . [the assisted union's] right to be the exclusive representative of the employees involved

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Rodgers considers the decision as constituting confirmation of the views expressed by him in his dissent in the *Darling* case, footnote 13, *supra*, with respect to the policy basis for the *Loewenstein* doctrine

18. 112 NLRB 387

has been established in an atmosphere free of restraint and coercion.'"

The Board recognizes that this case arose in the posture of Court consideration of appropriate implementation of the Board's, remedial powers under Section 10 of the Act and, indeed, that the Court stated that the prohibitions of Section 9(f), (g), and (h) and the requirement of Section 9(c) of Board-conducted elections "are concerned not with remedial orders under Section 10(c), but with questions of representation and unfair labor practices 'raised by a labor organization.'" However, the Board cannot disregard either the language of the Court heretofore referred to or the following statements of the Court which, in the Board's opinion, taken together, render untenable the policy basis for the *Loewenstein* doctrine: "The single objective of § 9(f), (g), and (h) was 'to stop the use of the Labor Boards by noncomplying unions."; "Nothing in the subsections . . . is a barrier to the conduct by the Board of an election not followed by a certification. . . ."; "'Subsections (f) (g) and (h) of § 9 merely describe advantages that may be gained by compliance with their conditions. The very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from noncompliance.'"; and, "Congress did not in § 9(f), (g), and (h) make the filing required by those subsections compulsory or a condition precedent to the right of a noncomplying union to be recognized as the exclusive representative of the employees."

As the Board reads the entire opinion of the Supreme Court in the *Bowman* case, the Court is clearly indicating that the Board should not concern itself solely and exclusively, as it did in *Loewenstein*, with an objective of Congress to deny the benefits of the Act to a noncomplying union. On the contrary, primary consideration must be given to the rights of the noncomplying union, the employees, and the employer. With regard to the rights of, and advantages to, a noncomplying union the Court points out that they should be restricted solely to the limited extent expressly provided in Section 9(f), (g), and (h). With respect to the rights of the employees, the Board is very impressed with the vigorous emphasis placed by the Court in *Bowman* upon the fact that the Board, in fashioning its remedy for the unfair labor practices found, must take into account and preserve "the employees' full choice of a bargaining representative." In the Board's opinion, parity of reasoning requires the conclusion that in a *Loewenstein* situation decisive weight should be given to the interests of the employer and the employees in resolving the representative status of a union which is seeking recognition, even though by virtue of its noncompliance the union itself could not directly petition the Board for an election. Accordingly, in a proceeding instituted by an employer's petition,[19] the Board shall henceforth place the name of a noncomplying union claimant on the ballot and direct an election, provided, however, that if the union wins the election and is not in compliance, only the arithmetical results will be certified.

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19. Cf. *Harris Foundry & Machine Company*, 76 NLRB 118, placing the name of a noncomplying union on the ballot in a proceeding instituted by a decertification petition.

The Board realizes that, as was noted in the *Loewenstein* case, the noncomplying union claimant's victory at the polls may confer upon it certain advantages. However, this is likewise true: with respect to, the conduct of an election involving the noncomplying assisted union in the, *Bowman* case. Moreover, it is the Board's opinion that any benefit which the union may derive from having its status determined in a Board election should be regarded, as the Court appears to have suggested in *Bowman*, as of an incidental character and not contrary to the letter and spirit of Section 9(f), (g), and (h).

Having duly considered the briefs, the record in this case, and having accorded the Union an opportunity for oral argument, and being fully advised of all the problems which are presented by this case, the Board, after due deliberation and consideration of the complexity of the issues involved, and after having had due regard for the rights of the parties and the public involved herein, has come to the conclusions hereinabove set out.

Member Bean, dissenting:

I would adhere to the long-established rule first enunciated in the *Herman Loewenstein* case and therefore dismiss this petition because the Union named as claiming recognition is not in compliance with the filing requirements of the statute. In my opinion, the statute, read in its entirety, denies to noncomplying unions not only direct benefits from this administrative agency, but also such indirect assistance as would inhere in a majority vote for a union which is denied only the technical formality of a paper certificate.