No. 17-___

IN THE

Supreme Court of the United States

NEWARK ELECTRIC CORP., *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

DANIEL J. MOORE
Counsel of Record
EDWARD A. TREVVETT
IBRAHIM TARIQ
HARRIS BEACH PLLC
99 Garnsey Road
Pittsford, NY 14534
(585) 419-8800
dmoore@harrisbeach.com

Counsel for Petitioners

December 27, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the District of Columbia in *Newark Electric Corp. et al. v. National Labor Relations Board*, No. 15-1111; 15-1162, 2017 WL 5662145, (D.C. Cir. July 14, 2017) (unpublished) improperly remand an action to the National Labor Relations Board, where the initiating complaint in the action was filed pursuant to the authority of an improperly appointed NLRB General Counsel, in violation of the Federal Vacancies Reform Act?

PARTIES

(1) Petitioners-Appellants are Newark Electric Corp., Newark Electric 2.0, Inc., and Colacino Industries, Inc. Pursuant to Rule 29.6 Petitioners-Appellants have no parent corporations, and no publicly held corporation holds 10% or more of the stock of any of the corporations.

(2) Respondent-Appellee is the National Labor Relations Board.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW.........	i
PARTIES..	ii
TABLE OF AUTHORITIES................................	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND PROVISIONS	1
STATEMENT OF THE CASE	4
REASON FOR GRANTING THE PETITION....	8
I. THE COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER THE NATIONAL LABOR RELATIONS BOARD MAY RATIFY ACTIONS THAT ARE FILED BY AN IMPROPERLY-APPOINTED GENERAL COUNSEL	8
A. An Appeal of the Lower Court's Remand Order Is Appropriate, as Petitioner Did Not Receive All of the Relief That it Requested......................	8
B. The Lower Court's Decision to Remand Runs Counter to Its Precedent and Counter to the Relief Afforded Other Parties Facing the Identical Issue of Actions Taken by the Improperly Appointed Acting General Counsel of the NLRB	9

TABLE OF CONTENTS—Continued

	Page
C. The Remand Order Would Allow Any Action by An Improperly Appointed NLRB General Counsel to be Ratified, and Thus, Violate the Appointments Clause	13
CONCLUSION	18
APPENDIX	
APPENDIX A: ORDER, U.S. Court of Appeals for the District of Columba Circuit (July 14, 2017)	1a
APPENDIX B: MANDATE, U.S. Court of Appeals for the District of Columba Circuit (July 14, 2017)	3a
APPENDIX C: DECISION AND ORDER, National Labor Relations Board (March 26, 2015)	4a
APPENDIX D: ORDER, U.S. Court of Appeals for the District of Columba Circuit (September 28, 2017)	65a
APPENDIX E: ORDER, U.S. Court of Appeals for the District of Columba Circuit (September 28, 2018[sic])	67a
APPENDIX F: 5 U.S. Code § 3345	68a
APPENDIX G: 5 U.S. Code § 3346	71a
APPENDIX H: RESPONDENTS' EXCEPTIONS, National Labor Relations Board (January 30, 2014)	72a

TABLE OF CONTENTS—Continued

	Page
APPENDIX I: BRIEF FOR PETITIONERS, U.S. Court of Appeals for the District of Columba Circuit (October 5, 2015)	85a

TABLE OF AUTHORITIES

CASES Page(s)

Creative Vision Resources, LLC v. N.L.R.B., 872 F.3d 274 (5th Cir. 2017)..................... 16

Forney v. Apfel, 524 U.S. 266 (1998)................................... 8, 9

Hooks v. Kitsap Tenant Support Servs., Inc., 816 F.3d 550 (9th Cir. 2016)................ 12-13, 15

N.L.R.B. v. Noel Canning, —U.S.—, 134 S.Ct. 2550 (2014) 6

N.L.R.B. v. Pier Sixty, LLC, 855 F.3d 115 (2d Cir. 2017) 12

Newark Electric Corp., Newark Electric 2.0, Inc., and Colacino Industries, Inc., 362 NLRB No. 44 (N.L.R.B. 2015) 1

Newark Electric Corp., et al v. N.L.R.B., No. 15-1111; 15-1162, 2017 WL 5662145 (July 14, 2017)..................... 1, 6, 8

Quality Health Servs. of P.R., Inc. v N.L.R.B., 873 F.3d 375 (1st Cir. 2017) 6, 12, 16

SW Gen. Inc., v. N.L.R.B., 796 F.3d 67 (D.C. Cir. 2015), *aff'd* — U.S. —, 137 S.Ct. 929 (2017)......*passim*

The Ardit Co., 364 NLRB No. 130 (2016)......................... 17

TABLE OF AUTHORITIES—Continued

CONSTITUTION Page(s)

U.S. Const. Art. II, § 2, cl. 2 ....*passim*

STATUTES

28 U.S.C. § 1254(l)....................................... 1

29 U.S.C. § 160(e) 11

Federal Vacancies Reform Act, 5 U.S.C. §§ 3345 *et seq* ....*passim*

§ 3345(b) 10

§ 3345(b)(1)... 10

§ 3346 .... 1, 10

§ 3348 .... 2, 15, 16

§ 3348(d)(1)-(2) 15

§ 3348(e) 15, 18

§ 3348(e)(1)... 15, 16

Pub.L. 105-277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681-613; amended Pub.L. 108-271, § 8(b), July 7, 2004, 118 Stat. 814).. 4

OTHER AUTHORITIES

144 Cong. Rec. S6413-14 (daily ed. June 16, 1998).. 14

157 Cong. Rec. S69 (daily ed. Jan 5, 2011).. 9

S.Rep No. 105-250, 1998 WL 404532 (July 15, 1998).. 14

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia in *Newark Electric Corp., et al v. National Labor Relations Board*, No. 15-1111; 15-1162 (July 14, 2017), granting review and vacating the underlying order of the National Labor Relations Board, is unpublished and appears at 2017 WL 5662145, and is attached as *Appendix A.* The opinion of the National Labor Relations Board in *Newark Electric Corp., Newark Electric 2.0, Inc., and Colacino Industries, Inc.,* appears at 362 NLRB No. 44 (N.L.R.B. 2015), and is attached as *Appendix C.*

The Court of Appeals subsequently (1) denied recall of the mandate and (2) denied rehearing *en banc,* which sought to address the issue of the improper remand, on September 28, 2017. *Newark Electric Corp., et al v. National Labor Relations Board*, No. 15-1111; 15-1162 (Filed September 28, 2017). The order denying recall of the mandate is attached as *Appendix D.* The order denying rehearing *en banc* is attached as *Appendix E*.

JURISDICTION

The United States Court of Appeals for the District of Columbia vacated and remanded this action to the National Labor Relations Board by order filed July 14, 2017. Petitioner moved for rehearing *en banc*, which was denied by the Court of Appeals on September 28, 2017.

This jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND PROVISIONS

5 U.S. Code §§ 3345; 3346. (Reproduced in full at *Appendix F*, and *Appendix G*, respectively).

5 U.S. Code § 3348 – Vacant office.

(a) In this section—

(1) the term “action” includes any agency action as defined under section 551(13); and

(2) the term “function or duty” means any function or duty of the applicable office that—

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is **established** by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the office shall remain vacant; and

(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office), only the head of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d)(1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

(e) This section shall not apply to—

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority;

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;

(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or

(5) an office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

Pub.L. 105-277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681-613; amended Pub.L. 108-271, § 8(b), July 7, 2004, 118 Stat. 814.)

U.S. Const. Art. II, § 2, cl. 2:

> [The President of the United States] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

STATEMENT OF THE CASE

The court below ostensibly ruled in Petitioners' favor by vacating the National Labor Relations Board's ("NLRB" or "Board") decision, however: the court below also *remanded* the action to the Board, effectively awarding Petitioners a victory in-name-only, and granting the Board a second shot at what amounts to a legally-unauthorized complaint.

On August 28, 2012, the International Brotherhood of Electrical Workers Local 840 (the "Union") filed an unfair labor practice charge alleging that Newark Electric Corp. ("NEC") and Colacino Industries, Inc. ("Colacino") committed various practices in violation of the National Labor Relations Act ("NLRA"). On

October 25, 2012, the Union filed an amended charge, to add Newark Electric 2.0 ("N.E. 2.0"). The amended charge alleged that NEC, NEC 2.0, and Colacino violated NLRA Sections 8(a)(1), 8(a)(3) and 8(a)(5) by: (1) abnegating a collective bargaining agreement ("CBA") with the Union during the pendency of the agreement; and (2) laying off or constructively discharging a Union employee in order to discourage union membership.

The underlying charges eventually matured to a complaint, filed on May 30, 2013, by NLRB Acting General Counsel Lafe Solomon, through Regional Director Rhonda Ley. Petitioners filed a timely answer to the complaint, raising, *inter alia,* the affirmative defense that the complaint should be dismissed because Acting General Counsel Lafe Solomon was not validly appointed under the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345 *et seq*.

In the interim, and before the parties began briefing on the underlying matters governed by the National Labor Relations Act, the United States Court of Appeals for the District of Columbia decided *SW Gen. Inc., v. NLRB,* 796 F.3d 67, 67 (D.C. Cir. 2015), *aff'd* — U.S. —, 137 S.Ct. 929 (2017) (hereinafter *SW General*). As in this case, Acting General Counsel Solomon had filed a complaint against the employer in *SW General,* alleging sundry violations of the NLRA. The precise issue for the D.C. Circuit in *SW General*, however, was the validity of Mr. Solomon's temporary appointment as Acting General Counsel—and in turn, the validity of any and all complaints filed by the agency under his steering. Ultimately, "the D.C. Circuit held that the NLRB's Acting General Counsel [Lafe] Solomon was serving in violation of the [Federal Vacancies Reform Act] when he issued the complaint against SW General," resulting in vacatur of the NLRB's action in the *SW General* matter. *See Quality Health Servs. of P.R., Inc. v. National Labor Relations Board*, 873 F.3d 375, 381 (1st Cir. 2017) (discussing *SW Gen.,* 796 F.3d at 72).

In short, the D.C. Circuit in *SW General* ruled that NLRB actions taken under the direction of an improperly-appointed General Counsel are unauthorized. *See SW General,* 796 F.3d at 69. It logically follows that a Federal agency's action, directed by an invalidly-appointed Federal officer, must be negated. Accordingly, the court denied enforcement of the NLRB's order and entirely vacated the NLRB's underlying order in *SW General*.

In the present matter, the D.C. Circuit superficially followed its precedent laid out by *SW General,* and similarly vacated the NLRB's underlying decision. *See Newark Electric Corp., et al v. National Labor Relations Board*, No. 15-1111; 15-1162, 2017 WL 5662145, (D.C. Circ., July 14, 2017), *attached at Appendix A*. But unlike in *SW General*, the D.C. Circuit in *this* case went a step further and *remanded* the case "for further proceedings before the Board. *Id.* In other words, the D.C. Circuit agreed that *SW General* mandated vacatur of the action—but at the same time, commanded that the action proceed afresh, even though the entire case originated without authority.

This result runs entirely counter to the fundamental rule of *SW General* and the United States Supreme Court's ruling in *N.L.R.B. v. Noel Canning,* that the NLRB's actions taken under improperly-appointed officers should be voided and should *not* be ratified by subsequent action. *See* —U.S.—, 134 S.Ct. 2550, 2573-74 (2014). Instead, under the D.C. Circuit's new "vacate-and-remand" procedure, the actions of an invalidly-appointed General Counsel continue in perpetuity, rendering toothless both the Federal Vacancies Reform Act and, perhaps more importantly, the Appointments Clause of the U.S. Constitution. *See* U.S. Const. Art. II, § 2, cl. 2.

To be sure, the *SW General* court added but one procedural qualifier to the rule that the NLRB's actions must be vacated if the officer issuing the complaint was appointed invalidly: the employer *must* raise an objection to the General Counsel's presence. The court in *SW General* "address[ed] the FVRA objection in [that] case because the petitioner *raised the issue in its exceptions to the ALJ decision as a defense to an ongoing enforcement proceeding*." *SW General,* 796 F.3d at 83 (emphasis added). In theory, the requirement that an employer must first raise an objection would save most, if not almost all, of the NLRB's actions taken under General Counsel Solomon. Petitioner does not dispute this rule. To the contrary, *Petitioner met this requirement* by specifically raising an objection under the FVRA in its exceptions to the NLRB Administrative Law Judge ("ALJ"). *See* Appendix H, 79a ("16…Acting General Counsel Lafe Solomon could not be properly appointed under the Federal Vacancies Reform Act and therefore lakced authority to issue the complaint in this case."). Even so, the court below instructs the parties to continue the action before the NLRB.

The result of the court's remand is an uncertain and undeveloped area of vital Federal law: when, exactly, is an agency's action void under the FVRA, when its principal officer is acting without authority? Petitioners complied with the requirements as laid out in *SW General,* by raising the matter during the administrative proceedings before the NLRB. And yet, the lower court's vacatur (while facially following *SW General*) is rendered meaningless if the employer here (and in the future, a different employer) is forced to re-litigate a case *that had no authority to be filed in the first place*.

Petitioner, therefore, seeks a writ of certiorari from this Court on the important question presented by this case.

REASON FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER THE NATIONAL LABOR RELATIONS BOARD MAY RATIFY ACTIONS THAT ARE FILED BY AN IMPROPERLY-APPOINTED GENERAL COUNSEL.

A. An Appeal of the Lower Court's Remand Order Is Appropriate, as Petitioner Did Not Receive All of the Relief That it Requested.

At the outset, Petitioner clarifies that it only appeals that portion of the D.C. Circuit's order that resulted in *remand*. A petitioner may properly appeal a Federal court's directive to remand to a Federal agency. "[T]his Court has clearly stated that a party is 'aggrieved' and ordinarily can appeal a decision 'granting in part and denying in part the remedy requested.'" *See Forney v. Apfel*, 524 U.S. 266, 267 (1998) (holding that Court of Appeals "erred in concluding that [Petitioner] could not appeal because she was the prevailing party" before the Court of Appeals). Here, Petitioner requested either vacatur, *or*, reversal of the NLRB's action. *See* Appendix I, 124a (". . . Petitioners respectfully request that the Court grant the petition, *reverse or vacate* the Board's Decision and Order . . ."). Thus, as Petitioner has "received some, but not all, of the relief requested," an appeal of the lower court's order resulting in remand is proper. *See id.* at 267.

B. The Lower Court's Decision to Remand Runs Counter to Its Precedent and Counter to the Relief Afforded Other Parties Facing the Identical Issue of Actions Taken by the Improperly Appointed Acting General Counsel of the NLRB.

A review of the factors that generated the D.C. Circuit's decision in *SW General* is illustrative, as those factors are equally present in this action and should militate toward identical relief.

President Barack Obama appointed Mr. Lafe Solomon to the position of Acting General Counsel of the National Labor Relations Board on June 18, 2010. Mr. Solomon became the Acting General Counsel effective June 21, 2010. Exactly 198 days into Mr. Solomon's temporary appointment, President Obama sought to remove the "Acting" moniker from Mr. Solomon's title, and nominated him on January 5, 2011 to a permanent post as the NLRB's General Counsel. *See* 157 Cong. Rec. S69 (daily ed. Jan 5, 2011). The Senate, however, returned Mr. Solomon's nomination in the negative. Following another unsuccessful nomination attempt in May 2013, President Obama ultimately withdrew Mr. Solomon's nomination and instead nominated Mr. Richard Griffin. Mr. Griffin was confirmed by the Senate and sworn in as the NLRB's General Counsel on November 4, 2013. In all, Mr. Solomon served as the NLRB's Acting General Counsel from June 21, 2010, to November 4, 2013.

The Federal Vacancies Reform Act ("FVRA"), however, imposes certain restrictions on the President's power to appoint acting administrative officers. *See SW General,* 796 F.3d at 70. Under the FVRA, the President may choose to appoint an acting officer in case of a vacancy, but "[g]enerally speaking [that] acting officer can serve no longer than 210 days and *cannot become the permanent nominee for the position*." *Id.* (emphasis added) (citing 5 U.S.C. §§ 3346; 3345(b)).

Mr. Solomon, of course, was nominated to become the permanent General Counsel by President Obama on January 5, 2011. The D.C. Circuit ruled that this nomination violated the FVRA. He also served well beyond the 210 days specified under the FVRA. Accordingly, the *SW General* court held that Mr. Solmon was ineligible to continue serving as Acting General Counsel as of January 5, 2011, the date he was nominated for the permanent post. *See* 796 F.3d at 69-72; 5 U.S.C. § 3345(b)(1). His service from that day forward was unauthorized, and so, Mr. Solomon lacked the power to authorize any complaints as of January 5, 2011. *See SW General*., 796 F.3d at 78-82. The genesis complaint in *SW General*, just like the complaint in the present action, was filed after January 5, 2011. Consequently, the *SW General* court denied the NLRB's "cross-application for enforcement and vacate[d] the NLRB order." *Id.* at 83.

Such result satisfied the core textual provisions of the FVRA, evidenced by the court's thorough analysis of the statutory provisions located at 5 U.S. Code §§ 3345 and 3346. In relevant part, section 3345(b)(1) "prohibits a person from being both the acting officer and the permanent nominee" unless certain exemptions apply, none of which applied to Mr. Solomon. *SW*

General, 796 F.3d at 74. In opposition, the Board in *SW General* argued that such limitations applied only to "first assistant" officers, as that term is used in the FVRA. *See id.* at 74-75. The court rejected that textual argument. "Perhaps sensing the weakness of its textual arguments," the Board next sought to find support in legislative intent. *See id.* at 76-77. That argument met a similar fate.

As last resort, the Board relied on its interpretation that the actions of an NLRB General Counsel, even if serving in violation of the FVRA, are merely *voidable*, and can be ratified by subsequent agency action. This argument is addressed further in Point C, *infra*.

In all, the *SW General* court explicitly found only one prerequisite that could effectively save the NLRB's complaint. Under the National Labor Relations Act, an employer must first exhaust their options before the NLRB, before having such matters reviewed by a Federal court. *See id.* at 82 (citing 29 U.S.C. § 160(e)). The employer in *SW General* met that requirement by raising "its FVRA challenge as an exception to the [NLRB] ALJ decision. It therefore complied with the NLRA's jurisdictional exhaustion requirement." *Id.*

This procedural requirement is vital, an absolute prerequisite before an employer can challenge the validity of a complaint generated by Mr. Solomon's NLRB. The court specifically held:

> "We address the FVRA objection in this case because the petitioner raised the issue in its exceptions to the ALJ decision as a defense to an ongoing enforcement proceeding. We doubt that an employer that failed to timely raise an FVRA objection—regardless whether enforcement proceedings are ongoing or

concluded—will enjoy the same success." *Id.* at 83.

As the employer in *SW General* met that requirement, it could next move to challenge the validity of the complaint—and of course, was successful in doing so. Subsequent decisions have rejected an employer's challenge to the validity of an NLRB complaint authorized under Mr. Solomon's tenure, precisely because the employer did not raise the objection during proceedings in front of the NLRB. *See e.g., National Labor Relations Board v. Pier Sixty, LLC*, 855 F.3d 115, 121 (2d Cir. 2017) ("But unlike the petitioner in *SW General*, Pier Sixty never raised this argument before the Board."); *Quality Health Servs. of P.R. v. National Labor Relations Board*, 873 F.3d 375, 383 (1st Cir. 2017) ("Because the [employer] failed to raise the issue before the Board, and has not shown any extraordinary circumstances excusing its forfeiture, we lack jurisdiction to consider its claim regarding the validity of the complaints issued by Acting General Counsel Solomon.").

Thus, the rule from *SW General* is that an employer must first raise an FVRA objection before the NLRB before it may challenge the General Counsel's authority. Petitioners did so here. If the objection has been raised, *SW General* mandates that the court vacate any complaint filed by Acting General Counsel Solomon. The lower court did so here.

What *SW General* did *not* require, and what no other court has done, is *remand* of the action back to the NLRB. Indeed, the Ninth Circuit, following *SW General,* did not remand an action to the NLRB after similarly ruling that General Counsel Solomon did not have the authority to issue an underlying complaint. *Hooks v. Kitsap Tenant Support Servs., Inc.,* 816

F.3d 550, 565 (9th Cir. 2016) (affirming *dismissal* of underlying complaint).

The resulting remand in this action is a tacit invalidation of *SW General*. It yields the following reality. An NLRB complaint may be generated without authority, and it can result in an administrative order adverse to an employer, even if the employer objects to the General Counsel's lack of authority. The employer can then try their luck at the Court of Appeals—and, if they properly objected before the NLRB—can likely obtain vacatur of the agency's adverse order. But the show goes on. Despite properly objecting to the General Counsel's authority, and despite proving that the complaint was generated without lawful authority, and despite obtaining vacatur of the resulting order—the employer must now re-litigate the matter before the Board, as if the complaint was authorized in the first place. The nonsensical result negates the rule from *SW General*, rather than negate the Board's unauthorized action.

Respectfully, remand abrogates *SW General*, and is inappropriate in this action.

C. The Remand Order Would Allow Any Action by An Improperly Appointed NLRB General Counsel to be Ratified, and Thus, Violate the Appointments Clause.

Generally, the Constitution requires "'Officers of the United States' to be nominated by the President 'by and with the Advice and Consent of the Senate.'" *SW General*, 796 F.3d at 69 (quoting U.S. Const. Art. II, § 2, cl. 2).

All the same, "[t]o keep the federal bureaucracy humming, the President needs the power to appoint acting officers who can serve on a temporary basis without first obtaining the Senate's blessing. *SW General*, 786 F.3d at 70; *see also* S.Rep No. 105-250, 1998 WL 404532 at *5 (July 15, 1998) ("vacancies occur . . . and since the President lacks any inherent appointment authority for government officers, legislation authorizing some non-Senate confirmed persons to perform the functions and duties of vacant offices is necessary if the government's operations are to be performed."). Faced with this reality, Congress in 1868 enacted the Vacancies Act, which "allowed the President to fill vacancies with temporary acting officers, subject to limitations on whom he could appoint and how long the appointee could serve." *SW General*, 786 F.3d at 70. In theory, the Vacancies Act could preserve the spirit of the Appointments Clause, while affording the Executive the flexibility it needed for the realities of governance. By the late 20th century, however, the Vacancies Act had morphed into an end-run around the Appointments Clause. "By 1998, an estimated 20% of all officers in positions requiring presidential nomination and Senate confirmation . . . were serving in a temporary acting capacity, many well beyond the time limits prescribed in the Vacancies Act." *Id.*

Thus, in June of 1998, Congress saw fit to replace the 1868 Vacancies Act with the Federal Vacancies Reform Act. "The statute was framed as reclamation of the Congress's Appointments Clause power." *Id.* (citing 144 Cong. Rec. S6413-14 (daily ed. June 16, 1998)). As stated above, the FVRA prohibits an acting officer from serving if and when he is made the permanent nominee for the position. *Id.* at 70-71. For almost all Federal officials whose appointments are subject to the advice and consent of the Senate, "[a]n action taken by any person who is not acting [in compliance with the FVRA] shall have no force or effect" and "may not be ratified." *Id.* at 71 (citing 5 U.S.C. § 3348(d)(1)-(2)) (alteration in original). The rule applies to *almost all* Federal agencies and officers, not all, because the FVRA expressly exempts certain officers, including the General Counsel of the NLRB, from this automatic invalidation rule. *See* 5 U.S.C. § 3348. Thus, "[a]lthough the FVRA generally renders void actions taken in violation of its provisions, *see* 5 U.S.C. § 3348(d)(1)-(2), it also exempts from that automatic result actions by a select pool of officers, including the General Counsel of the NLRB, *see* 5 U.S.C. § 3348(e)." *Hooks,* 816 F.3d at 564 (9th Cir. 2016); *see also SW General*, 796 F.3d at 79. The Ninth Circuit in *Hooks*, citing *SW General,* proclaimed that "[t]he exemption provision thus 'renders the actions of [such] improperly serving [officers, including the Acting General Counsel,] *voidable*, not void.'" *Hooks*, 816 F.3d at 564 (citing *SW General*, 796 F.3d at 79) (alteration and emphasis in *Hooks*).

But the Ninth Circuit's citation to *SW General*, for the proposition that the actions of an improperly appointed General Counsel are merely *voidable*, is not an established rule of law—and is ripe for review. Indeed, the D.C. Circuit in *SW General* took *no position* as to whether the FVRA's exemption for the NLRB General Counsel could save the actions of improperly appointed NLRB General Counsels. The court stated: "we . . . *assume* that section 3348(e)(1) renders the actions of an improperly serving Acting General Counsel *voidable*, not void . . . [w]e express no view on whether section 3348(e)(1) could be understood more broadly to wholly insulate the Acting General Counsel's actions even in the event of an FVRA violation." *SW General,* 796 F.3d at 79. On appeal, the Supreme Court similarly took no position on this precise issue, stating: "[t]he Court of Appeals assume[d] that section 3348(e)(1) renders the actions of an improperly serving Acting General Counsel voidable and rejected the [NLRB's] arguments against voiding Solomon's actions. *The [NLRB] did not seek certiorari on this issue, so we do not consider it.*" *N.L.R.B. v. SW General, Inc.,* — U.S. —, 137 S.Ct 929, 938 at n.2 (2017) (emphasis added) (citations omitted).

Other Circuit Courts of Appeal, noting that the issue is still open, have similarly taken no position on this precise issue. "The D.C. Circuit has left open whether the actions of an improperly serving Acting General Counsel are voidable or instead 'wholly insulate[d] . . . even in the event of an FVRA violation.' We express no view on that question." *Creative Vision Resources, LLC v. National Labor Relations Board*, 872 F.3d 274, 292 at n.7 (5th Cir. 2017). The First Circuit similarly declined to address the same question, even in the face of a party's concession on the point: "[a]lthough we find it unnecessary to decide whether the [NLRB's] complaints were void or voidable, we accept the [employer's] concession and note that . . . the NLRB's General Counsel is exempted from the provisions of section 3348." *Quality Health Servs. of P.R., Inc. v. National Labor Relations Board*, 873 F.3d 375, 383 at n.7 (1st Cir. 2017).

The courts' reluctance to address the matter warrants review. The Ninth Circuit appears to be the only court to have taken the view that the actions of an improperly appointed NLRB General Counsel are only void*able*, and thus, may be later ratified. For support, the Ninth Circuit relied on the D.C. Circuit's ruling in *SW General*—but as explained above, the D.C. Circuit expressly declined to reach that question. Similarly, the Fifth Circuit has abstained from this question; and the First Circuit—even when presented with a concession on the point—found it "unnecessary to decide." In short: one Circuit Court of Appeal has remarked that the matter is settled; three other Circuit Courts have unambiguously held the matter open. This question is ripe for the Court's review, as a ruling decides the future of this action.

If an improperly-appointed officer's action can be simply "ratified" by his or her successor, the Executive is under no temporal pressure to find an officer that will pass Senate scrutiny. Indeed, Mr. Solomon served from June 21, 2010, to November 4, 2013, well-beyond the time limit specified by the FVRA. And further, following the valid appointment of Mr. Solomon's immediate successor, (Richard Griffin) the NLRB promptly ratified actions taken under Mr. Solomon's command:

> "Specifically, on October 23, 2015, General Counsel Richard F. Griffin Jr. issued a Notice of Ratification in this case which states, in relevant part: The prosecution of this case commenced under the authority of Acting General Counsel Lafe E. Solomon during the period after his nomination on January 5, 2011, while his nomination was pending with the Senate, and before my confirmation on November 4, 2013 . . . For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint." *The Ardit Co.*, 364 NLRB No. 130 (2016).

It requires no stretch of the imagination to understand how the rule could be abused: an Executive branch, unable to obtain the Senate's assent on its nominee, could appoint General Counsels *ab infinito,* confident in the knowledge that *whoever* they end up with will ratify the invalid actions of their predecessor. To wit, this rule is not limited to the NLRB General Counsel, but the entire class of Federal officers specified by section 3348(e): the General Counsel of the Federal Labor Relations Authority; any Inspector General appointed by the President; any Chief Financial Officer appointed by the President; or any office of an Executive agency, if a statutory provision expressly prohibits the head of the agency from performing the functions and duties of such office. *See* 5 U.S.C. § 3348(e). The more logical conclusion—the one mandated by the Appointments Clause—is that such actions *must* be void, because the Senate must first be afforded an opportunity to advise and consent on officers' *before* their actions can shape vital areas of Federal policy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL J. MOORE
Counsel of Record
EDWARD A. TREVVETT
IBRAHIM TARIQ
HARRIS BEACH PLLC
99 Garnsey Road
Pittsford, NY 14534
(585) 419-8800
dmoore@harrisbeach.com

Counsel for Petitioners

December 27, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed: July 14, 2017]

No. 15-1111
Consolidated with 15-1162

NEWARK ELECTRIC CORP., *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

September Term, 2016
NLRB-03CA088127

ORDER

BEFORE: Tatel, Brown, and Wilkins, Circuit Judges

Upon consideration of the motion to vacate and remand and for expedited issuance of mandate in light of the Supreme Court's decision in *NLRB v. SW General*, the opposition thereto, and the reply, it is

ORDERED that the petition for review be granted, the cross-application for enforcement be denied, the decision of the National Labor Relations Board be vacated, and the case remanded for further proceedings before the Board. *See NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017), *aff'g SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015). Petitioners may raise their laches argument on remand and seek judicial review if unsatisfied with the result.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith to the agency.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Robert J. Cavello
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed: July 14, 2017]

No. 15-1111
Consolidated with 15-1162

NEWARK ELECTRIC CORP., *et al.*,

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

September Term, 2016
NLRB-03CA088127

MANDATE

In accordance with the order of July 14, 2017, and pursuant to Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

APPENDIX C

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Newark Electric Corp., Newark Electric 2.0, Inc., and Colacino Industries, Inc., *and* International Brotherhood of Electrical Workers, Local 840.

Case 03–CA–088127

March 26, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On January 6, 2014, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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,[1] and

[1] We correct the following error in the judge's decision. The judge found that at the time the letter of assent C was signed by Respondent Newark Electric, there were several union members employed by Newark Electric. The record reflects, however, that there were no union members employed by Newark Electric at that time. The Union's business manager, Michael Davis, testified that two employees were performing what later became

bargaining unit work, and that they would have the opportunity to join the Union after completing a probationary period. This error does not affect our disposition of this case.

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

We reject the Respondents' argument that the complaint should be dismissed because the Board did not have a quorum at the time the complaint issued. Although subsequently the Supreme Court held unconstitutional the January 2012 appointments of three Board members in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), that decision does not affect the General Counsel's authority as an independent officer appointed by the President and confirmed by the Senate. The General Counsel's authority to investigate unfair labor practice charges and to issue and prosecute unfair labor practice complaints derives directly from the language of the Act, not from any power delegated by the Board. See 29 U.S.C. §§ 153(d) & 160(b); *Richardson Chemical Co.*, 222 NLRB 5, 6 (1976). Accordingly, the presence or absence of a valid Board quorum has no bearing on the General Counsel or his agent's prosecutorial authority in this matter. See *Pallet Companies, Inc.,* 361 NLRB No. 33, slip op. at 1 (2014).

We also reject the Respondents' alternative argument that Acting General Counsel Lafe Solomon was not properly appointed under either the Act or the Federal Vacancies Reform Act (Vacancies Act), 5 U.S.C. § 3345 et seq. The Acting General Counsel was properly appointed under the Vacancies Act, which provides an alternative to the specific procedures provided by the Act, and the complaint is not subject to attack based on the circumstances of his appointment. See *Huntington Ingalls Inc.*, 361 NLRB No. 64, slip op. at 2–3 fn. 8 (2014) (citing *Muffley v. Massey Energy Co.,* 547 F. Supp. 2d 536, 542–543 (S.D.W. Va. 2008), affd. 570 F.3d 534 (4th Cir. 2009) (upholding authorization of a 10(j) injunction proceeding by Acting General Counsel designated pursuant to the Vacancies Act)). We also find unpersuasive the Respondent's reliance on *Hooks v. Kitsap* conclusions as modified below, and to adopt the recommended Order as modified and set forth in full below.[2]

Amended Conclusions of Law

Substitute the following for Conclusions of Law 2 and 6.

2. At all material times, Respondents Colacino Industries, Newark Electric 2.0 and Newark Electric have had substantially identical management, operations, equipment, customers, and supervision, as well as common ownership and common control over labor relations.

Tenant Support Services, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), for the reasons given in *Huntington Ingalls*, supra.

Last, in adopting the conclusion that Respondents Colacino Industries and Newark Electric are alter egos, we find it unnecessary to pass on the judge's finding that Colacino Industries and Newark Electric had substantially identical business purposes. See *Liberty Source W, LLC*, 344 NLRB 1127, 1127 fn. 1 (2005) (the Board does not require the presence of each factor in finding alter ego status), enfd. sub nom. *Trafford Distribution Center v. NLRB*, 478 F.3d 172, 182 (3d Cir. 2007). We also do not rely on *Park Avenue Investments LLC,* 359 NLRB No. 134 (2013), cited by the judge. See *NLRB v. Noel Canning*, supra.

[2] We have amended the judge's Conclusions of Law and Remedy to conform to his unfair labor practice findings and to reflect that the Respondent recognized the Union as the employees' bargaining representative under Sec. 8(f) without regard to the Union's majority status. We shall modify the judge's recommended Order to conform to the amended conclusions of law and remedy, and to the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified and in accordance with our decisions in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), affd. 354 F.3d 534 (6th Cir. 2004), and *Durham School Services*, 360 NLRB No. 85 (2014).

6. The International Brotherhood of Electrical Workers, Local 840 (IBEW, Local 840) is a labor organization within the meaning of Section 2(5) of the Act, and upon signing the February 24, 2011 Letter of Assent C, became the exclusive collective-bargaining representative of all the Respondents' employees in the appropriate bargaining unit described below for the purposes of collective bargaining within the meaning of Section 8(f):

> All employees performing work, as set forth in Article II of the January 1, 2011 to May 31, 2012 agreement between the Union and the Finger Lakes, New York Chapter of NECA, and the June 1, 2012 to May 31, 2015 successor agreement between the Union and the Finger Lakes, New York Chapter of NECA, within the geographic area set forth in Article II of the same agreements.

Amended Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In addition to the remedies recommended by the judge, we shall require the Respondent to compensate unit employees for the adverse tax consequences, if any, of receiving any lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

Further, having found that the Respondent unlawfully discontinued required contributions to certain benefit funds, we shall order the Respondent to make whole its unit employees covered by those funds by making all delinquent contributions to those funds, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).[3] The Respondent also shall be required to reimburse its unit employees for any expenses ensuing from its failure to make the required benefit fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), including all medical expenses that would have been covered by the funds. Such amounts shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).[4]

ORDER

The National Labor Relations Board orders that the Respondents, Newark Electric Corporation, Newark Electric 2.0, Inc., and Colacino Industries, Inc., Newark, New York, a single employer and alter egos, their officers, agents, successors, and assigns, shall

---

[3] We leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make whole" remedy. *Merryweather Optical Co.*, supra.

[4] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

1. Cease and desist from

(a) Refusing to honor the February 24, 2011 Letter of Assent C and the collective-bargaining agreement that is in effect from June 1, 2012, through May 31, 2015, between the IBEW, Local 840 and the Finger Lakes Chapter, NECA, which establishes the terms and conditions of employment of the Respondents' employees in the following appropriate bargaining unit during the term of the contract and any automatic extensions thereof:

> All employees performing work, as set forth in Article II of the January 1, 2011 to May 31, 2012 agreement between the Union and the Finger Lakes, New York Chapter of NECA, and the June 1, 2012 to May 31, 2015 successor agreement between the Union and the Finger Lakes, New York Chapter of NECA, within the geographic area set forth in Article II of the same agreements.

(b) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative, within the meaning of Section 8(f), of the Respondents' employees in the appropriate unit during the term of their collective-bargaining agreement and any automatic extensions thereof.

(c) Repudiating and failing and refusing to apply to unit employees their collective-bargaining agreement since July 20, 2012, and to make payments to the fringe benefit funds under the collective-bargaining agreement and any automatic extensions thereof.

(d) Discharging or otherwise discriminating against employees because they form, join, or assist the IBEW, Local 840, or any other labor organization, or engage in protected concerted activities, to discourage employees from engaging in these activities.

(e) 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) Give full force and effect to the terms and conditions of employment provided in the collective-bargaining agreement with the Union, and any automatic renewal or extension of it.

(b) Make whole unit employees for any loss of earnings and other benefits resulting from the Respondents' failure to honor the terms of the agreement, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Remit the fringe benefit funds payments that have become due and reimburse unit employees for any losses or expenses arising from the Respondents' failure to make the required payments, in the manner set forth in the amended remedy section of this decision.

(d) On request, bargain collectively in good faith with the Union as the exclusive representative of the employees in the appropriate bargaining unit during the term of the collective-bargaining agreement and any automatic extensions thereof.

(e) Within 14 days from the date of this Order, offer Anthony Blondell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(f) Make Anthony Blondell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(g) Compensate each affected employee, including Anthony Blondell, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

(h) Within 14 days from the date of this Order, remove from their files any reference to the unlawful discharge of Anthony Blondell, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(i) 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 and other adjustments of monetary benefits due under the terms of this Order.

(j) Within 14 days after service by the Region, post at the Respondents' Newark, New York facilities copies of the attached notice marked "Appendix."[5]

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

Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, or sold the business or the facilities involved herein, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since July 20, 2012.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. March 26, 2015

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(seal) NATIONAL LABOR RELATIONS BOARD

Appendix

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not refuse to honor the February 24, 2011 Letter of Assent C and the collective-bargaining agreement with the Union that is in effect from June 1, 2012, through May 31, 2015, which establishes the terms and conditions of your employment in the following appropriate bargaining unit during the term of the contract and any automatic extensions thereof:

All employees performing work, as set forth in Article II of the January 1, 2011 to May 31, 2012 agreement between the Union and the Finger Lakes, New York Chapter of NECA, and the June 1, 2012 to May 31, 2015 successor agreement between the Union and the Finger Lakes, New York Chapter of NECA, within the geographic area set forth in Article II of the same agreements.

We will not fail and refuse to recognize and bargain in good faith with the Union as your collective-bargaining representative during the term of the collective-bargaining agreement and any automatic extensions thereof.

We will not repudiate and fail and refuse to apply to unit employees your collective-bargaining agreement since July 20, 2012, and to make payments to the fringe benefit funds under that agreement and any automatic extensions thereof.

We will not discharge or otherwise discriminate against any of you for supporting the IBEW, Local 840, or any other labor organization, or engaging in protected concerted activities, to discourage you from engaging in these activities.

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 give full force and effect to the collective-bargaining agreement effective from June 1, 2012, through May 31, 2015, and any automatic extensions thereof.

We will make you whole for any losses you may have suffered as a result of our refusal to honor the terms of the collective-bargaining agreement.

We will remit the fringe benefit funds payments that have become due and reimburse you for any losses or expenses arising from our failure to make the required payments.

We will, on request, bargain in good faith with the Union as your exclusive collective-bargaining representative during the term of the collective-bargaining agreement.

We will, within 14 days from the date of the Board's Order, offer Anthony Blondell full reinstatement to his former job or, if that job is no longer available, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

We will make Anthony Blondell whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

We will compensate each affected employee, including Anthony Blondell, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

We will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Anthony Blondell, and we will, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

NEWARK ELECTRIC CORP., NEWARK ELECTRIC 2.0, INC., AND COLACINO INDUSTRIES, INC.

The Board's decision can be found at www.nlrb.gov/case/03-CA-088127 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Claire T. Sellers, Esq. and *Mary Elizabeth Mattimore, Esq.,* for the General Counsel.

Edward A. Trevvett, Esq. (Harris Beach, PLLC), of Pittsford, New York, for the Respondent-Employer.

DECISION

Statement of the Case

KENNETH W. CHU, Administrative Law Judge. This case was tried on August 26 and 27, 2013,[6] in Buffalo, New York, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 3 of the National Labor Relations Board (NLRB or Board) on May 30, 2013. (GC Exh. 1.)[7] The complaint, based upon charges filed by the International Brotherhood of Electrical Workers (IBEW), Local 840 (the Charging Party or Union), alleges that Newark Electric Corp. (Respondent Newark Electric), Newark Electric 2.0, Inc. (Respondent Newark 2.0), and Colacino Industries, Inc. (Respondent Colacino) (collectively, the Respondents) are a single employer or alter egos and the Respondents violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act (NLRA or Act).

---

[6] All dates are in 2012, unless otherwise indicated.

[7] Testimony is noted as "Tr." (Transcript). The exhibits for the General Counsel and Respondent are identified as "GC Exh." and "R. Exh." The closing briefs are identified as "GC Br." for the General Counsel and "R. Br." for the Respondent.

The Respondents filed timely amended answers to the complaint denying the material allegations in the complaint and asserting several affirmative defenses.[8]

---

[8] Counsel for the Respondents moved to dismiss the complaint and asserted at trial (Tr. 11, 12) and in its brief that the Board and those who represent it, had no authority to issue this complaint and prosecute this action because the Board did not have a quorum of three of its five members in order to issue a complaint and to take other actions, citing *Noel Canning v. NLRB*, 705 F.3d 490, 499 (D.C. Cir. 2013), cert. granted 133 S.Ct. 2861 (2013), and *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, 2645. However, as the court acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). Thus, the Board has rejected this argument, as the issue regarding the validity of recess appointments "remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act." See *G4S Regulated Security Solutions*, 359 NLRB No. 101, slip op. at 1 fn. 1 (2013), citing *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn. 1 (2013). The Respondent's alternate argument is that the complaint should be dismissed because Acting General Counsel Lafe Solomon could not properly be appointed under the Federal Vacancies Reform Act (FVRA) and therefore lacked authority to issue the complaint in this case, citing *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 U.S. Dist. LEXIS 114320 (W.D. Wash. Aug. 12, 2013). (R. Exh. 1.) The General Counsel argues that AGC Solomon was properly appointed under the FVRA. Contrary to the Respondent's assertion, the express terms of the FVRA make it applicable to all executive agencies, with one specific exception inapplicable here, 5 U.S.C. § 3345(a); see 5 U.S.C. § 105 ("Executive agency" defined to include independent agencies), and to all offices within those agencies, such as the office of General Counsel, that are filled by presidential appointment with Senate confirmation, 5 U.S.C. § 3345(a). *Belgrove Post Acute Care Center*, above. I am bound only to apply established Board precedent which the Supreme Court has not reversed, notwithstanding contrary decisions by the lower courts. *Waco, Inc.*, 273 NLRB 746, 749 fn.

Issues

The complaint alleges that the Respondents violated Section 8(a)(5) and (1) of the Act when on or about July 20, 2012, they withdrew recognition and repudiated the collective-bargaining agreement that they were parties with the Union. The complaint further alleges that the Respondents violated Section 8(a)(3) and (1) when employee Anthony Blondell (Blondell) was laid-off because his employment was conditioned upon working for a nonunion company.

After the close of the hearing, the briefs were timely filed by the parties, which I have carefully considered. On the entire record, including my observation of the demeanor of the witnesses,[9] I make the following

Findings of Fact

I. Jurisdiction and Labor Organization Status

At all material times, the Respondent Newark Electric, a New York corporation, has been an electrical contractor in the construction industry with an office and place of business in Newark, New York. At all material times, the Respondent Newark 2.0, a New York corporation, has been an electrical contractor in the construction industry with an office and place of

---

14 (1984). As such, the Respondents' motion to dismiss the complaint is denied. Moreover, the Board now has five members and a General Counsel who have been confirmed by the Senate.

[9] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was not credible and unworthy of belief.

business in Newark, New York. At all material times, the Respondent Colacino Industries, a New York corporation, has been an electrical contractor in the construction industry and a provider of information technology services with an office and place of business in Newark, New York. During a representative 1-year period, Respondents Colacino Industries and Newark 2.0 purchased and received goods at its Newark, New York facility valued in excess of $50,000 directly from enterprises within the State of New York, each of which other enterprises had received the goods directly from points outside the State of New York.[10]

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

II. The Alleged Unfair Labor Practice

A. Background

James Colacino (Colacino) is the owner and president of Respondents Colacino Industries and Newark 2.0. The Respondent Newark Electric was incorporated in May 1979 by Colacino's father, Richard Colacino. (R. Exh. 5.) Colacino was employed by his father and worked at Respondent Newark Electric for over 20 years. Colacino testified he purchased the assets, good will, equipment, website, customer database from his father in 2000, but did not outright buy the company or assumed the company's liabilities.

Colacino maintained that Newark Electric was always 100 percent owned by his father, Richard Colacino.

[10] The attorney for the Respondents and the General Counsel stipulated that Respondents Colacino Industries and Newark 2.0 are single employer/alter egos for the purpose of the hearing and that the Board has jurisdiction over them. (Tr. 7, 8.)

(Tr. 170–173; 243–245.) Colacino denies being an owner or company officer of Respondent Newark Electric. (Tr. 171.) According to Richard Colacino, Newark Electric has not been operating as a business since its assets were sold in 2000, and was subsequently dissolved on April 13, 2013, after resolving its tax liabilities. (Tr. 174–175; 285–288.)

Respondent Colacino Industries was incorporated by Colacino in February 2000, and the purchased assets from Newark Electric were folded into Colacino Industries. (Tr. 200.) Respondent Colacino Industries is 100 percent owned by Colacino who is also the president. (Tr. 183; R. Exh. 3.) The place of business for Respondent Newark Electric was at 131 Harrison Street, Newark, New York, at the time Colacino Industries was incorporated. Colacino testified that once Colacino Industries was incorporated, he moved all the purchased assets from Newark Electric to a different building at 126 Harrison Street, which was across the street. The building that had housed Newark Electric on 131 Harrison street was owned by Colacino (which he had purchased during his parents' divorce proceeding) and he sold the property. (Tr. 244, 245.) The building on 126 Harrison Street is also owned by Colacino and Respondent Colacino Industries leases and pay rent to Colacino for the use of the property. (Tr. 173, 195.)

Colacino stated that the primary business of Respondent Colacino Industries was in automation systems integration, performing mainly software development, integration and service for water, sewer systems, food industry, and manufacturing. Colacino indicated that a small portion of Colacino Industries' business was in traditional electrical work, which was mostly handled by Richard Colacino. (Tr. 166–170; 240.)

Colacino maintain that Newark Electric was dormant after the assets were sold by his father in 2000. Colacino testified that Newark Electric had done no business and had not hired any employees since 2000. (Tr. 244, 245.) Colacino stated, however, for name recognition purposes during the transition of operations from Newark Electric to Colacino Industries, he continued to use the Newark Electric logo, stationery, and other identifying aspects. He testified that "we wanted to retain the name recognition (of Newark Electric). So, over a period of time, as we transitioned . . . we're trying to keep the brand recognition." (Tr. 173, 198–200, 241.)

Contrary to the assertions of Colacino, I find that the Respondent Newark Electric was holding itself out to the public as an active operating company from the years 2000 to 2012, even after selling all its assets to Respondent Colacino Industries. The record shows that Respondents Colacino Industries and Newark Electric are housed at 126 Harrison Street. The entrance doors to 126 Harrison Street are stenciled with the Newark Electric and Colacino Industries logos (Tr. 173); the Colacino Industries stationery also contained the Newark Electric logo; the company vans for Colacino Industries company continued to advertise and display the Newark Electric logo (although Colacino was allegedly working on the "next generation" logo (Tr. 174, 246; GC Exh. 19); and the customer purchase orders and invoices were addressed to Respondents Colacino Industries and Newark Electric. (GC Exhs. 34, 32, 31.)

Further, the employees of Colacino Industries completed timesheets that showed the Colacino and

Newark Electric logos. Employees filling out their job cards and supply requisitions only showed the Newark Electric logo. The employer's contributions to the union funds came from Newark Electric. (GC Exh. 9.)

Blondell testified that he completed his job cards with the Newark Electric logo. (Tr. 126.) Blondell further testified that Colacino was the owner of Respondents Colacino Industries, Newark Electric, and Newark Electric 2.0. He confirmed all three companies are housed in one building with one address and that the names of Respondent Colacino Industries and Newark Electric are stenciled on the glass door. He said that he received all his supplies and parts from one warehouse regardless of which company was performing the work. Blondell said there was one facsimile, copier, and printer machine for all three companies and one phone system that did not identify the company for the incoming call. Colacino had kept the original Newark Electric phone number. Blondell also confirmed that the company vans continue to display the Newark Electric logo. Blondell said that none of the vans had any markings indicating Colacino Industries or Newark Electric 2.0. (Tr. 119–124.)

Colacino testified that the phone calls would all come in for Colacino Industries, but for the electric and pipe work, the calls would be directed to Richard Colacino (who mainly performed this type of work) and the calls for any automation systems work would be taken by a different group. (Tr. 176.) He said that communications by emails between the Respondents and the public were interchangeable between newarkelectric.com and colacino.com (GC Exh. 29), but explained that it did not matter which email address was used by an outsider because the messages would always arrive under the colacino.com mailbox. (Tr. 196–198, 259.)

With regard to Respondent Newark Electric 2.0, Colacino filed for incorporation on March 8, 2011, and at the same time, applied for a Federal employer identification number. (GC Exh. 28.) The Respondent Newark Electric 2.0 is 100 percent owned by Colacino who is also the president. According to Colacino, Newark Electric 2.0 was incorporated to perform the traditional electrical work that was not Colacino Industries' main business. He envisioned Respondent Newark Electric 2.0 to be a division of Respondent Colacino Industries. (Tr. 170–174.) As such, the counsel for the General Counsel and for the Respondents stipulated that Respondents Newark Electric 2.0 and Colacino Industries are a single employer/alter ego enterprise and subjected to the Board's jurisdiction. (Tr. 7, 8.)

Colacino testified that Newark Electric 2.0 was also allegedly created in order to appease the aggressive barrage of emails, letters, and personal appearances by the business manager of the Union, Michael Davis (Davis). Colacino complained that Davis was disrupting his office staff in his campaign to convince Colacino to sign up with the Union. (Tr. 180.)

Davis has been the business manager for the Local 840 since July 2011, and is responsible for enforcing the collective-bargaining agreements between the Union and employers. Prior to holding that position, Davis was a union organizer from 2005 to 2011. Davis said that his objective as a union organizer was to increase union membership and to convert employers from nonunion to union contractors. (Tr. 15, 16.)

Colacino testified that Davis had been trying to persuade him to sign up with the Union since 2005, and he would have frequent contacts with Colacino at least several times a week, including lunches, personal appearances, and scheduled meetings at his premises. Colacino characterized these contacts as “persistent” with a fair amount of pressure. Colacino stated that Davis wanted him to sign a letter of assent, which is essentially an agreement for a trial period for the Union to demonstrate the benefits of being a union contractor.

Colacino testified that Davis also offered to provide journeyman caliber electricians for him on a trial basis. Colacino repined that Davis would provide such employees, including Blondell, and then take them off the job even if they were willing to continue working for a nonunion shop. According to Colacino, the campaign to unionize by Davis reached a point where Davis would sign up some of Colacino’s employees as union member and then immediately laid them off because they could not continue to work for a nonunion shop. Colacino said he felt to pressure to sign a letter of assent when Davis allegedly represented to him that Colacino would be able to have Blondell and other union electricians return to work upon signing the letter. (Tr. 246–251.) According to Colacino, Davis would leave completed letters of assent for Colacino to sign and made comments that Colacino’s problem with finding good skilled labor would “go away” once he signs the letter of assent. (Tr. 254; R. Exh. 2.)

Davis testified that he knew James and Richard Colacino since 2005, and does not deny trying to sign up Respondent Newark Electric as a union contractor. (Tr. 21, 22, 64.) Davis testified that he was aware that the elder Colacino sold Newark Electric to James

Colacino. Davis also believed that Colacino then became president of Newark Electric because Colacino gave him a company business card containing the Newark Electric logo. The record shows that the business card stated the name of James Colacino and his title has "President/CEO." (Tr. 64–67; GC Exh. 7.) Davis testified that was not aware of the existence of Newark Electric 2.0 during the time when he was trying to sign up Newark Electric as a union shop. (Tr. 58, 65, 299.)

Vicky Bliss (Bliss) testified that she worked at Respondent Colacino Industries in 2010 and 2011 as the office manager. She witnessed Davis coming by the office looking for Colacino at least 3 times a day. Bliss said that Davis would show up at the office unannounced or wait for Colacino in the company parking lot. On other occasions, Bliss said that Davis would call for Colacino. Bliss said that she knew Davis was trying to get Colacino to join the union. She characterized Davis' conversations and efforts as "friendly but persuasive." (Tr. 290–293.)

B. The Letters of Assent

Davis testified that Local 840 represents electricians in five counties in the northern tier of the State of New York. The Local, as part of IBEW, has a master collective-bargaining agreement with the National Electrical Contractors Association (NECA), a multiple employers association.

Davis said that, in essence, under the work preservation clause in section 2.06(a) of the master agreement, a union contractor is prohibited from subcontracting out to a nonunion shop. Davis testified that the previous master agreement was from January 1, 2011 to May 31, and the current agreement is from June 1 to May 31, 2015. (Tr. 17–18; GC Exhs. 2, 3.) The work preservation clause states:

> In order to protect and preserve, for the employees covered by this Agreement, all work heretofore performed by them, and in order to prevent any device or subterfuge to avoid the protection and preservation of such work, it is hereby agreed as follows: If and when the Employer shall perform any on-site construction work of the type covered by this Agreement, under its own name or under the name of another, as a corporation, company, partnership, or any other business entity including a joint venture, wherein the Employer, through its officers, directors, partners, or stockholders, exercises either directly or indirectly, management control or majority ownership, the terms and conditions of this Agreement shall be applicable to all such work. All charges or violations of this Section shall be considered as a dispute and shall be processed in accordance with the provisions of this Agreement covering the procedure for the handling of grievances and the final binding resolution of disputes.

Davis testified that an employer becomes a party to the master agreement by signing either a Letter of Assent A or a Letter of Assent C. He indicated that a Letter of Assent A is for an employer who has been a previous union contractor whereas a Letter of Assent C is for an employer who has not been a union contractor but is willing to engage as a union shop on a trial basis. (Tr. 18, 19.) Upon signing a Letter of Assent C, the employer becomes bound by the multiemployer master agreement between the Union and NECA.

A Letter of Assent C bounds the employer to the master agreement for 180 days from the effective date of the letter.[11] The employer, after the first 180 days and within the first 12 months of the effective date, may terminate the letter of assent and the master collective-bargaining agreement by giving written notice at least 30 days prior to the selected termination date to the NECA and Union. At the earliest point in time to terminate, the employer would be required to give written notice on the 181st day from the effective date.

If the employer does not take advantage to terminate the letter between the 181st and 335th day, then the employer would be bound by the terms of the master agreement until it expires. The 335th day of the 1-year anniversary date of the letter is the last day possible to terminate the letter because the employer is required to provide a written 30-day notice to the NECA and Union before the anniversary date. If the employer fails to terminate the letter of assent after the first 12 months from the effective date, the employer is bound by the master agreement until its stated termination date as well as to all subsequent amendments and renewals.

If the employer desires to terminate the letter of assent and does not intend to comply with and be bound by all the provisions in any subsequent agreements, the employer must notify the NECA and Union in writing at least 100 days prior to the termination

[11] The Letter of Assent A played no significant role in this complaint. (GC Exh. 4.)

date of the then current agreement. (GC Exh. 5; Tr. 20, 21.)

C. The Signing of Letters of Assent C by Respondent Newark Electric

Davis has been trying to convince Colacino to sign a Letter of Assent C for Respondent Newark Electric since 2006. (Tr. 19–21.) Davis said he finally convinced Colacino to sign the Letter of Assent C in February 2011. Davis testified that it was his understanding that the Letter of Assent C signed by Colacino was for the Respondent Newark Electric. Davis said the letter of assent was signed in the evening on February 24, 2011 at the Newark Electric offices and approved by the NECA on May 6, 2011. (GC Exh. 6.) Davis said that Colacino signed on behalf of Newark Electric and that Richard Colacino was also presented for the signing. Davis indicated that Clark Culver, who was the former business manager, signed for the Union. Davis said that everyone then went to dinner to celebrate the signing. (Tr. 21–29.) Colacino testified that his father was there for the signing because "he likes to eat" and everyone went to dinner afterwards. (Tr. 232.)

The record shows that the Letter of Assent C was signed on February 24, 2011, by Colacino above the line that had his name and title as CEO. The name of the firm on the Letter of Assent C stated "Newark Electric" with an address at 126 Harrison Street. The Federal employer identification number was referenced as 16–1127802, which was the correct Federal ID number for Newark Electric. Davis testified that the name of the company and Federal ID number was obtained from Bliss. (Tr. 22.)

Colacino testified that he did not know how Davis received the Federal ID information and denied authorizing any one in his company to provide the information to him. He indicated that previous letter of assents were filled out by Davis or someone working for the Union with incorrect information, such as the address for Newark Electric. Colacino maintained that he did not review the Letter of Assent C before signing on February 24. Colacino testified that "I assumed (the information) would be accurate because Mike (Davis) was well aware of the formation of separate companies." (Tr. 254–257.) Colacino insisted that he told Davis that the Letter of Assent C was for Respondent Newark Electric 2.0 and never noticed that the symbol "2.0" was missing from the letter. (Tr. 183, 232, 265.) Colacino also testified that Newark Electric 2.0 did not have a Federal employer tax ID at the time the Letter of Assent C was signed. (Tr. 257.) Davis, however, has always maintained that he was not aware of the existence of Respondent Newark Electric 2.0 until April 2012.

The effective date of the Letter of Assent C was February 24, 2011. Pursuant to the contract provisions of the letter, the Respondent Newark Electric was bound to the terms of the letter for the next 180 days and would then have the opportunity from August 24, 2011, to January 24, 2012, to terminate the assent by providing the 30-day written notice to both the Union and NECA. At the very latest date that the Respondent Newark Electric could terminate the Letter of Assent C and the collective-bargaining agreement was on January 24, 2012, which would be 30 days prior to the 1-year anniversary of the letter of assent.[12]

With the signing of the letter of assent, the Union became the exclusive collective- bargaining representative of the Respondents' employees in the following appropriate bargaining unit of

> All employees performing work, as set forth in Article II of the January 1, 2011 to May 31, 2012 agreement between the Union and the Finger Lakes, New York Chapter of NECA, and the June 1, 2012 to May 31, 2015 successor agreement between the Union and the Finger Lakes, New York Chapter of NECA, with the geographic area set forth in Article II of the same agreements.

At the time the Letter of Assent C was signed by the Respondent Newark Electric, there were several union members employed by Respondent Newark Electric. Davis testified that he agreed with Colacino that the union members would finish up their assignments under the nonunion terms and conditions of employment and thereafter, they would begin to receive union wages and benefits in accordance with the letter of assent and the master collective-bargaining agreement. Davis recalled that Blondell, Mike Bebernitz (Bebernitz), and Mark Patterson (Patterson) were three employees already performing bargaining unit work at Respondent Newark Electric. Davis said that eventually these three and others would become union members after performing their obligatory 1000 hours probationary period. (Tr. 25–28.)

---

[12] The counsel for the General Counsel inadvertently noted February 24, 2011, as the expiration date of the letter of assent, which actually should read February 24, 2012. (See GC Br. at 11.)

The record shows that the payroll reports of the employees and the union local contributions and deductions reflect all three named Respondents. (GC Exh. 9.) Davis testified that he did not pay much attention to the different names or Federal tax ID numbers on the reports or to the contributions being paid to the Local. He said his only concern was that the benefits were being properly and timely made. (Tr. 59, 70–80.)

As noted above, Respondent Colacino Industries was created in 2000 after Colacino brought the Newark Electric assets from his father. Colacino testified that he did not sign a letter of assent for Colacino Industries when he signed one for Newark Electric in February 2011, because he was trying to operate the companies as two separate businesses. Colacino reiterated that he wanted to segregate the electrical work with Newark Electric 2.0. (Tr. 183.) Nevertheless, Colacino signed Respondent Colacino Industries to a Letter of Assent C just 2 months after signing Newark Electric. (Tr. 185.)

Colacino explained that for accounting and administrative reasons, he was not able to segregate the finances and insurance for the two companies. Colacino said, for example, that he did not have the cash reserves to pay salaries for the Newark Electric 2.0 employees and that the premiums were extremely high to insure a new company. Colacino said that he raised the difficulties in operating two companies under one financial and administrative roof with Davis and he purportedly told Colacino that his problems would be resolved if Colacino also sign up Respondent Colacino Industries to a Letter of Assent C. (Tr. 183–185.)

Colacino testified that it was his intent that the Letter of Assent C binding Respondent Colacino Industries would supersede the letter of assent signed earlier with Respondent Newark Electric 2.0. Colacino said that Davis told him that the letter of assent for Newark Electric would essentially just dissolve. Colacino testified that Davis told him a single company could not have two concurrent letters, but that he (Davis) would nevertheless check with IBEW. Colacino said that Davis informed him about 30 days later that the easiest way to resolve this issue was to redate the letter of assent with Respondent Newark Electric so that it would follow the same timeframe as the letter of assent for Colacino Industries. He testified that Davis unexpectedly called him and said that the Union had redated the Letter of Assent C for Respondent Newark Electric to match the July 20 date. (Tr. 184–192.) Colacino testified that he never received the redated letter of assent, but it was his understanding that it was accomplished. He never gave another thought about the redating of the Letter of Assent C. (Tr. 223, 224.)

According to Davis, it was Colacino who approached him in July 2011, and suggested to Davis about signing up Respondent Colacino Industries to a Letter of Assent C. Davis testified that Colacino explained to him that it was difficult to maintain the accounting books with two different companies and two different set of employees. Davis testified that it was his understanding that Colacino was referring to Respondents Colacino Industries and Newark Electric as the two companies with accounting issues. Davis insisted that Colacino never mentioned Respondent Newark Electric 2.0 as being the second company as having the bookkeeping problems. According to Davis, since he was not yet aware that Newark Electric 2.0 existed, he told Colacino that there should be no problems with two letters of assent, but would have to first check with IBEW. Davis testified that the Letter of Assent C for Respondent Colacino Industries was approved and Colacino signed the letter on July 20, 2011.[13] (Tr. 29–32, 92; GC Exh. 10.)

Contrary to Colacino's testimony, Davis testified that the letter of assent for Respondent Newark Electric was still in effect since he had already been informed by the IBEW that there were no problems with a single owner having two different letters for two different companies. Davis absolutely denied that he told Colacino the letter of assent for Respondent Colacino Industries would supersede the letter of assent for Respondent Newark Electric. He further denied agreeing to re-date the letter of assent for Respondent Newark Electric to the same date (July 20) as the letter of assent signed with Respondent Colacino Industries. (Tr. 32–35, 88–91, 93–96.)

D. The Termination of the Letters of Assent

Davis testified that Colacino notified him by letter dated April 12 that Respondent Colacino Industries was terminating its Letter of Assent C and the collective-bargaining agreement with the Union effective on May 26. A copy of the notice to terminate was also sent to the NECA, Finger Lakes chapter. Colacino also requested a meeting with Davis to discuss the "the reasons for this decision and how the IBEW can support NEC 2.0, Inc." (GC Exhs. 12, 33.) Davis said he was taken by surprise because this was the first

[13] Colacino testified that he signed the Letter of Assent C for Respondent Colacino Industries "2 months later" (after the February 24, 2011 Letter of Assent C for Respondent Newark Electric), which was obviously mistaken testimony. (Tr. 183.)

occasion he heard of a company named Newark Electric 2.0. Davis attempted to contact Colacino for a meeting, but was never able to reach him. (Tr. 36, 37, 58.)

The parties stipulated and it is not in dispute that Colacino correctly and timely terminated the Letter of Assent C on May 26 with Respondent Colacino Industries. (Tr. 83.)

The record shows that Respondent Colacino Industries continued to pay union contributions for April, May, and June. (GC Exhs. 14, 15.) However, it was obvious that Colacino was moving away from his relationship with the Union. On June 29, Davis met with a union member, Rick Bush (Bush), who requested information on how to withdraw from the Union. According to Davis, Bush wanted an honorary withdrawal because it was his intention to work for a nonunion shop. Davis told Bush that Newark Electric was still a union shop and that if he relinquishes his union membership, Bush would no longer be able to work for a union shop. Davis testified that Bush then decided to resign from the union. Davis surmised that Bush wanted to work for the Respondents.

After his conversation with Bush, Davis said that he again attempted to contact Colacino to determine what was happening. (Tr. 38–49.) Davis further testified that he was unable to reach Colacino, but shortly that same day, he received a visit from two Colacino employees and was handed a letter dated June 29. (Tr. 40–42; GC Exh. 13.) The letter stated, in part, that

> In compliance with the letter of assent dated 7/20/2011, Newark Electric 2.0 is terminating the letter of assent and the collective-bargain-

ing agreement effective today, the 29th of June, 2012.

Davis said he knew nothing about Newark Electric 2.0 and insisted that the Union never signed a letter of assent with Newark Electric 2.0. (Tr. 41, 42.) Davis testified that eventually, Scott Barra (Barra) contacted him and arranged for a meeting with Colacino for July 2. Davis said that Barra was a union member referred to Colacino to perform collective-bargaining work.[14]

At the July 2 meeting, Colacino began by saying that he was being restricted in his flexibility to hire employees that could perform programming work (ostensibly for Respondent Colacino Industries) that required some electrical work because the electrical work was reserved for bargaining unit employees. Davis replied that he did not have a problem if Colacino hired one employee to perform both union and nonunion work so long as Colacino paid to the union funds when the programmers did electrical work. It was at this meeting that Colacino then asserted that the signing of Respondent Colacino Industries to the Letter of Assent C superseded the letter of assent for Respondent Newark Electric. Davis replied that the Letter of Assent C was signed with Respondent Newark Electric and still considered that company as a union contractor. Davis thought that the meeting was fruitful and agreed to meet again with Colacino on July 9. However, Davis received a phone call from Bliss informing him that Colacino intended to go nonunion and the parties never met. (Tr. 44–47.)

[14] Barra, like Bush, also resigned from the Union in order to work for Colacino. (Tr. 48, 49; GC Exh. 16.)

Colacino testified that he was aware that there were two letters of assent, but thought it was no longer an issue because he had liquidated Newark Electric 2.0 on July 31 (the actual paperwork was filed on September 4). (Tr. 214–218, 241; R. Exh. 4.) Colacino further testified that when Blondell, Barra, and Bush brought to his attention in June that the Union still believed Respondent Newark Electric 2.0 was still a union shop, Colacino decided it was wise to affirmatively terminate the letter of assent for Newark Electric 2.0 on June 29. Colacino said that he wrote to Davis to inform him of the termination. The notice terminating the letter of assent for Newark Electric 2.0 referenced the July 20, 2011 signing date for the Letter of Assent C because Colacino believed that the original date of February 24, 2011, for Newark Electric 2.0 had been redated by Davis to July 20. (GC Exh. 13; Tr. 218–220.) Colacino conceded that if the letter of assent for Respondent Newark Electric 2.0 was not redated, the notice to terminate would have been untimely.

Davis testified that the notice to terminate Newark Electric must also be filed with the NECA, which he contended, was not done by Colacino. (Tr. 102.) Colacino insisted that he sent a copy of the June 29 termination notice to the NECA, but the notice to the NECA was not provided for the record by the Respondents. (Tr. 220.)

Colacino also said that the employee who had wrote the letter to terminate the letter of assent for the Newark Electric 2.0 mistakenly typed in June 29 as the effective termination date, when it should have been July 29. Colacino again insisted that the Letter of Assent C was signed for Respondent Newark

Electric 2.0 and not for any other company. (Tr. 221–224.)

Discussion

A. Single Employer and Alter Egos Status

The General Counsel argues that Respondents Colacino Industries and Newark Electric are either a single employer entity or alter egos. The General Counsel contends that if Colacino Industries and Newark Electric are single employer/alter egos, then Respondent Colacino Industries is bound to the Letter of Assent C between the Respondent Newark Electric and the Union.

The single employer doctrine is found when two ongoing businesses are treated as a single employer based upon the ground that they are owned and operated as a single unit. *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir. 1983), cert. denied 464 U.S. 892, 104 S.Ct. 237 (1983). Motive is normally irrelevant. In finding single employer status, the Board has typically looked to whether there is (1) common ownership; (2) common management; (3) functional interrelation of operations; and (4) centralized control of labor relations. *Broadcast Employees NABET Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255, 85 S.Ct. 876 (1965). In *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1181–1182 (2006), the Board explained

> In determining whether two entities constitute a single employer, the Board considers four factors: common control over labor relations, common management, common ownership, and interrelation of operations. *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989).

In *Radio & Television Broadcast Technicians v. Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965), the Supreme Court, in considering which factors determine whether nominally separate business entities should be treated as a single employer, stated

> The controlling criteria set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.

Not all of the criteria need be present to establish a single employer status and no single criterion is controlling. Single employer status "ultimately depends upon 'all circumstances of the case' and is characterized by the absence of an 'arms-length relationship found among unintegrated companies." *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1284 (2001); also *Hahn Motors*, 283 NLRB 901 (1987).

With respect to the General Counsel's theory that the Respondents are alter egos, the Board utilizes additional factors and a broader standard in determining whether two or more ostensibly distinct entities are in fact alter egos. The Board considers whether the entities in question are substantially identical, including the factors of management, business purpose, operating equipment, customers, supervision as well as common ownership. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976); *Advance Electric*, 268 NLRB 1001, 1002 (1984).

The Board and the courts have applied the alter ego doctrine in those situations where one employer entity will be regarded as a continuation of a predecessor, and the two will be treated interchangeably for purposes of applying labor laws. The most obvious example occurs when the second entity is created by the owners of the first for the purpose of evading labor law responsibilities; but identity of ownership, management, supervision, business purpose, operation, customers, equipment, and work force are also relevant in determining alter ego status. See *Fallon-Williams Inc*., 336 NLRB 602 (2001), *C.E.K. Industries Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 354 (1st Cir. 1990). While the Board considers whether one entity was created in an attempt to enable another to avoid its obligations under the Act, the Board has consistently held that such a motive is not necessary for finding alter ego status. *Crawford Door Sales Co*., above. In looking at the various factors shared by the entities, the Board has noted that no one factor is controlling or determinative. *NLRB v. Welcome-American Fertilizer Co*., 443 F.2d 19, 21 (9th Cir. 1971). Like the single employer doctrine, the existence of such status ultimately depends on "all circumstances of the case" and is characterized as an absence of an "arms' length relationship found among unintegrated companies." *Operating Engineers Local 627 (South Prairie Construction) v. NLRB*, 518 F.2d 1040, 1045–1046 (D.C. Cir. 1975), affd. in relevant part sub. nom.

The parties stipulated that Respondents Colacino Industries and Newark Electric 2.0 are alter egos and is a single employer enterprise. The threshold issue of the complaint is the relationship between Respondents Colacino Industries/Newark Electric 2.0 and Newark Electric. The General Counsel argues that the Respondents are bound by the Letter of Assent C signed by Respondent Newark Electric on the theory that all three companies are either a single employer or alter egos.

In my findings, the totality of the evidence strongly supports the conclusion that Colacino Industries/ Newark Electric 2.0 and Newark Electric are alter egos or a single employer. Colacino brought all the assets of Newark Electric in 2000 and funneled the assets to his newly created Colacino Industries. Colacino is the 100-percent owner of Colacino Industries and Newark Electric 2.0 (until it was dissolved in 2012). Colacino also continued to use the name of Newark Electric in his commercial and business dealings with his customers and the general public.

Colacino Industries was created to perform commercial and residential software and to design and build automation and integration systems, but also to perform electrical work.[15] Contrary to the Respondents' assertions, Respondent Newark Electric was not a dormant company after 2000 when the assets were sold to Colacino. The record shows that Newark Electric was not legally dissolved until 2013, but the company continued to operate and generate business as evidenced by the invoices and customer purchase orders that mostly reflected the Newark Electric logo and payments that were addressed to both Respondents Colacino Industries and Newark Electric. It is clear that invoices and purchase orders were used interchangeably between Respondents Newark Electric and Colacino Industries.

Further, Colacino continued to use Respondent Newark Electric logo, stationery, and other identifying aspects as a division of Respondent Colacino Indus-

[15] Colacino had testified that his programmers would also perform electrical work although he insisted that all electrical work was being performed by the Respondent Newark Electric 2.0.

tries. Though Colacino denies ownership of Newark Electric, Colacino's business card given to Davis stated that James Colacino (and not Richard Colacino) as the president and CEO of Newark Electric. Colacino also testified that he wanted Newark Electric to be a division of Respondent Colacino Industries and some stationery logos reflected this fact.[16] Most significantly, Colacino ultimately made all the personnel decisions in the hiring and retaining of employees and in the management of all three companies.

In addition, Respondents Colacino Industries and Newark Electric were housed in the same premises at 126 Harrison Street. The entrance doors to 126 Harrison Street have the logos of Newark Electric and Colacino Industries; there was one facsimile, copier and printer machine for all three companies and one phone system with Newark Electric keeping its own phone number and incoming calls are identified through either the Newark Electric or Colacino Industries ID number; the Respondent Colacino Industries company vans continued to display the Newark Electric logo; and communications by emails between the Respondents and the public were interchangeable between newarkelectric.com and colacino.com.

The record further shows that the employees of Colacino Industries completed their timesheets and job cards having the Colacino and Newark Electric logos. Employees completing supply and parts requisi-

[16] Even assuming that formal ownership of Respondent Newark Electric was with Richard Colacino, during the period of formal ownership of Newark Electric, the active control of both companies was in the hands of James Colacino. This satisfies the element of common ownership. See *Kenmore Contracting* Co., 289 NLRB 336 (1988); also *Milford Services, Inc.*, 294 NLRB 684 (1989).

tion forms only showed the Newark Electric logo and one warehouse were used to provide the supplies for all three companies. The employer's contributions to the union funds had the name of Newark Electric.

Therefore, I find that at all material times, as alter egos, the Respondents Colacino Industries and Newark Electric have substantially identical management, business purpose, operating equipment, customers, purchases, premises, facilities, and supervision as well as common ownership. *Park Avenue Investments LLC*, 359 NLRB No. 134 (2013); *Crawford Door Sales Co.*, above.

I also find that at all material times, as a single employer, the Respondents Colacino Industries and Newark Electric have a common officer, ownership, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for each other; have interchanged personnel with each other, have engaged in common purchasing, and have held themselves out to the public as a single-integrated business enterprise. *Emsing's Supermarket, Inc.*, above; *Park Avenue Investments LLC*, above.[17]

---

[17] In the alternative, the General Counsel argues that regardless of the alter egos/single employer status of Respondents Colacino Industries and Newark Electric, the Board has jurisdiction over Respondent Newark Electric as a separate entity. The counsel for the General Counsel alleges that the Board has jurisdiction over Respondent Newark Electric because it is a corporation with an office and place of business in New York and that it had purchased and received goods valued in excess of $50,000 from other enterprises located within the State of New York and from points outside of the State of New York. (Tr. 162–166.) The Respondents deny that Respondent Newark Electric is a corporation with an office and place of business in New York and maintain that Respondent Newark Electric has

B. Repudiation of the Collective-Bargaining Agreement

The Respondents argue that Newark Electric never signed a letter of assent with the Union and therefore, they are not bound by the collective-bargaining agreement. The Respondents maintain that the letter of assent was actually signed by Respondent Newark Electric 2.0. I disagree.

I find that the Letter of Assent C was signed by Respondent Newark Electric on February 24, 2011. The objective record shows that the Letter of Assent C signed on February 24, 2011, had the name of the firm as "Newark Electric;" the name of the individual signing on behalf of Newark Electric was "James R. Colacino;" his title under his signature was "CEO;" and the Federal tax identification number provided was for Newark Electric. The objective record also shows that Newark Electric 2.0 was not incorporated

---

not operated since 2000. (Tr. 162–165.). The General Counsel had subpoenaed the Respondents' invoices. Rather than to submit the entire record of invoices, the parties agreed that the General Counsel would submit a sample of all invoices for 2011 and 2012. (Tr. 163–165.) A review shows that the invoices during a representative sample of jobs from August 28, 2011 to October 20, 2012, indicated that Respondent Newark Electric was operating and performing jobs with gross revenues valued in excess of $100,000 dollars from various entities engaged in interstate commerce. The invoices contained the logo of Newark Electric as being a division of Colacino Industries. There is no mention of Newark Electric 2.0 on any of the invoices. (GC Exhs. 26, 27.) Respondent Newark Electric in conducting its business operations and performed services valued in excess of $50,000 from enterprises located within the State of New York has engaged in interstate commerce. As such, I agree with the General Counsel and find that the Board has jurisdiction over Respondent Newark Electric as a separate enterprise engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

until March 8, 2011, and did not have its own Federal tax number in February.

Colacino said it was always his intention to sign Newark Electric 2.0 to the letter of assent. Colacino testified that he was anxious to sign the letter of assent because Davis had been pressing him to do so for several years and paid little attention to the information contained in the letter. He also said that Newark Electric 2.0 was mentioned several times during the signing as the company for the letter of assent.

I do not credit the testimony of Colacino on this point. I find that Colacino's testimony that Newark Electric 2.0 had signed the Letter of Assent C lacks credibility.[18] At the time that the Letter of Assent C was signed, Colacino knew that Newark Electric 2.0 did not exist or at best, he was in the process of incorporating the new company. Colacino also knew that Newark Electric 2.0 did not have a Federal tax number at the time of the February signing. Colacino denied being an officer of Newark Electric, but nevertheless signed the letter as the CEO of Newark Electric and had provided a business card to Davis indicating he was the president and CEO of Newark Electric. Colacino (or for that matter, Richard Colacino, who was also present at the signing) could have raised all this misinformation to the Union so that the letter could be corrected to his satisfaction. Instead, Colacino did not raise any "red flags" and proceeded to sign the Letter of Assent C.

[18] The General Counsel notes that a Board judge had found that Colacino lacked credibility in his testimony in another case. (GC Br. at 25.) However, my credibility findings are based on this record and not on the findings of another judge.

Colacino then signed Respondent Colacino Industries to a Letter of Assent C with the Union on July 20, 2011. Davis agreed to a second Letter of Assent C with Respondent Colacino Industries because he understood the arrangement to be purely an administrative and bookkeeping matter. Nevertheless, Davis did check and received approval from IBEW for a second letter of assent.

Approximately 9 months later, on April 12, Colacino noticed the Union and NECA that Colacino Industries was terminating its letter of assent, effective May 26. There is no dispute that Colacino Industries timely and effectively terminated its letter of assent. Colacino then attempted to terminate the letter of assent of Newark Electric on June 29, which he believed it to be for Newark Electric 2.0. On July 9, Bliss called Davis that the Respondents intended to be a nonunion contractor, effectively repudiating the collective-bargaining agreement.

I find, however, that inasmuch as Respondents Colacino Industries, Newark Electric 2.0, and Newark Electric are alter egos/single employer, Respondent Colacino is bound to the then-current master agreement through its letter of assent with Newark Electric, which was not effectively terminated by Colacino on June 29. Once Newark Electric signed the letter of assent on February 24, 2011, it could not terminate the letter prior to August 24, 2011. After August 24, 2011, Newark Electric had until February 24, 2012, to terminate the letter of assent by providing notice of termination to the NECA and Union no later than January 24, 2012 (30 days prior to the termination date). After February 24, 2012, Newark Electric was tied to the master agreement until May 31, 2012, the expiration date of the agreement.

Newark Electric could have elected to terminate the collective-bargaining relationship if notice was provided at least 100 days prior to the expiration date (May 31) of the master agreement. However, since Newark Electric failed to provide such timely notice to the NECA and the Union, Newark Electric was bound until May 31, 2015, which is the expiration date of the then successor agreement.

The Respondent Newark Electric did not avail itself of either options to terminate the letter of assent and therefore, it could not repudiate the collective-bargaining agreement. Having found Respondents Colacino Industries, Newark Electric 2.0, and Newark Electric is a single employer/alter egos, it follows that Respondent Colacino Industries has an obligation to bargain with the Union and is bound by the NECA collective-bargaining agreement that Newark Electric signed through the letter of assent. *Concourse Nursing Home,* 328 NLRB 692 (1999); *Crawford Door Sales Co.,* above.

Therefore, since the Respondents have failed and refused to apply the terms and conditions of the collective-bargaining agreement between the NECA and the Union, they have failed and refused to bargain in good faith with the exclusive bargaining representative of their employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act. *Barnard Engineering Co.,* 295 NLRB 226 (1989) (ordering the respondent and alter ego to comply with agreement in effect at the time and subsequent agreement and further ordered both respondents to pay the wage rates and make contributions to the fringe benefit funds as provided in those agreements).

I find that the Respondents' admitted failure to recognize and bargain with the Union, their failure to maintain the wages, hours, and other working terms and conditions of the NECA collective-bargaining agreement, and their failure to apply the NECA agreement to unit employees violated Section 8(a)(5) and (1) of the Act.

C. The Respondents' Defenses

The Respondents also argue several additional defenses in its answer. The Respondents argue that Colacino agreed to sign off the letter of assent with Respondent Colacino Industries because Davis represented to him that one individual could not have two letters of assent C and the Letter of Assent C with Newark Electric 2.0 would have to be dissolved or "go away" so that there was only one single Letter of Assent C. The Respondents also argued that Davis "bullied" Colacino in signing the first Letter of Assent C with Newark Electric.

I find that Colacino was not forced, duped, or fraudulently induced in signing the Letters of Assent C for Newark Electric and Colacino Industries. I find no meritorious evidence that Davis had agreed to redate the Letter of Assent C for Newark Electric or that he represented to Colacino that the first Letter of Assent C was superseded by the signing of the Letter of Assent C for Colacino Industries.

With regard to the first Letter of Assent C with Newark Electric, it is clear that Davis never forced Colacino to sign the letter in February 2011. Bliss testified that Davis was friendly but persuasive. Colacino and Davis testified that there was much fanfare over the signing of the letter and the parties, including Richard Colacino, then went out to dinner to celebrate. This does not support the Respondents' contention of being bullied or forced by the Union to sign the Letter of Assent C.

It is also equally clear from the record that Colacino knew he could not timely terminate the Letter of Assent C for Newark Electric and would be bound by the successor bargaining agreement until 2015. However, by claiming that the first letter of assent was dissolved, superseded, or redated with the Letter of Assent C for Colacino Industries, Colacino believed that he could then return to a nonunion shop once the Letter of Assent C for Colacino Industries was timely terminated.

I find Davis' testimony more worthy of belief than Colacino's testimony on this point. Davis testified that Colacino approached him about signing Respondent Colacino Industries because of administrative and bookkeeping problems. Davis credibly testified that he had to check with the IBEW for approval before agreeing to such an arrangement. I find that Davis' testimony is credible when he denied agreeing to dissolve the Letter of Assent C with Newark Electric. Signing up another company to the collective-bargaining agreement was Davis' goal as a union organizer. Here was his opportunity to recruit employees of Colacino Industries to the union. There was absolutely no conceivable business reason for Davis to agree on dissolving the Letter of Assent C with Newark Electric.

With regard to the redating of the Letter of Assent C with Newark Electric to July 20, Davis also credibly denied telling Colacino that he had redated the Letter of Assent C. Colacino said that Davis called him "out of the blue" to tell him that he had redated the Letter of Assent C for Newark Electric.

I find that Davis never had a conversation about redating the first letter of assent or that it would be superseded with the signing of the Letter of Assent C with Colacino Industries. First, Davis simply did not have the authority to somehow dissolve the first letter of assent. As such, there was no detrimental reliance on the part of Colacino because the conversation about redating the first letter of assent never occurred. Colacino presented no evidence to corroborate such a conversation with Davis. Second, Colacino never received or requested a copy of the redated letter of assent, which he would have received if the document was redated. Third, there are no notes to memorialize the conversations about redating the letter, no recollected dates of the alleged conversations between Colacino and Davis about redating or superseding the Letter of Assent C for Newark Electric, and only vague recollections as to when and what exactly occurred regarding the redating. Colacino said that he was focused on other matters and just accepted Davis' purported representation that the letter was redated. His testimony is not worthy of belief. Colacino is an astute businessman. He brought the assets of Newark Electric and created at least two other companies. He was anxious to sign letters of assent C for Newark Electric and Colacino Industries. To maintain that he was not paying attention to the information in signing the first letter of assent for Newark Electric and that he did not follow up to ensure that the letter was actually redated makes his testimony unworthy of belief.

D. The Layoff of Anthony Blondell

The counsel for the General Counsel alleges that Blondell was constructively discharged when the Respondents conditioned his continued employment on working for a nonunion company in violation of Section 8(a)(3) and (1) of the Act.

Blondell is an electrician and a member of the Union for the past 28 years. In 2006, he was sent by the Union to work for Colacino to help out for 4 months. Subsequently, Blondell started his own company and became a subcontractor for Colacino from May 2007 until November 2010. After Colacino signed the letter of assent for Respondent Newark Electric, Blondell began working for Colacino from March 2011 to July 2012. Blondell said that after Colacino signed the letter of assent for Respondent Colacino Industries, his pay statements reflected the name of Newark Electric 2.0 and the name of Respondent Colacino Industries until he was laid-off. (Tr. 106, 107; GC Exh. 20.)

Blondell testified that he was terminated on June 29 after receiving his final paycheck from Respondent Colacino Industries.[19] The letter of termination stated that Blondell was discharge for disclosing company information without consent. The termination letter was signed by Colacino. (Tr. 108, GC Exh. 21.) Blondell said he was surprised with his discharge and went to see Bliss, the office manager. According to Blondell, Bliss told him that Blondell allegedly purloined a document off the desk in Colacino's office. Blondell denied taking any document and wanted to meet with Colacino. Blondell met with Colacino the following day, on June 30. Blondell explained to Colacino that he did not take any documents and that Colacino should have spoken to him first before terminating him. Colacino believed Blondell, apologized to him and rescind the letter of termination. Blondell's termina-

[19] The termination of Blondell, although initially filed as a charge by the Union, was subsequently not alleged in the complaint of the General Counsel. (Tr. 99, 100.)

tion was rescinded by letter dated July 5. (Tr. 109, 110, 115; GC Exh. 22.)

Blondell testified that after his termination was resolved, he continued to discuss with Colacino about other matters. Blondell said that Colacino told him that he was having difficulties making the letter of assent work and that July 20 was going to be the last date for the letter of assent for Respondent Colacino Industries. Blondell said that about an hour into their meeting, Barra arrived and became part of the conversation regarding the July 20 date. Blondell said that Barra was also aware that Colacino intended to terminate the letter of assent on July 20. (Tr. 110–113).[20]

Blondell testified that as the July 20 date approach for the termination of the letter of assent for Respondent Colacino Industries, he asked Colacino on either July 17 or 18 regarding the status of his employment. Blondell asked whether it was the intention of Colacino to lay him off on July 20. Blondell said he was concerned whether he would be still working or be laid-off and would have to look for work in the union hall. According to Blondell, Colacino told him that assuming no deal was made by him and the Union (to keep a union shop), Blondell would be laid-off. Blondell said that he accepted this explanation from Colacino because he "was a union employee, and if he was going nonunion, there wasn't any way I could work for him." (Tr. 116, 117.) Blondell admitted that Colacino never told him to quit. (Tr. 148.)

[20] Davis testified above that he was trying to reach Colacino when he received a telephone call from Barra. It was at the June 30 meeting that prompted Barra to make a call to Davis to arrange a meeting with the Union for July 2.

The record shows that Blondell was laid-off due to the lack of work by Colacino on July 20. (GC Exh. 23.) Blondell testified that there was work for him to perform even though the notice cited a lack of work for his layoff. Blondell also testified that Barra (and Bush) was not laid-off by Colacino. When asked why, Blondell said that he assumed that Barra was not laid-off because Barra had resigned his union membership and could continue working for a nonunion shop. (Tr. 117–119.)

In contrast, Colacino testified that he had no intention to layoff Blondell. Colacino said that Blondell approached him about his employment status because Blondell was aware of the termination date of the collective-bargaining relationship with the Union. Colacino testified that Blondell told him that he had to lay him off for lack of work. Colacino allegedly replied to Blondell that he did not have a lack of work, but Blondell insisted for Colacino to lay him off. According to Colacino, the Union was going to use Blondell as a tool against the company and Blondell did not relish seeing that happen to Colacino. (Tr. 227–230.)

Barra testified that he has been a union member for over 12 years and had served in several official positions with the Union prior to resigning in July 2012. He was aware that Colacino was about to rescind the letters of assent and go nonunion. Barra testified that he spoke to Davis about this and Davis informed him that "if Jim (Colacino) goes non-union . . . I'll pull you guys from him and then we'll see how much work he does with no employees." (Tr. 270–274.) Barra said that he needed to work and there were no guarantees that the Union would be able to find him another job once he was "pulled" from Colacino. Barra said that the decision to resign from the Union was made between himself and his spouse. Barra denied that Colacino told him to resign from the Union. (Tr. 274, 275.)

Barra said that he attended at least two meetings (approximately 2 weeks before July 20) with Colacino and Blondell and confirmed that he heard Blondell telling Colacino that he (Colacino) should "just lay him off for lack of work" so that Blondell could not be used as a "tool" by the Union arguing that Respondents were still a union company because Blondell was still working for Colacino. (Tr. 276–279.)

Discussion

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) and (1) turning on employer motivation. The General Counsel must first make a prima facie showing to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983). In *Manno Electric,* 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows

> The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would

> have taken the same action even if the employee had not engaged in protected activity.

Under the NLRA, a traditional constructive discharge occurs when an employee quits because his employer has deliberately made the working conditions unbearable and it is proven that (1) the burden imposed on the employee caused and was intended to cause a change in the employee's working conditions so difficult or unpleasant that the employee is forced to resign, and (2) the burden was imposed because of the employee's union activities. *Grocers Supply Co.,* 294 NLRB 438, 439 (1989). Here, under the Hobson's choice theory, an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition. *Hoerner Waldorf Corp.,* 227 NLRB 612, 613 (1976).

The evidence establishes that just prior to July 20, Respondent Colacino Industries terminated Blondell and at least two other bargaining unit employees voluntarily resigned their union membership in order to continue working for Colacino. Blondell credibly testified that he approached Colacino and asked whether he would be laid-off on July 20, knowing that Colacino was terminating the letter of assent and the collective-bargaining agreement on that date. Blondell credibly testified that Colacino replied by saying he would have to terminate Blondell's employment by laying him off. Given this choice, Blondell accepted his layoff because he wanted to remain with the union. I do not credit the testimony of Colacino and Barra on this point. It is difficult for me to reasonably believe that Blondell asked to be laid-off as testified by Barra and Colacino. Blondell credibly testified that he was in the middle of completing a project and that there was work available for him to perform. It is also difficult for me to accept the testimony of Colacino and Barra that Blondell would agree to be laid-off by Colacino so he could not be used as a tool between the union and Colacino.

Inasmuch as the Respondents had unlawfully repudiated the collective-bargaining agreement and withdrew recognition of the Union, it was clear that Colacino was intent in going with a nonunion shop and did not want to continue employing Blondell. The Respondents failed to prove that regardless of Blondell's union affiliation or activities, he would have been laid-off due to a lack of work. As such, the Respondents failed to satisfy their *Wright Line* rebuttal burden. In essence, Colacino offered Blondell the disabling choice of being terminated or accepting terms and conditions of employment that would be substantially reduced if he commenced working for Respondent Colacino Industries in a nonunion setting. This is a classic case of discriminating against the employee because of his current terms and conditions of employment by discouraging membership in a labor organization. *Engineering Contractors, Inc.*, 357 NLRB No. 127, slip op. at 6 (2011).

Under these circumstances, I find that the Respondents violated Section 8(a)(3) and (1) of the Act when they unlawfully terminated the employment of Blondell.

Conclusions of Law

1. At all material times, Respondents Colacino Industries, Newark Electric 2.0, and Newark Electric

are corporations with an office and place of business located at 126 Harrison Street in Newark, New York, and have been engaged in the construction industry as electrical contractors.

2. At all material times, Respondents Colacino Industries, Newark Electric 2.0, and Newark Electric have had substantially identical management, business purposes, operations, equipment, customers, and supervision, as well as ownership.

3. Based on its operations described above and the parties' stipulation, Respondent Newark Electric, Respondent Newark Electric 2.0, and Respondent Colacino Industries constitute a single-integrated business and have been at all material times alter egos and a single employer within the meaning of the Act.

4. During the 12 months preceding issuance of the complaint, in conducting its operations described above, the Respondents provided services valued in excess of $50,000.

5. The Respondents constitute an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. The International Brotherhood of Electrical Workers, Local 840 is a labor organization within the meaning of Section 2(5) of the Act.

7. Since July 20, 2012, the Respondents have failed and refused to apply the terms and conditions of the February 24, 2011 Letter of Assent C and the June 1, 2012 through May 31, 2015 collective-bargaining agreement with the IBEW and NECA, Finger Lakes Chapter, to the employees in the appropriate bargaining unit in violation of Section 8(a)(5) and (1) of the Act.

8. By withdrawing recognition and repudiating the collective-bargaining agreement with Local 840, and by failing to continue in effect all the terms and conditions of employment of its collective-bargaining agreement including by ceasing to make contributions to the benefit funds, the Respondents have been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1).

9. By discharging employee, Anthony Blondell, the Respondents have been discriminating in regard to the hire, tenure, or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

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

Remedy

Having found that the Respondents are a single employer or alter egos, its officers, agents, successors, and assigns, I shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondents violated Section 8(a)(5) and (1) of the Act by refusing to recognize the February 24, 2011 Letter of Assent C and collective-bargaining agreement that is in effect from June 1, 2012, through May 31, 2015, with the IBEW, Local 840 and the Finger Lakes Chapter, NECA, that establishes the terms and conditions of employees in the appropriate bargaining unit, I shall order the Respondents to comply with the Letter of Assent C and all the terms and conditions of employment of the collective-bargaining agreement.

Having found that the Respondents violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from IBEW Local 840 and failing from July 20, 2012, to continue in effect all the terms and conditions of the IBEW and NECA agreement, I shall order the Respondents to recognize Local No. 840 as the exclusive bargaining representative of employees in the unit and to apply all the terms and conditions of the IBEW agreement, and any automatic extensions thereof. I shall also order the Respondents to make whole, unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondents failure to continue in effect all of the terms and conditions of the IBEW Local No. 840 agreement 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* and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Having also found that the Respondents violated Section 8(a)(3) and (1) of the Act by discharging Anthony Blondell, I shall order the Respondents to offer him full reinstatement to his former job or, if the job no longer exists, to a substantially equivalent job, without prejudice to seniority or any other rights or privileges previously enjoyed. Further, the Respondents shall make the aforementioned employee whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River*

Medical Center, above. The Respondents shall also be required to expunge from its files any and all references to the unlawful discharge of the aforementioned employee and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

The Respondents shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondents shall also compensate Anthony Blondell for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings and of fact and conclusions of law and on the entire record, I issue the following recommended[21]

1. Cease and desist from

(a) Refusing to honor the February 24, 2011 Letter of Assent C and collective-bargaining agreement that is in effect from June 1, 2012, through May 31, 2015, with the IBEW, Local 840 and the Finger Lakes Chapter, NECA, that establishes the terms and conditions of employees in the appropriate bargaining unit.

(b) Failing and refusing to bargain collectively in good faith with the Union, IBEW Local 840 as the Section 9(a) exclusive bargaining representative of the employees in the appropriate unit during the term of their collective-bargaining agreement and any automatic extensions thereof.

---

[21] 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.

(c) Repudiating and failing and refusing to continue in effect all the terms and conditions of its collective-bargaining agreement with the IBEW Local 840 since July 20, 2012, and to make payments to the fringe benefit funds under the collective-bargaining agreement.

(d) Discharging and laying off employees by conditioning their employment in working in a nonunion company and by discouraging employees from engaging in concerted activities.

(e) 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 purposes and policies of the Act.

(a) Give full force and effect to the terms and conditions of employment provided in the collective-bargaining agreement with the Union and make whole unit employees for any loss of earning and other benefits resulting from the Respondents' failure to honor the terms of the agreement in the manner set forth in the remedy section of this decision.

(b) Upon request by the Union, bargain collectively in good faith with the Union as the exclusive representative of the employees in the appropriate bargaining unit.

(c) Remit the fringe benefit funds payments which have become due and reimburse unit employees for any losses arising from the Respondent's failure to make the required payments in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of the Order, offer Anthony Blondell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.

(e) Make Anthony Blondell whole, with interest, for any loss of earnings and benefits suffered by him as a result of his unlawful layoff.

(f) Preserve and, within fourteen (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 payments 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 and other adjustments of monetary benefits due under the terms of this Order.

(g) Within fourteen (14) days, post at the Respondents' Newark, New York facility, a copy of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices

---

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

shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facilities involved in these proceedings, or sold the business or the facilities involved herein, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since July 20, 2012.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certificate of a responsible official on a form provided by the Region attesting to the steps the Respondents have taken to comply.

Dated, Washington, D.C. January 6, 2014

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 the collective-bargaining representative of our employees in the appropriate bargaining unit described below:

> All employees performing work, as set forth in Article II of the January 1, 2011 to May 31, 2012 agreement between the
>
> Union and the Finger Lakes, New York Chapter of NECA, and the June 1, 2012 to May 31, 2015 successor agreement between the Union and the Finger Lakes, New York Chapter of NECA, within the geographic area set forth in Article II of the same agreements.

We will not fail and refuse to recognize and adhere to the collective-bargaining agreement dated June 1, 2012, through May 31, 2015, by failing to pay contractually established wage rates and failing to make contractually-required fund contributions to the unit described above.

We will not lay off or condition your employment on working for a nonunion company.

We will not in any similar manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

We will make whole our employees for any losses they may have suffered as a result of our refusal to honor the applicable collective-bargaining agreement by transmitting, with interest, the contributions owed on their behalf to the Union's funds.

We will continue in force and effect the collective-bargaining agreement effective from June 1, 2012, through May 31, 2015.

We will offer full and immediate reinstatement to Anthony Blondell to his former job or, if that job is no longer available, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.

We will make Anthony Blondell whole for any loss of earnings and other benefits he suffered as a result of our discrimination against him, plus interest.

We will within 14 days from the date of the recommended Order, remove from our files any reference to Anthony Blondell's unlawful July 20, 2012 layoff and expunge it from our records, and within 3 days thereafter, we will notify him in writing that we have done so and that the layoff will not be used against him in any way.

NEWARK ELECTRIC CORP., NEWARK ELECTRIC 2.0, INC., AND COLACINO INDUSTRIES, INC.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1111
Consolidated with 15-1162

NEWARK ELECTRIC CORP., *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Filed On: September 28, 2017

ORDER

BEFORE: Tatel and Wilkins, Circuit Judges

Upon consideration of the motion to recall the mandate and the response thereto, and the petition for rehearing, it is

ORDERED that the motion and petition be denied. The panel does not consider its prior order remanding the cases to the National Labor Relations Board to be inconsistent with the relief awarded in SW General, Inc. v. NLRB, 796 F.3d 67 (D.C. Cir. 2015), aff'd, 137 S. Ct. 929 (2017). See Noel Canning v. NLRB, 823 F.3d 76 (D.C. Cir. 2016) (holding that National Labor Relations Board was authorized to reconsider merits of case despite lack of express remand order).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed: September 28, 2018]

No. 15-1111
Consolidated with 15-1162

NEWARK ELECTRIC CORP., *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

September Term, 2017
NLRB-03CA088127

ORDER

BEFORE: Garland, Chief Judge, and Henderson, Rogers, Tatel, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows, Deputy Clerk

APPENDIX F

5 U.S. Code § 3345 – Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office–

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if–

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)

(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if–

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if–

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)

(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

(Added Pub.L. 105-277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681-611; amended Pub.L. 108-271, § 8(b), July 7, 2004, 118 Stat. 814.)

APPENDIX G

5 U.S. Code § 3346 – Time limitation

(a) Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office--

(1) for no longer than 210 days beginning on the date the vacancy occurs; or

(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.

(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.

(2) Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve—

(A) until the second nomination is confirmed; or

(B) for no more than 210 days after the second nomination is rejected, withdrawn, or returned.

(c) If a vacancy occurs during an adjournment of the Congress sine die, the 210-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

APPENDIX H

HARRIS BEACH PLLC
Attorneys at Law
99 Garnsey Road
Pittsford, NY 14534
(585) 419-8800

EDWARD A. TREVVETT
DIRECT: (585) 419- 8643
FAX: (585) 419-8817
ETREVVETT@HARRISBEACH.COM

January 30, 2014

VIA Federal Express
National Labor Relations Board
Office of the Executive Secretary
1099 14th Street NW
Washington, DC 20570

Re: Newark Electric Corp., et. al
Case No.: 03-CA-088127

To Whom it May Concern:

Enclosed are 8 copies of Respondents' Exceptions to the Decision of the Administrative Law Judge along with a Brief in Support of Exceptions to the Decision of the Administrative Law Judge in this matter.

As the certificate of service indicates, copies have been served on the other parties.

Very truly yours,

HARRIS BEACH PLLC

/s/ *Edward A. Trevvet*
Edward A. Trevvett

cc: Rhonda P. Ley
Regional Director
National Labor Relations Board — Region 3
Niagara Center Building
130 South Elmwood Avenue, Suite 630
Buffalo, NY 14202

Claire T. Sellers, Esq.
Field Attorney
National Labor Relations Board — Region 3
Niagara Center Building
130 South Elmwood Avenue, Suite 630
Buffalo, NY 14202

Donald D. Oliver, Esq.
Blitman & King, LLP
443 North Franklin Street, Suite 300
Syracuse, NY 13204-5423

Michael Davis
IBEW Local 840
58 Castle Street
Geneva, NY 14456-2621

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case Nos. 03-CA-088127

NEWARK ELECTRIC CORP., NEWARK ELECTRIC 2.0, INC., AND COLACINO INDUSTRIES, INC.,
a single employer and/or alter egos

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 840

RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

HARRIS BEACH PLLC
Edward A. Trevvett
Attorneys for Respondents, Newark Electric Corp., Newark Electric 2.0, Inc., and Colacino Industries, Inc.
99 Garnsey Road
Pittsford, New York 14534
Telephone: (585) 419-8800
Facsimile: (585) 419-8817

Dated: January 30, 2014

Pursuant to Section 102.46 of the National Labor Relations Board Rules and Regulations, Respondents Newark Electric Corp. ("NEC"), Newark Electric 2.0, Inc. ("NEC 2.0") and Colacino Industries, Inc. ("Colacino") hereby file the following Exceptions to the Decision of Administrative Law Kenneth W. Chu (JD[NY]-03-14) dated January 6, 2014 ("ALJD"). Respondents except to certain findings of fact, credibility determinations and conclusions of law, and except to the failure of the

Administrative Law Judge ("AU") to make certain findings, conclusions, and recommendations.

I. Respondents Except to the Following Findings of Fact and Credibility Determinations Contained in the ALJD

Because they are improper, contrary to record evidence, and not supported by the record considered as a whole, for the reasons set forth more fully in Respondents' Supporting Brief, Respondents except to each of the following findings of fact and/or credibility determinations contained in the ALJD.

1. ALJD, page 2, lines 18-20, reading as follows:

At all material times, Respondent Newark Electric, a New York corporation, has been an electrical contractor in the construction industry with an office and place of business in Newark, New York.

(Tr. 170-75, 200, 243-45, 266-67, 285-88; RX 5.)[1]

2. ALJD, page 3, lines 47-48 and page 4 line 1, reading as follows:

Contrary to the assertions of Colacino, I find that the Respondent Newark Electric was holding itself out to the public as an active operating company from the years 2000 to 2012 even after selling all its assets to Respondent Colacino Industries.

(Tr. 170-75, 200, 243-45, 266-67, 285-88; RX 5.)

[1] In accordance with Section 102.46(b) of the Board's Rules and Regulations, the portions of the record relied upon in support of each Exception are designated in parenthesis following each exception. References to the transcript of the hearing are denoted as "Tr. ___." References to General Counsel's exhibits are denoted as "GCX ___," and references to Respondents' exhibits are denoted as "RX ___."

3. ALJD, page 4, lines 12-13, reading as follows:

The employer's contributions to the union funds came from Newark Electric.

(Tr. 59, 71, 172-73, 243-44, 285-86; GCX 9.)

4. ALJD, page 6, lines 28-35, reading as follows:

If the employer does not take advantage to terminate the letter [of assent C] between the 181st and 335th day, then the employer would be bound by the terms of the master agreement until it expires. The 335th day of the 1-year anniversary date of the letter is the last day possible to terminate the letter because the employer is required to provide a written 30 day notice to the NECA and Union before the anniversary date. If the employer fails to terminate the letter of assent after the first 12 months from the effective date, the employer is bound by the master agreement until its stated termination date as well as to all subsequent amendments and renewals.

(Tr. 96, 111-12, 138, 185-88, 191-92, 221-22, 273-76; GCX 1c, 6, 13.)

5. ALJD, page 6, lines 48-49 and page 7 line 1, reading as follows:

Davis said the letter of assent was signed in the evening of February 24, 2011 at the Newark Electric offices and approved by the NECA on May 6, 2011 (GC Exh. 6).

(GCX 6.)

6. ALJD, page 7, lines 25-26, reading as follows:

Davis, however, has always maintained that he was not aware of the existence of Respondent Newark Electric 2.0 until April 2012.

(GCX 9.)

7. ALJD, page 7, lines 32-35, reading as follows:

At the very latest date that the Respondent Newark Electric could terminate the letter of assent C and the collective-bargaining agreement was on January 24, 2012, which would be 30 days prior to the 1-year anniversary of the letter of assent

(Tr. 80-81, 83,96, 111-12, 138, 185-88, 191-92, 221-22, 273-76; GCX lc, 5, 6, 10, 11, 13.)

8. ALJD, page 7, lines 47-48, reading as follows:

At the time the letter of assent C was signed by Respondent Newark Electric, there were several union members employed by Respondent Newark Electric.

(Tr. 28, 170-75, 183, 200, 243-45, 246-53, 266-67, 285-88, 291-93; GCX 6, 9; RX 2, 5.)

9. ALJD, page 8, lines 9-10, reading as follows:

The record shows that the payroll reports of the employees and the union local contributions and deductions reflect all three named Respondents.

(Tr. 28, 59, 70-71; GCX 9.)

10. ALJD, page 8, lines 26-29, reading as follows:

Colacino said that he raised the difficulties in operating two companies under one financial and administrative roof with Davis and he purportedly told Colacino that his problems would be resolved if Colacino also sign up Respondent Colacino Industries to a letter of assent C.

(Tr. 183-85.)

11. ALJD, page 13, lines 30-31, reading as follows:

I find that the letter of assent C was signed by Respondent Newark Electric on February 24, 2011.

(Tr. 80-81, 83,96, 111-12, 138, 171-75, 185-88, 191-92, 221-22, 243-44, 266-67, 283-86; GCX 6, 11, 13; RX 5.)

12. ALJD, page 14, lines 7-37:

The ALJ's determination that Jim Colacino's testimony that Newark Electric 2.0 had signed the letter of assent C lacks credibility.

(Tr. 28, 85-90, 171, 179, 183-88, 246-53, 291-93; GCX 6, 9, 10.)

13. ALJD, page 16, lines 5-37:

The ALJ's determination that Davis' testimony was more credible than Jim Colacino's testimony regarding the termination of the letter of assent C for Newark Electric.

(Tr. 28, 85-90, 171, 179, 183-88, 191-92, 215-22, 241-43, 246-53, 261, 291-93; GCX 5, 6, 9, 10, 12, 33, RX 4.)

14. ALJD, page 17, lines 31-32, reading as follows:

The record shows that Blondell was laid-off due to the lack of work by Colacino on July 20.

(Tr. 144-48, 227-29, 273-75, 276-79; GCX 21, 22, 23.)

15. ALJD, page 18, lines 45-52 and page 19, lines 1-5:

The ALJ's determination that Blondell's testimony that he was laid off was more credible than the testimony of Jim Colacino and Scott Barra that Blondell asked to be laid off.

(Tr. 145-48, 227-29, 273-76, 278; GCX 21, 22, 23.)

II. Respondents Except to the Following Conclusions of Law Contained in the ALJD

Because they are improper, contrary to record evidence, and not supported by the record considered as a whole, for the reasons set forth more fully in Respondents' Supporting Brief, Respondents except to each of the following conclusions of law contained in the ALJD.

16. ALJD, pages 1-2, footnote 3:

The ALJ's denial of the Respondents' motion to dismiss the complaint on the basis that the Board and those representing it had no authority to issue the complaint and prosecute the action because the Board did not have a quorum to issue a complaint and take other actions and, alternatively, Respondents' motion to dismiss the complaint because Acting General Counsel Lafe Solomon could not be properly appointed under the Federal Vacancies Reform Act and therefore lacked authority to issue the complaint in this case.

(GCX 1a, 1e)

17. ALJD, page 12, lines 12-50, and page 13 lines 1-21:

The All's finding that Colacino Industries/Newark Electric 2.0 and Newark Electric are alter egos or a single employer, that at all material times, as alter egos, the Respondents Colacino Industries and Newark Electric have substantially identical management, business purpose, operating equipment, customers, purchases, premises, facilities and supervision, as well as common ownership and that at all material times as a single employer and have held themselves out to the public as a single-integrated business enterprise.

(Tr. 80-81, 166-75„ 238-40, 243-44, 266-67, 283-88; GCX 2, 3, 4, 5, 9, 11, 28; RX 3, 5.)

18. ALJD, page 13, footnote 12:

The ALJ's finding that the Board has jurisdiction over Respondent Newark Electric as a separate enterprise engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(Tr. 171-75, 243-44, 266-67, 283-85, 287-88; RX 5.)

19. ALJD, page 14, lines 38-48 and page 15, lines 1-25:

The ALJ's finding of an alter ego/single employer relationship between Colacino, NE 2.0 and NEC and conclusion that Colacino was bound to the master agreements because the letter of assent C with NEC was not effectively terminated by Colacino on June 29. Also the All's further conclusions that because NEC did not avail itself of the option to terminate the letter of assent C, it could not repudiate the collective bargaining agreement and therefore violated Section 8(a)(5) and (1) of the Act by failing to apply the NECA agreement to unit employees.

(Tr. 111-12, 138, 185-88, 215-22, 241-43, 273-76; RX 4, GCX 2, 3, 6, 12, 13, 33)

20. ALJD, page 15, lines 29-52 and page 16, lines 1-36:

The ALJ's finding and underlying rationale that Colacino was not forced, duped or fraudulently induced in signing the letters of assent C for NE 2.0 and Colacino.

(Tr. 28, 85-90, 111-12, 183-89, 191-92, 215-22, 246-53, 273-76, 291-93; RX 2, GCX 6, 9, 10, 13.)

21. ALJD, page 19, lines 7-20:

The ALJ's finding and underlying rationale that Respondents violated Section 8(a)(3) and (1) of the Act by unlawfully terminating the employment of Blondell.

(Tr. 145-48, 227-29, 273-76, 278; GCX 21, 22, 23.)

22. ALJD, page 19, lines 24-50 and page 20, lines 1-14:

The ALJ's "Conclusions of Law" and underlying rationale finding that Respondents together constitute a single integrated business and were at all material times alter egos and a single employer within the meaning of the Act; that Respondents constitute a single employer engaged in commerce within the meaning of the Act; that Respondents violated Section 8(a)(5) and (1) of the Act; and that Respondents violated Section 8(a)(3) and (1) of the Act.

(Tr. 11-12, 28, 32, 80-81, 83-84, 85-90, 96, 111-12, 138, 145-48, 152-53, 166-69, 171-73, 174-75, 179, 182, 183-84, 185-88, 189, 191-92, 215-17, 218-22, 227-29, 238-39, 241-44, 246-53, 261, 266-67, 273-76, 278, 283-88, 291-93; RX 2, 3; GCX 1a, 1c, 1e, 1i, 2, 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 21, 22, 23, 28, 33.)

23. ALJD, page 20, lines 18-51 and page 21, lines 1-7:

The entire portion of the ALJ's Decision entitled "Remedy."

(Tr. 11-12, 28, 32, 80-81, 83-84, 85-90, 96, 111-12, 138, 145-48, 152-53, 166-69, 171-73, 174-75, 179, 182, 183-84, 185-88, 189, 191-92, 215-17, 218-22, 227-29, 238-39, 241-44, 246-53, 261, 266-67, 273-76, 278, 283-88, 291-93; RX 2, 3; GCX 1a, 1c, 1e, 1i, 2, 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 21, 22, 23, 28, 33.)

24. ALJD, page 21, lines 8-44 and page 22, lines 1-32:

The entire portion of the Order requiring Respondents to cease and desist from certain activity and to take affirmative action as set forth in the ALJD.

(Tr. 11-12, 28, 32, 80-81, 83-84, 85-90, 96, 111-12, 138, 145-48, 152-53, 166-69, 171-73, 174-75, 179, 182, 183-84, 185-88, 189, 191-92, 215-17, 218-22, 227-29, 238-39, 241-44, 246-53, 261, 266-67, 273-76, 278, 283-88, 291-93; RX 2, 3; GCX 1a, 1c, 1e, 1i, 2, 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 21, 22, 23, 28, 33.)

25. The Appendix to the ALJD entitled "Notice to Employees" in its entirety.

(Tr. 11-12, 28, 32, 80-81, 83-84, 85-90, 96, 111-12, 138, 145-48, 152-53, 166-69, 171-73, 174-75, 179, 182, 183-84, 185-88, 189, 191-92, 215-17, 218-22, 227-29, 238-39, 241-44, 246-53, 261, 266-67, 273-76, 278, 283-88, 291-93; RX 2, 3; GCX 1a, 1c, 1e, 1i, 2, 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 21, 22, 23, 28, 33.)

III. Respondents Except to the Failure of the Administrative Law Judge to Make Certain Findings, Conclusions and Recommendations

The failure of the Administrative Law Judge to make each of the following findings, conclusions and/or recommendations was improper, contrary to the record evidence, not supported by the record considered as a whole, and contrary to established law, as set forth more fully in Respondents' Supporting Brief.

26. ALJD, page 15, lines 27-52 and page 16 lines 1-37:

The ALJ's failure to find the Respondents' defense based on the doctrines of detrimental reliance, equitable estoppel, misrepresentation and/or unclean hands meritorious.

(Tr. 11-12, 28, 32, 80-81, 83-84, 85-90, 96, 111-12, 138, 145-48, 152-53, 166-69, 171-73, 174-75, 179, 182, 183-84, 185-88, 189, 191-92, 215-17, 218-22, 227-29, 238-39, 241-44, 246-53, 261, 266-67, 273-76, 278, 283-88, 291-93; RX 2, 3; GCX 1a, 1c, 1e, 1i, 2, 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 21, 22, 23, 28, 33.)

27. ALJD, page 15, lines 27-52 and page 16 lines 1-37:

The ALJ's failure to find the Respondents' defense based on the doctrines of fraud in the execution and/or fraud in the inducement meritorious.

(Tr. 11-12, 28, 32, 80-81, 83-84, 85-90, 96, 111-12, 138, 145-48, 152-53, 166-69, 171-73, 174-75, 179, 182, 183-84, 185-88, 189, 191-92, 215-17, 218-22, 227-29, 238-39, 241-44, 246-53, 261, 266-67, 273-76, 278, 283-88, 291-93; RX 2, 3; GCX 1a, 1c, 1e, 1i, 2, 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 21, 22, 23, 28, 33.)

28. ALJD, page 14, lines 10-41:

The All's failure to find and conclude that Respondents timely terminated all letters of assent C.

(Tr. 11-12, 28, 32, 80-81, 83-84, 85-90, 96, 111-12, 138, 145-48, 152-53, 166-69, 171-73, 174-75, 179, 182, 183-84, 185-88, 189, 191-92, 215-17, 218-22, 227-29, 238-39, 241-44, 246-53, 261, 266-67, 273-76, 278, 283-88, 291-93; RX 2, 3; GCX 1a, 1c, 1e, 1i, 2, 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 21, 22, 23, 28, 33.)

Dated: January 30, 2014
Pittsford, New York

Respectfully submitted,

HARRIS BEACH PLLC

By: /s/ Edward A. Trevvett
Edward A. Trevvett
Attorneys for Respondents Newark Electric Corp., Newark Electric 2.0, Inc. and Colacino Industries, Inc.
99 Garnsey Road
Pittsford, New York 14534
Telephone: (585) 419-8800
Facsimile: (585) 419-8817

APPENDIX I

NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed 10/05/2015]

No. 15-1111
Consolidated with 15-1162

NEWARK ELECTRIC CORP., NEWARK ELECTRIC 2.0, INC., and COLACINO INDUSTRIES, INC.,

Petitioners-Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner

On Petition for Review and Cross-Application for Enforcement of a Decision and Order of the National Labor Relations Board in NLRB Case No. 03-CA-088127

BRIEF FOR PETITIONERS

Edward A. Trevvett
Gregory M. Dickinson
HARRIS BEACH PLLC
99 Garnsey Road
Pittsford, New York 14534
E-mail: etrevvett@harrisbeach.com
Tel.: 585-419-8643

Attorney for Petitioners-Cross-Respondents

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici. The following parties appeared before the National Labor Relations Board in *Newark Electric Corp. et al.* and *International Brotherhood of Electrical Workers, Local 840*, No. 03–CA–088127 and are parties in this Court:

(1) Petitioners-Appellants Newark Electric Corp., Newark Electric 2.0, Inc., and Colacino Industries, Inc.

(2) Respondent-Appellee National Labor Relations Board

International Brotherhood of Electric Workers Local 840 was the charging party in the NLRB case but is not a party to this appeal. There is no intervenor or amicus.

Rulings Under Review. The Petitioners seek review of the Decision and Order of the National Labor Relations Board dated March 26, 2015 along with the attached Administrative Law Judge's Decision in the case captioned *Newark Electric Corp. et al.* and *International Brotherhood of Electrical Workers, Local 840*, No. 03–CA–088127. A copy of the Decision and Order was attached to the Petition for Review filed on April 20, 2015 and to Petitioners' Notice of Filing Underlying Decision from Which Petition Arises filed May 21, 2015.

Related Cases. This case on review was not previously before this Court or any other court, and there is no related case before this Court or any other court as defined in Circuit Rule 28(a)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioners state that Newark Electric Corp., Newark Electric 2.0, Inc., and Calacino Industries, Inc. have no parent corporations, and no publicly held corporation holds 10% or more of the stock of any of the corporations. Newark Electric 2.0, Inc. provides power distribution, lighting, and emergency power solutions. Colacino Industries is a high technology control systems provider specializing in industrial IT services, cloud-based computing, and network security. Newark Electric Corp. has not done any business in the last ten years, but formerly provided power solutions in western New York.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
JURISDICTIONAL STATEMENT	1
STANDING	1
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
I. PROCEDURAL HISTORY	2
II. STATEMENT OF FACTS	4
A. Colacino Industries, Inc.	4
B. Newark Electric 2.0	5
C. Newark Electric Corp.	5
D. Union Agent Mike Davis	6
E. The First Letter of Assent	7
F. The Second Letter of Assent	8
G. Termination of Petitioners' Relationship with the Union	10
H. The Union's Response to Colacino's Decision	11
SUMMARY OF THE ARGUMENT	13
ARGUMENT	15
I. STANDARD OF REVIEW	15
II. ACTING GENERAL COUNSEL LAFE SOLOMON WAS SERVING IN VIOLATION OF THE FEDERAL VACANCIES REFORM ACT AT THE TIME THE COMPLAINT ISSUED	16
III. THE BOARD LACKED A QUORUM AT THE TIME THE COMPLAINT ISSUED	19

A. *Noel Canning* and the Three-Member Quorum Requirement 19

B. The Power to Issue Complaints is a Board Power 21

C. The Assignment of the Complaint-Issuing Power Does Not Permit Its Exercise When the Board Lacks a Quorum 25

IV. THERE WAS NO ENFORCEABLE AGREEMENT BETWEEN PETITIONERS AND THE UNION 28

A. Colacino Industries is in Neither a Single Employer nor an Alter Ego Relationship with Newark Electric Corporation 30

B. Alternatively, If Colacino Industries and NEC Were Alter Egos, then Both Letters of Assent Were Validly Terminated in April 2012 33

V. COLACINO INDUSTRIES DID NOT CONSTRUCTIVELY DISCHARGE ANTHONY BLONDELL 34

CONCLUSION 37

STATUTORY ADDENDUM

5 U.S. Code § 3345 - Acting officer......................Add. 1

5 U.S. Code § 3346 - Time limitation..................Add. 3

29 U.S. Code § 153 - National Labor Relations Board ....Add. 4

29 U.S. Code § 159 - Representatives and elections..Add. 6

29 U.S. Code § 160 - Prevention of unfair labor practices ....Add. 9

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases Page

Carr Finishing Specialties, Inc., 358 NLRB No. 165 (2012) 30

ConAgra, Inc. v. NLRB, 117 F.3d 1435 (D.C. Cir. 1997) 15

Concourse Nursing Home, 328 NLRB 692 (1999) 34

Crawford Door Sales Co., 226 NLRB 1144 (1976) 34

Crowley Marine Servs., Inc. v. NLRB, 234 F.3d 1295 (D.C. Cir. 2000) 5

Emerson v. Fisher, 246 F. 642 (1st Cir. 1918) 28

Federated Logistics & Operations v. NLRB, 400 F.3d 920 (D.C. Cir. 2005) 15

Haleston Drug Stores v. NLRB, 187 F.2d 418 (9th Cir. 1951) 18

Hooks v. Kitsap Tenant Support Services, Inc., No. C13-5470 BHS, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013) 18

*[1]*Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*,564 F.3d 469 (D.C. Cir. 2009) .. 20, 24, 27, 28

Lively Elec., Inc., 316 NLRB 471 (1995) 35

New Process Steel v. NLRB, 560 U.S. 674 (2010) 15, 25

Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013) 14, 19, 20

NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) 20, 21, 25

---

[1] Authorities upon which we chiefly rely are marked with asterisks.

Pallet Companies, Inc., 361 NLRB No. 33 (2014) 22

Richardson Chemical Co., 222 NLRB 5 (1976) .. 22

SSC Mystic Operating Co. v. NLRB, Nos. 14–1045, 14–1089, 2015 WL 5474118 (D.C. Cir. Sept. 18, 2015) 26

**SW Gen., Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015) 3, 4, 13, 16, 17, 18, 26

Tradesmen Int'l, Inc. v. NLRB, 275 F.3d 1137 (D.C. Cir. 2002) 15

UC Health v. NLRB, Nos. 14–1049, 14–1193, 2015 WL 5474171 (D.C. Cir. Sept. 18, 2015) 26, 27, 28

Statutes

5 U.S.C. § 3345 .... 16, 17

5 U.S.C. § 3346 16

29 U.S.C. § 153(b) 20, 24, 26, 27, 28

*29 U.S.C. § 153(d) 22, 23, 24, 26, 28

29 U.S.C. § 159(b) 27

29 U.S.C. § 159(c) 27

29 U.S.C. § 160(a) 1

*29 U.S.C. § 160(b) 2, 13, 19, 20, 22, 23, 24, 25, 26

29 U.S.C. § 160(e) 1, 15

29 U.S.C. § 160(f) 1

Other Authorities

157 Cong. Rec. S69 (daily ed. Jan. 5, 2011) 16

Rules

Fed. R. App. P. 15(a) 1

Constitutional Provisions

U.S. Const. art. II, § 2, cl. 3 20

JURISDICTIONAL STATEMENT

The NLRB asserted subject jurisdiction over the underlying case under 29 U.S.C. § 160(a). The Board issued a final Decision and Order on March 26, 2015. The Board's decision is reported as *Newark Electric Corp., Newark Electric 2.0, Inc., & Colacino Industries, Inc. & International Brotherhood of Electrical Workers, Local 840*, No. 03–CA–088127, 2015 WL 1439923 (N.L.R.B. Mar. 26, 2015). In accordance with Rule 15(a) of the Federal Rules of Appellate Procedure, on April 20, 2015, Petitioners petitioned this Court for review. This Court has jurisdiction over the Petition for Review under 29 U.S.C. § 160(f) and over the Board's Cross-Application for Enforcement under 29 U.S.C. § 160(e).

STANDING

As the parties aggrieved by the Board's decision, Petitioners have standing under 29 U.S.C. § 160(f) to petition the Court to review and set aside the decision.

STATEMENT OF THE ISSUES

1. Whether the National Labor Relations Board's Acting General Counsel Lafe Solomon was validly appointed and held the power to authorize the Complaint in this case?
2. Whether the Board's power to issue unfair labor practice complaints pursuant to 29 U.S.C. § 160(b) may be exercised when the Board lacks a three-member quorum?
3. Whether the Board erred in concluding that there was an enforceable Letter of Assent C Agreement between Colacino Industries and the Union?

4. Whether the Board erred in finding that Petitioners constructively discharged Anthony Blondell in order to discourage union membership?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On August 28, 2012, the International Brotherhood of Electrical Workers Local 840 (the "Union") filed a charge alleging that Newark Electric Corp. ("NEC") and Colacino Industries, Inc. committed various unfair labor practices in violation of the National Labor Relations Act. On October 25, 2012, the Union filed an amended charge, adding Newark Electric 2.0 ("NE 2.0"). As amended, the charge alleged that NEC, Colacino, and NEC 2.0 violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act by (1) abnegating a collective bargaining agreement with the Union mid-term; and (2) laying off or constructively discharging Union member Anthony Blondell in order to discourage union membership.

Acting General Counsel of the National Labor Relations Board Lafe Solomon issued a complaint on May 30, 2013, through Regional Director Rhonda Ley. Petitioners filed a timely answer to the complaint, including the affirmative defense that the complaint should be dismissed because "the Acting General Counsel was not validly appointed under the Federal Vacancies Reform Act at the time [the] Complaint was issued." J.A. 42.

A hearing was held before Administrative Law Judge Kenneth W. Chu, who on January 6, 2014 rendered a decision concluding that the Petitioners committed unfair labor practices in violation of the Act. The Board affirmed in a Decision and Order dated

March 26, 2015, No. 03–CA–088127. Petitioners filed a petition for review by this Court on April 20, 2015.

Briefing was originally scheduled to begin in July 2015, but on June 18, 2015, Petitioners moved to defer briefing pending the resolution of *SW Gen., Inc. v. NLRB*, which was then under consideration by a prior panel of this Court and raised a legal issue determinative of this appeal—whether Acting National Labor Relations Board General Counsel Lafe Solomon was validly appointed to his position, and, if not, whether his invalid appointment required vacature of a Board decision resulting from a complaint issued during his period of unauthorized service. *See* 796 F.3d 67, 70 (D.C. Cir. 2015). Over the Board's opposition, the Court ordered briefing deferred until October 2015 in light of *SW General*.

SW General was decided on August 7, 2015. The Court concluded that Solomon had been ineligible to serve as Acting General Counsel from January 5, 2011 to November 4, 2013, and vacated an NLRB order resulting from a complaint issued during his unauthorized service on the ground that Solomon had lacked the power to authorize the underlying complaint.

II. STATEMENT OF FACTS

A. Colacino Industries, Inc.

Colacino Industries was formed in February 2000 by James Colacino, its President and 100% owner. Colacino Industries' primary business is as an automation systems integrator. It provides high technology solutions including software development, software service, and hosted software applications mainly for the water and wastewater, food industry, and manufacturing industries. Colacino Industries' automationhouse and systems-integration work includes building automation systems, high technology robotic welding systems, telemetry, SCADA (shorthand for "Supervisory Control And Data Acquisition," which is a type of industrial control monitoring system), and cloud computing. Traditional "pipe and wire" electrical contracting work also constitutes a small percentage of Colacino Industries' business. Prior to 2011, Colacino Industries was a nonunion company.

B. Newark Electric 2.0

Newark Electric 2.0 ("NE 2.0") was formed on March 8, 2011, also by James Colacino, its President and 100% owner. NE 2.0 was formed after years of discussions between Colacino and Union Business Agent Mike Davis, who regularly pressured Colacino to convert Colacino Industries to a union company by entering into a Letter of Assent C agreement (hereinafter "Letter of Assent") with the International Brotherhood of Electrical Workers ("IBEW"). Colacino formed NE 2.0 to segregate from Colacino Industries the small percentage of its business that was traditional "pipe and wire" bargaining unit work covered by the Union's multi-employer agreements with the Finger Lakes Chapter of the National Electrical Contractors Association. Simultaneously with NE 2.0's formation, Colacino signed NE 2.0 to a Letter of Assent with the Union effective February 24, 2011.

C. Newark Electric Corp.

Newark Electric Corp. ("NEC") was formed in May 1979 and was at all times 100% owned by Richard Colacino, James Colacino's father. James Colacino worked for his father Richard at NEC from the 1970s to the 1990s, but at no time was James Colacino ever an owner or officer of NEC or authorized to sign agreements on its behalf; he was simply an employee. In 2000 NEC ceased operations, and Richard Colacino sold all of the company's assets only to James Colacino for $500,000.00. Richard Colacino retained 100% ownership and control of NEC after the asset sale. After paying off a tax lien that prevented him from immediately dissolving the company, Richard Colacino was finally able to dissolve NEC on April 3, 2013.

D. Union Agent Mike Davis

Since 2005, Union Agent Mike Davis has regularly pressured James Colacino to sign an agreement with the IBEW Local 840 and convert Colacino Industries into a union contractor. Colacino tried to explain that he did not believe that the Union and the employees it could supply from the hiring hall were a good fit for the vast majority of Colacino Industries' business, but Davis was tenacious and his presence ubiquitous. J.A. 98. Davis made it his business to stalk Colacino at his office for months, circling in the parking lot or parking and waiting as long as an hour and a half for Colacino to show up. Davis would barge past Colacino's staff and into his office in the back to badger him about signing with the Union. J.A. 123–24.

At one point, Davis provided Colacino with an electrician from the hiring hall, Anthony Blondell, as a trial worker to demonstrate the benefits of Union affiliation. J.A. 113–14. When Colacino would not agree to sign his company up with the Union, Davis ended that relationship and forced Blondell to come back to the hall, threatening to make Blondell pay $38,000 into the Union benefits funds if he continued working for Colacino. Davis also engaged in a campaign of economic blackmail against Colacino by hiring away his employees and then laying them off to deprive Colacino of his skilled workforce and cause him significant unemployment insurance expenses. J.A. 114.

Davis continued to inundate Colacino with calls, texts, and messages, and even Facebook comments. Every time he cornered Colacino, he would have a Letter of Assent ready for him to sign, to make all the problems "go away."

E. The First Letter of Assent

At his wits end, Colacino ultimately capitulated to Davis's requests. Colacino created Newark Electric 2.0 to separate out the traditional "pipe and wire" electrical work (at which the Union is most proficient) from Colacino Industries' other business and agreed to give the Union a try with the new company. Davis prepared a Letter of Assent, and on February 24, 2011, Colacino met with Davis and another representative of the Union to sign the agreement.

The Petitioners and the Union dispute whether the First Letter of Assent was intended to be between the Union and NEC or between the Union and NE 2.0. Davis prepared the document for Colacino's signature on behalf of "Newark Electric," but at that time NEC had long since ceased all operations, and any agreement on NEC's behalf would have required the signature of Colacino's father, who owned the assetless company. Ultimately, however, the Board found that NEC and not NE 2.0 was the true party to the First Letter of Assent because Colacino had signed the document as drafted and because NE 2.0 was still in the process of forming at the time of the agreement and did not have its own Federal tax number. J.A. 13–15, 18.

The First Letter of Assent was for a six-month trial period with the Union effective February 24, 2011. The agreement was to bind the company for 180 days, after which it would have the opportunity to terminate the agreement by written notice to the Union.

F. The Second Letter of Assent

Within a few months[2] of the agreement it became clear to Colacino that operating NE 2.0 and Colacino Industries separately was unsustainable. NE 2.0 suffered from cash-flow problems because, as a startup company, it did not have the necessary cash reserves to meet payroll and other expenses when faced with slow-paying customers. In addition, Colacino's insurance costs rose dramatically because NE 2.0 was a new business and because the Union's tactic of hiring away and then laying off Colacino's workers had monumentally increased his unemployment insurance expenses. J.A. 96–97.

In early summer 2011, Colacino realized that his strategy to separate Colacino Industries' traditional electrical business into NE 2.0 could not continue, and

[2] The Decision and Order's discussion of the timing of the Second Letter of Assent is inconsistent. In a section of the decision that questions Colacino's testimony that he was operating Colacino Industries as a distinct entity from NEC, the ALJ found that although Colacino testified that "he was trying to operate the companies as two separate businesses . . . [n]evertheless, Colacino signed Respondent Colacino Industries to a Letter of Assent[] just 2 months after signing Newark Electric." J.A. 14. The two-month figure is drawn from Colacino's own misrecollection during his testimony, J.A. 96, and is clearly mistaken. The Decision recognizes in footnote 8 that the two-month figure cannot be correct, but nonetheless relies on it on two separate occasions: once to question whether Colacino truly operated NEC and Colacino Industries as separate entities, J.A. 14, and a second time when it noted that he was "anxious" to sign up Colacino Industries as a reason to doubt his testimony generally, J.A. 19.

so he began to consider his options. According to the terms of the First Letter of Assent, there was no way to terminate the agreement until the expiration of the 180-day trial period on August 24, 2011. Colacino considered riding out the agreement for a few more months and "pulling the plug" on the NE 2.0 experiment by terminating the First Letter of Assent at the end of the six months. J.A. 97.

But when Colacino raised the difficulty of operating the two companies with Union Agent Davis, they agreed to a different option. Instead of waiting out the 180-day period of the First Letter of Assent, Colacino could re-combine NE 2.0 and Colacino Industries' business immediately, go back to operating as a single entity,[3] and test out the Union with the combined businesses by entering into a Second Letter of Assent on behalf of Colacino Industries that would commit the company to using Union workers for that portion of its business that was bargaining unit work. J.A. 97.

Colacino agreed to the plan and signed a Second Letter of Assent, this time on behalf of Colacino Industries, on July 20, 2011. After signing the Second

[3] The ALJ's findings of fact as adopted by the Board evidence a misunderstanding of Colacino's and Davis's testimony regarding the decision to re-combine NE 2.0 and Colacino Industries. The ALJ understood their testimony to be that they agreed that Colacino's problems would be resolved "if Colacino *also* sign[ed] up Colacino Industries to a Letter of Assent," J.A. 14, in addition to the First Letter of Assent with NE 2.0. But Colacino and Davis both testified that the goal was to re-combine the businesses into a single entity. Colacino's testimony was that he and Davis agreed to "simplify it" by going back to operating "under one footprint." J.A. 97. And Davis testified that Colacino entered into the Second Letter of Assent because "it was getting hard . . . to keep track of the two different companies . . . and he wanted to put them all in one spot." J.A. 52.

Letter of Assent, Colacino re-combined the two companies. NE 2.0 ceased operating, and Colacino conducted all business through Colacino Industries. Like the previous agreement, the Second Letter of Assent provided for a 180-day Union trial period, after which the company would have the opportunity to terminate the agreement by written notice to the Union.

G. Termination of Petitioners' Relationship with the Union

By the spring of 2012 it was time for Colacino to make a decision regarding whether to continue with the Union. The window for terminating the Second Letter of Assent had opened in January 2012 and would close on the agreement's one-year anniversary, July 20, 2012.

Colacino determined that it was not to his company's advantage to continue with the Union, and so in April 2012 he instructed his CFO to take the necessary steps to terminate the Second Letter of Assent. A letter terminating the Second Letter of Assent was sent to the Union on April 12, 2012, notifying it that Colacino Industries had decided to terminate its agreement with the Union effective May 26, 2012. It is undisputed that this letter effectively terminated Colacino Industries' agreement with the Union. J.A. 15.

H. The Union's Response to Colacino's Decision

The Union did not take Colacino's decision lying down. In June 2012, Colacino learned through some of his employees (Tony Blondell, Scott Barra, and Rick Bush), that the Union was taking the position that he was still operating a union company by virtue of the First Letter of Assent. J.A. 105. In particular, union members Rick Bush and Scott Barra had each separately gone to Davis to withdraw from the Union so that they could work for Colacino Industries as a nonunion company. J.A. 15, 54–57. Davis explained to them that in the Union's view Colacino was still operating a union company, told them that if they thought it was a nonunion company they would have to relinquish their union memberships to work there, but warned them that the Union planned to fight Colacino on the issue and that if it were found to be a Union company, they would not be able to work for it if they relinquished their memberships. J.A. 57.

Despite Davis's threat, Barra and Bush both decided to resign their memberships and work for Colacino Industries, in their view a nonunion company. At this same time another of Colacino Industries' union employees, Anthony Blondell, made a different choice[4] based on his much longer membership in the Union and its pension plan. He approached Colacino and asked to be laid off so that he could escape the Union battle with his pension and good standing intact. J.A. 107–08.

When Colacino learned that the Union was taking the position that Colacino Industries was still bound to the Union through the old First Letter of Assent (between the Union and "Newark Electric"), he immediately directed his CFO to terminate the First Letter of Assent. Alerted to the Union's theory that his company was bound by the old agreement, Colacino also immediately started the process of officially dissolving NE 2.0, which had ceased operating in July 2011 when

---

[4] The Board found that Blondell did not freely end his employment with Colacino Industries and was constructively discharged when the company ended its relationship with the Union. This finding was in error for reasons discussed *infra* Part V.

the Second Letter of Assent was signed, but had never been officially dissolved. J.A. 111, 411.

True to its threat, the Union soon filed a charge with the NLRB challenging Colacino Industries' decision to become a nonunion company by alleging (1) that even after it terminated the Second Letter of Assent Colacino Industries remained bound through the Union's First Letter of Assent with "Newark Electric"; and (2) that the company terminated or constructively discharged Anthony Blondell in order to discourage union membership.

SUMMARY OF THE ARGUMENT

First. This Court held in *SW General v. NLRB* that from January 5, 2011 to November 4, 2013, Lafe Solomon served as the NLRB's Acting General Counsel in violation of the Federal Vacancies Reform Act (FVRA). 796 F.3d 67 (2013). The Court concluded that because Solomon's service was in violation of the FVRA he lacked the power to authorize the underlying complaint and therefore vacated the NLRB's decision and order. The error was not harmless, reasoned the Court, because given the General Counsel's statutory function as supervisor of the NLRB's prosecutorial arm, it is impossible to "be confident that the complaint . . . would have issued under an Acting General Counsel other than Solomon." *SW Gen.*, 796 F.3d at 80.

The same result is warranted here. The original charge against Petitioners was filed on August 28, 2012, and the complaint issued on May 30, 2013, meaning that both the investigation and decision to issue the complaint occurred during Solomon's period of unauthorized service. Because the complaint issued while Solomon was serving in violation of the FVRA and lacked authority to issue complaints, the resultant Decision and Order must be vacated.

Second. The Board initiated the underlying proceeding against Petitioners pursuant to its authority under § 160(b) of the NLRA, which grants the Board the authority to issue unfair labor practice complaints. 29 U.S.C. § 160(b). In order to exercise its powers under the NLRA, however, the Board must have a quorum of three members. The Decision and Order must be vacated because at the time it issued the underlying complaint the Board had only a single validly appointed member, did not meet the NLRA's quorum requirement, and therefore could not exercise its power to issue complaints. *See Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *aff'd* 134 S. Ct. 2550 (2014).

Third. The Board erred in holding that there was an enforceable Letter of Assent between Colacino Industries and the Union. It is undisputed that Colacino Industries terminated its agreement with the Union, the Second Letter of Assent, in April 2012, and Colacino Industries cannot be vicariously bound by the First Letter of Assent between the Union and NEC.

Fourth. The Board's finding that Colacino Industries discharged Anthony Blondell in order to discourage union membership is not supported by the evidence. The evidence shows that Blondell decided to end his employment with Colacino Industries based on his own personal assessment of the benefits and risks of continuing as a Union member to work for Colacino Industries after it became a nonunion company—continued employment with Colacino Industries versus unemployment insurance benefits and avoiding being brought up on charges by the Union, facing

Union discipline, or even losing his Union pension benefits.

ARGUMENT

I. STANDARD OF REVIEW

In determining whether to enforce an NLRB order, the Court must initially consider whether the Board had statutory authority to act. The NLRB is a creature of statute, and when it acts outside that authority, its actions must be set aside. *See New Process Steel v. NLRB*, 560 U.S. 674, 688 (2010).

The Court should set aside an NLRB order if the Board "erred in applying established law to the facts" or when its findings of facts are unsupported by the record. *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1438 (D.C. Cir. 1997). The Court will defer to the Board's findings of fact if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). However, the Court "does not function simply as the Board's enforcement arm," *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1141 (D.C. Cir. 2002), and "[its] review is not a mere rubber stamp." *Crowley Marine Servs., Inc. v. NLRB*, 234 F.3d 1295, 1303 (D.C. Cir. 2000). The evidence supporting the Boards' factual determinations must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 923 (D.C. Cir. 2005).

II. ACTING GENERAL COUNSEL LAFE SOLOMON WAS SERVING IN VIOLATION OF THE FEDERAL VACANCIES REFORM ACT AT THE TIME THE COMPLAINT ISSUED

The Board's Decision and Order must be set aside because it was the result of a complaint authorized by Lafe Solomon while he was serving as the Board's Acting General Counsel in violation of the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 *et seq*. Passed in 1998 as a "reclamation of the Congress's Appointments Clause power," the FVRA imposes certain restrictions on the President's power to appoint acting administrative officers to serve during unexpected vacancies. *See SW Gen., Inc. v. NLRB*, 796 F.3d 67, 70 (D.C. Cir. 2015). Under the FVRA the President may choose to appoint an acting officer in case of a vacancy, but "[g]enerally speaking [that] acting officer can serve no longer than 210 days and cannot become the permanent nominee for the position." *Id.* (citing §§ 3346; 3345(b)).

The President appointed Lafe Solomon on June 18, 2010, to serve as the Acting General Counsel of the National Labor Relations Board effective June 21, 2010. 198 days into Solomon's temporary appointment, the President nominated him on January 5, 2011, to a permanent position as the NLRB's General Counsel. 157 Cong. Rec. S69 (daily ed. Jan. 5, 2011). The Senate, however, returned Solomon's nomination, and after another unsuccessful nomination in May, 2013, the President ultimately withdrew Solomon's nomination and instead nominated Richard Griffin. Griffin was confirmed by the Senate and sworn in as NLRB's General Counsel on November 4, 2013. Solomon served as Acting General Counsel from June 21, 2010 to November 4, 2013.

In *SW General* this Court held that Solomon's service as Acting General Counsel after January 5, 2011, violated the FVRA because on that date he was nominated to a permanent position as the NLRB's General Counsel and thus became ineligible to continue serving as Acting General Counsel. *See* 796 F.3d at 69–72; 5 U.S.C. § 3345(b)(1). After concluding that Solomon's unauthorized service was neither harmless error nor immune from challenge under the de facto officer doctrine, the Court in *SW General* vacated an NLRB order resulting from a complaint issued during Solomon's period of unauthorized service (January 5, 2011 to November 4, 2013) on the ground that Solomon had lacked the power to authorize the underlying complaint. *SW Gen.*, 796 F.3d at 78–82.

The same result is warranted here. The original charge was filed on August 28, 2012, and the complaint issued on May 30, 2013, meaning that both the investigation and decision to issue the complaint occurred during Solomon's period of unauthorized service. From the very beginning and consistently throughout the litigation, Petitioners have challenged the legitimacy of the Board's complaint on the ground that Solomon's service as Acting General Counsel violated the FVRA—as an affirmative defense to the complaint, as a ground for dismissing the complaint in their post-hearing brief before the ALJ, as an exception to the ALJ's decision in their appeal to the Board, and now in their request for review by this Court. J.A. 42, 439–42, 464, 486–88.

The issue of Solomon's appointment has been preserved for review, and, as in *SW General*, Petitioners have satisfied the de facto officer doctrine's requirements for a collateral attack on an official's authority because (1) Petitioners initially challenged Solomon's authority as a defense to the Board's complaint against them; and (2) the Board was made aware of the defect by Petitioners' August 23, 2013 answer.[5] *See* 796 F.3d at 81–82. Solomon's service in violation of the FVRA has harmed Petitioners because "'oscillations in rigor are characteristic of prosecuting officers,'" and it is impossible to "be confident that the complaint . . . would have issued under an Acting General Counsel other than Solomon." *SW Gen.*, 796 F.3d at 80 (quoting *Haleston Drug Stores v. NLRB*, 187 F.2d 418, 422 n.5 (9th Cir. 1951)). Solomon lacked authority to issue the complaint that resulted in the challenged order, and that order must now be set aside.

III. THE BOARD LACKED A QUORUM AT THE TIME THE COMPLAINT ISSUED

A. *Noel Canning* and the Three-Member Quorum Requirement

The Board initiated the underlying proceeding against Petitioners pursuant to its authority under § 160(b) of the NLRA, which grants the Board the authority to issue unfair labor practice complaints against employers and to require them to appear before the Board or its designated agent for a hearing:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair

[5] Even before Petitioners' answer, the Board was aware of the defect in Solomon's appointment at least ten days earlier, when the Western District of Washington issued its decision in *Hooks v. Kitsap Tenant Support Services, Inc.*, No. C13-5470 BHS, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), which concluded that Solomon had not been validly appointed under the FVRA. "The [de facto officer doctrine's] notice requirement is satisfied if the agency learns of the defect from *any* source, not only the petitioner." *SW Gen.*, 796 F.3d at 82.

> labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency . . . ."

29 U.S.C. § 160(b). In order to exercise its powers under the NLRA, however, the Board must have a quorum of three members. The Decision and Order must be vacated because at the time it issued the underlying complaint against Petitioners the Board had only a single validly appointed member, did not meet the NLRA's quorum requirement, and therefore could not exercise the Board's power to issue complaints. *See Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *aff'd* 134 S. Ct. 2550 (2014).

The complaint issued on May 30, 2013. At that time the Board consisted of Chair Mark Pearce and Members Sharon Block and Richard Griffin. Pursuant to the Recess Appointments Clause, which gives the President the power "to fill up all Vacancies that may happen during the Recess of the Senate," U.S. Const. art. II, § 2, cl. 3, Members Block and Griffin were appointed by the President on January 4, 2012, during a three-day adjournment between Senate sessions, and they were sworn in five days later, on January 9, 2012.[6] The Supreme Court subsequently determined that their appointments were invalid, however, because the three-day adjournment did not constitute a "Recess

---

[6] Terence Flynn was also appointed and sworn in on these dates, but subsequently resigned in July 2012 before the complaint was issued.

of the Senate" within the meaning of the Recess Appointments Clause. *Noel Canning*, 134 S. Ct. at 2560–67, 2573–78.

When the Board issued the underlying complaint against the Petitioners in May 2013, it had only a single validly appointed member, Board Chair Mark Pearce. "It is undisputed that the Board must have a quorum of three in order to take action," *Noel Canning*, 705 F.3d 490 at 499, because the Act includes a "quorum provision [that] clearly requires that a quorum of the Board is, 'at all times,' three members." *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 473 (D.C. Cir. 2009) (quoting 29 U.S.C. § 153(b)). "[T]his requirement must always be satisfied." *Id.* Because the Board did not meet the NLRA's three-member quorum requirement, it could not lawfully exercise its power under 29 U.S.C. § 160(b) to issue the underlying unfair labor practice complaint.

B. The Power to Issue Complaints is a Board Power

The ALJ rejected Petitioners' quorum-requirement challenge to the complaint on the ground that this Court wrongly decided *Noel Canning*, that the recess appointments were valid, that the Board met the NLRA's quorum requirement, and that pending a final answer to the quorum question "the Board is charged to fulfill its responsibilities under the Act." J.A. 11. Following the Supreme Court's affirmance of *Noel Canning*, however, the Board acknowledged that it lacked a valid quorum and was precluded from invoking its powers under the NLRA at all times that it had fewer than three validly appointed members.

In its Decision and Order affirming the ALJ's determination, the Board developed a new rationale:

The Board did lack a quorum, but it turns out that that does not matter because the power to issue complaints is not a power of the Board, but, rather, a power vested directly in the General Counsel by the NLRA. According to the Board, "the presence or absence of a valid Board quorum has no bearing on the General Counsel or his agent's prosecutorial authority in this matter" because "[t]he General Counsel's authority . . . to issue and prosecute unfair labor practice complaints derives directly from the language of the Act, not from any power delegated by the Board." J.A. 7.

The Board's post hoc rationalization fails under the clear text of the NLRA.[7] The underlying complaint against Petitioners issued pursuant to § 160(b) of the Act, which grants *the Board* the authority to issue unfair labor practice complaints:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, *the Board*, or any agent or agency designated by the Board for such purposes, *shall have the power to issue and cause to be served upon such person a complaint* stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency . . . ."

29 U.S.C. § 160(b) (emphasis added). In support of its conclusion that the NLRA vests the power to issue a complaint directly in the General Counsel, exclusive

[7] The Board's argument also fails for the simple reason that even if the power to issue complaints were a non-Board power held directly by the General Counsel, that power was not validly exercised in this case because Acting General Counsel Solomon was serving in violation of the FVRA.

of the Board, the Board relied on 29 U.S.C. § 153(d),[8] which provides that the General Counsel shall be appointed by the President and have final authority over unfair labor practice investigations and complaints:

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. *He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title*, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

29 U.S.C. § 153(d). The Board reads this provision to create complaint-issuing power vested directly in the General Counsel and thus unaffected by any defects in the Board's power to act.

---

[8] The Decision and Order also cited *Pallet Companies, Inc.*, 361 NLRB No. 33 (2014) and *Richardson Chemical Co.*, 222 NLRB 5 (1976). *Pallet Companies* simply states the Board's statutory argument without additional elaboration, and *Richardson Chemical* is inapposite because it addresses whether the General Counsel can delegate his statutory responsibilities to an Acting Regional Director, not whether the NLRA designates the Board or the General Counsel as the first-order assignee of those powers.

That is not what the statute says. Section § 153(d) provides for a General Counsel that is to be appointed by the President as an independent officer of the Board, but there can be no doubt about whose authority the General Counsel is appointed to exercise. The General Counsel has the authority "*on behalf of the Board*, in respect of the . . . issuance of complaints" 29 U.S.C. § 153(d) (emphasis added). Such complaints are issued "under section 160 of this title," which expressly states that it is the Board that holds the ultimate complaint-issuing power: "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, *the Board*, or any agent or agency designated by the Board for such purposes, shall have the power to issue [a complaint]." § 160(b) (emphasis). Read together, Sections 160(b) and 153(d) of the NLRA plainly provide that that the authority to issue complaints is a power located in the Board and that that the officer responsible for exercising the Board's power to issue complaints is to be appointed by the President.

The reason that the Board must strain against the plain meaning of Sections 153(d) and 160(b)—searching for an extra-Board power to issue complaints vested by Congress directly in the General Counsel—is that powers located in the Board cannot be invoked when the Board lacks a quorum. As this Court explained in *Laurel Baye*, the Board's power to act exists only when the Board consists of at least three members. 564 F.3d 469, 475. When the Board's membership falls below the quorum, its powers cease, along with those of anyone authorized to act on its behalf. *Id.*

Laurel Baye addressed whether the two remaining members of a three-member Board subgroup to which the full Board had earlier delegated authority pursuant to § 153(b) could continue to act on behalf of the Board even after the full Board's membership fell below three members. The Board argued that § 153(b) should be read to carve out an exception from the usual three-member quorum requirement when the Board delegates its powers to subgroups and that § 153(b) instead requires a quorum of only two members for subgroups to whom the Board delegates authority under that section. *Id.* at 472–73.

Laurel Baye rejected the Board's reading, reasoning that "[§ 153(b)'s two-member] delegee group quorum provision . . . does not eliminate the requirement that a quorum of the *Board* is three members" and that "the Board cannot by delegating its authority circumvent the statutory Board quorum requirement, because this requirement must always be satisfied." *Id*. The Court went on to explain that this is so because "[t]he only authority by which the committee can act is that of the Board," and "[i]f the Board has no authority, it follows that the committee has none."[9] *Id.* at 473.

[9] The Supreme Court took up the two-member delegation question in *New Process Steel, L.P. v. NLRB* and, like *Laurel Baye*, concluded that a two-member subgroup could not act on behalf of the Board. 560 U.S. 674 (2010). *New Process Steel*, however, decided the issue on different grounds than did *Laurel Bay*, expressly reserving for the future the question of whether in all circumstances a delegee is precluded from acting in the absence of a Board quorum. *See* 560 U.S. at 684–85 & n.4. The Court declined to address whether "failure to meet a quorum requirement necessarily establishes that an entity's power is suspended so that it can be exercised by no delegee" and explained that delegations to regional directors or the general counsel "implicate[] a separate question that our decision does not address." *Id.* at 685, n.4. In this Circuit, however, that question has been answered by *Laurel Baye*.

The same holds true here. The General Counsel is appointed by the President to exercise the Board's authority under § 160 to issue complaints, and at those times that the Board has no authority, neither does the official appointed to exercise that authority on its behalf. Because the Board did not meet the NLRA's three-member quorum requirement, neither the Board nor the General Counsel on its behalf could lawfully exercise the Board's power under 29 U.S.C. § 160(b) to issue the underlying unfair labor practice complaint.

C. The Assignment of the Complaint-Issuing Power Does Not Permit Its Exercise When the Board Lacks a Quorum

The Supreme Court in *Noel Canning* having undermined the ALJ's determination, J.A. 11, that the Board in fact held the three-member quorum required to issue a complaint; this Court in *SW General* having rejected the Board's determination, J.A. 7, that Acting General Counsel Solomon was validly appointed and empowered to issue the underlying complaint; and the clear text of §§ 153(d) and 160(b) precluding the Board's reasoning below, J.A. 7, that the NLRA vests an extra-Board power to issue complaints directly in the General Counsel, the Board may now attempt to seize on two recent decisions by this Court to raise yet another theory on appeal: that the complaint-issuing power may be exercised even when the Board lacks a quorum because that power was assigned to the General Counsel and regional directors at a time when the Board did meet the three-member quorum requirement.

In two cases decided September 18, 2015, this Court considered whether the NLRB's regional directors could continue to exercise the power delegated to them pursuant to § 153(b) to conduct and certify union elections even at a time when the Board failed to satisfy § 153(b)'s three-member quorum requirement. Divided panels in each case concluded that "the lack of a quorum at the Board does not prevent Regional Directors from continuing to exercise delegated authority that is not final because it is subject to eventual review by the Board" once the Board regains a quorum. *SSC Mystic Operating Co. v. NLRB*, Nos. 14–1045, 14–1089, 2015 WL 5474118, at *3 (D.C. Cir. Sept. 18, 2015); *see UC Health v. NLRB*, Nos. 14–1049, 14–1193, 2015 WL 5474171 (D.C. Cir. Sept. 18, 2015).

In each case the Court reasoned that unlike *Laurel Baye*, in which a subgroup of the Board was delegated unreviewable "final authority [to] speak on the Board's behalf," the delegation of authority to conduct and certify union elections "expressly reserve[ed] for the Board the power to review and reverse any determination a Regional Director makes." *UC Health*, 2015 WL 5474171, at *8. Section 153(b) retains the Board's power to "review any action of a regional director delegated to him pursuant to this paragraph," including the power to conduct and certify union elections pursuant to §§ 159(b) and (c).

Because of this reserved power of Board review, "[n]o [union election] decision of the Regional Directors is ever final under its own power." *UC Health*, 2015 WL 5474171, at *9. Instead, "it is the Board's action—declining to grant review or granting review and upholding or reversing the Regional Director's decision—"that finally commits the Board's imprimatur because it is "the Board's ratification" that "give[s] binding force to a Regional Director's [union election] determination." *Id.* Under *UC Health*, the regional directors' continued exercise of their union-election power in the absence of a Board quorum is unproblematic because the regional directors wield only a nonfinal power rather than the Board's full authority. *Id.* at *8–9.

The statutory scheme by which complaint-issuing power is assigned to the General Counsel and regional directors is entirely different. The NLRA expressly precludes Board intervention in the General Counsel's complaint-issuing determinations by providing that "[h]e shall have *final authority*, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board." § 153(d) (emphasis added). Unlike the union-election power delegated pursuant to § 153(b), the Board's complaint-issuing power is wielded directly and finally by the General Counsel. When the Board itself lacks the power to take final action, so too does the General Counsel on its behalf. *See Laurel Baye*, 564 F.3d at 473; *UC Health*, 2015 WL 5474171, at *8 (citing *Emerson v. Fisher*, 246 F. 642, 648 (1st Cir. 1918) (assistant treasurer could not take final action in place of treasurer when no individual held that office)).

The Decision and Order must be vacated.

IV. THERE WAS NO ENFORCEABLE AGREEMENT BETWEEN PETITIONERS AND THE UNION

This case centers around two Letters of Assent entered into with the Union—one on February 24, 2011, and another later that year on July 20, 2011. Before the Board, the Petitioners and the Union disputed whether the First Letter of Assent was between the Union and Newark Electric or between the Union and Newark Electric 2.0. James Colacino signed the agreement on behalf of "Newark Electric," but NEC had ceased operations more than ten years previously, and, in any case, he was never its owner and never authorized to sign on its behalf. James Colacino understood the agreement to be between the Union and Newark Electric 2.0, a company that he formed at that time for the purpose of segregating out the traditional "pipe and wire" portion of Colacino Industries' business. Nonetheless, the Board found the agreement actually to have been between the Union and NEC because Newark Electric 2.0 was still in the process of forming at the time of the agreement and did not have a Federal tax number, and because James Colacino signed the document as drafted and did not alert the Union to any "red flags." J.A. 18.

No one has ever contended that James Colacino signed the First Letter of Assent on behalf of Colacino Industries. Instead, Colacino Industries' relationship with the Union was established by the Second Letter of Assent dated July 20, 2011. It is undisputed that Colacino Industries effectively terminated the Second Letter of Assent approximately nine months into the trial period with the Union. J.A. 18.

Nonetheless, the Board found Colacino Industries to have committed an unfair labor practice by breaching an agreement with the Union even though Colacino Industries undisputedly terminated the Second Letter of Assent—the only agreement it ever entered with the Union—and even though no one has ever contended that Colacino Industries was a signatory to the First Letter of Assent. In so concluding, the Board relied on a misapplication of the alter ego and single employer doctrines to bind Colacino Industries not through its own, concededly terminated, agreement with the

Union but through the First Letter of Assent that the Board found to have been entered into between the Union and NEC.

A. Colacino Industries is in Neither a Single Employer nor an Alter Ego Relationship with Newark Electric Corporation

The Board examines four factors to determine whether two nominally separate employing entities constitute a single employer: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) common control of labor relations. *Carr Finishing Specialties, Inc.*, 358 NLRB No. 165 (2012). With regard to alter ego status, the Board looks at additional factors including whether the entities are substantially identical based on their management, business purpose, operating equipment, customers, supervision and common ownership. *Id.*

The Board concluded that Colacino Industries was an alter ego of and single employer with NEC because Colacino Industries used purchase orders and invoices bearing the NEC logo; because it used the NEC logo on stationary, business cards, timesheets, company vehicle, and requisition forms; because the companies were housed in the same premises and used the same warehouse; and because James Colacino "made all the personnel decisions in the hiring and retaining of employees." J.A. 17. These findings do not satisfy the Board's multifactor tests for alter egos or single employers.

In concluding that NEC and Colacino Industries were operating as alter egos and a single employer, the Board quickly rushed past the critical threshold question of whether NEC was even operational at the point when alter ego status was asserted. In fact, NEC has been completely dormant since 2000 when

Richard Colacino sold all of NEC's assets, name and likeness, good will, and customer base to James Colacino for $500,000.00. The only reason NEC was not completely dissolved in 2000 is that Richard Colacino had to finish paying off a tax lien against that company. When that tax lien was paid off, NEC was promptly dissolved in 2013. Otherwise, NEC was completely defunct as of 2000.

The Board's conclusion that the two companies were alter egos and a single employer was based on erroneous findings of fact and begged the very question it was trying to answer. First, the ALJ based his conclusion that Colacino Industries was an alter ego of and single employer with NEC in part on his finding that at the time the Second Letter of Assent was signed, NEC continued to generate business and employ a number of individuals who were managed by James Colacino on behalf of both companies. J.A. 14, 17. But as the Board noted in its decision and order on appeal correcting the ALJ's fact finding, "the record reflects . . . that there were no union members employed by Newark Electric at that time." J.A. 7. *NEC was defunct and had no employees at all.*

Second, among the considerations that the Board relied on to conclude that Colacino Industries and NEC were alter egos is that if Colacino had truly been "trying to operate the companies as two separate businesses" he would not have "signed Respondent Colacino Industries to a Letter of Asset[] just 2 months after signing Newark Electric." J.A. 14. But that timeline of events is clearly inaccurate, as recognized in footnote 8 of the decision and shown by the dates on the Letters of Assent themselves. J.A. 230–32, 249–51.

Third, and most fundamentally, when the Board concluded that NEC was still conducting business operations because NEC's logo, premises, warehouse, etc. were still in use, it assumed the very question it was trying to answer. In reality, the fact that Colacino used NEC's assets is attributable to the fact that it purchased those assets in 2000 when NEC ceased operating as an active business.

Moreover, even if Colacino Industries and NEC had been operational at the same time they still would not satisfy the Board's established criteria for single employer or alter ego status. When both were operational, each entity was 100% owned and controlled by different individuals, Colacino by James Colacino and NEC by Richard Colacino. There was never any interrelation of operations or common control of labor relations, inasmuch as Colacino was formed in 2000 and NEC went completely dormant in 2000. While James Colacino worked for Richard Colacino at NEC prior to forming his own company and Richard Colacino works for James Colacino at Colacino Industries, neither ever had any ownership or management role in the other's company.

It is utterly nonsensical to say that NEC and Colacino Industries are substantially identical when the evidence shows that they never even existed contemporaneously as business entities and that even when the companies were operational, each was separately controlled and operated. The Decision and Order should be reversed insofar as it determined Colacino Industries to have committed unfair labor practices on the basis of an agreement between the Union and NEC.

B. Alternatively, If Colacino Industries and NEC Were Alter Egos, then Both Letters of Assent Were Validly Terminated in April 2012

Even assuming, *arguendo*, that Colacino Industries and NEC did contemporaneously operate and that the two were alter egos or a single employer, the Board erred in concluding that the signing by NEC of the First Letter of Assent and the signing by Colacino Industries of the Second Letter of Assent produced two distinct agreements each independently enforceable against either company. That is so because if the two companies were actually a single entity, the Second Letter of Assent entered into on July 20, 2011, merged with and superseded the earlier agreement, binding both Colacino Industries and NEC as a single employer. That Second Letter of Assent was effectively terminated by Colacino Industries' letter dated April 12, 2012, which undisputedly terminated the company's relationship with the Union effective May 26, 2012. J.A. 18.

The Board's decision attempts to have it both ways, but if Colacino Industries is to be treated as a single entity with and alter ego of NEC for the purpose of binding it by NEC's agreement with the Union, it must also be treated as a single entity for the purpose of extinguishing its relationship with the Union. The authorities cited by the Board in support of its decision, J.A. 18, are not to the contrary. *Concourse Nursing Home*, 328 NLRB 692 (1999), and *Crawford Door Sales Co.*, 226 NLRB 1144 (1976), stand for the common-sense proposition that an organization may be bound by an agreement entered into by its alter ego even though the organization did not itself enter into that agreement. But that is not this case. Here, Colacino Industries had *its own* agreement with the Union, which it validly terminated when Colacino decided to end his affiliation with the Union.

V. COLACINO INDUSTRIES DID NOT CONSTRUCTIVELY DISCHARGE ANTHONY BLONDELL

The Board concluded that Colacino Industries' constructively discharged Anthony Blondell in violation of Sections 8(a)(3) and 8(a)(1) of the Act by intentionally imposing working conditions on Blondell so difficult or unpleasant that he was forced to resign, and that it did so because of Blondell's union activities. A constructive discharge violation under these sections requires discriminatory treatment with a motive of encouraging or discouraging union membership. *Lively Elec., Inc.*, 316 NLRB 471, 472 (1995). In this case the Board relied on the Hobson's choice theory of constructive discharge, concluding that Colacino Industries discriminated against Blondell by forcing him to decide between losing his job and giving up his union membership. J.A. 20.

The evidence shows otherwise. As Colacino Industries moved to become a nonunion company, its Union employees (Blondell, Barra, and Bush) personally weighed their decisions to continue with Colacino Industries as Union members at a nonunion company, to continue with Colacino Industries but resign from the Union, or to leave employment with Colacino Industries altogether.

Barra and Bush decided to resign their Union membership and continue working for Colacino Industries. Barra, a former Union officer, testified that the Union had in the past permitted its members to go to inactive status and work for nonunion employers, but that when he asked Union Business Agent Davis for permission to remain with Colacino Industries after it went nonunion, Davis denied him permission. J.A. 119. Davis told Barra that he and the other Union members could not stay members of the Union and continue to work for a nonunion company. Barra testified that had he nonetheless continued with Colacino Industries without resigning from the Union, the Union would have brought him up on charges.[10] J.A. 119. In the end, both Barra and Bush chose to resign from the Union and continue working for Colacino Industries. J.A. 294, 296.

Blondell, based on his much longer membership in the Union and its pension plan, made a different decision. Stuck with no good choices in a tug-of-war between the Union and Colacino Industries, he approached Colacino and asked to be laid off. Colacino testified that Blondell was a good employee, that he had work for him to do, and that he had no intention of laying him off. And Blondell acknowledged that Colacino never told him to quit the Union. J.A. 82. But, despite his willingness to continue employing Blondell, Colacino laid Blondell off as he requested (citing a "lack of work" J.A. 308) so that Blondell could escape the Union tug-of-war with his pension and good standing intact. J.A. 107–08.

Colacino Industries never conditioned Blondell or the other Union members' employment on quitting the Union. The company would have gladly continued to employ them whether members of the Union or not.

[10] Illustrating the Union's hostility to Colacino Industries and the credibility of this threat, on one occasion when Barra spoke with Davis about the issue, Davis stated that "if Jim goes nonunion . . . I'll pull you guys from him and then we'll see how much work he does with no employees." J.A. 119.

The separation letter Colacino wrote at Blondell's behest plainly bespeaks an employer that was sad to see him go: "Your employment here was sincerely appreciated and you are considered to be among the best in the trade. That said, I hope the future holds opportunities for us to work together again." J.A. 309. The evidence establishes that Blondell left Colacino based on his own assessment of the benefits and detriments of continuing at a nonunion company and that Colacino Industries in no way forced his hand.

The Board provided no particular rationale for discrediting Barra's testimony and failed to discuss the evidence adduced by Petitioners supporting Colacino's and Barra's accounts. The Decision and Order finding Petitioners to have constructively discharged Blondell in violation of Sections 8(a)(3) and 8(a)(1) of the Act must be reversed. Blondell left the company for his own personal reasons.

CONCLUSION

For the reasons above, Petitioners respectfully request that the Court grant the petition, reverse or vacate the Board's Decision and Order, and deny the Board's cross-petition for enforcement.

Respectfully submitted,

/s/ Edward A. Trevvett
Edward A. Trevvett
Gregory M. Dickinson
HARRIS BEACH PLLC
99 Garnsey Road
Pittsford, New York 14534
E-mail: etrevvett@harrisbeach.com
Tel.: 585-419-8643

Attorneys for Petitioners