

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
ATLANTA BRANCH OFFICE

ADVANCED HEATING & COOLING, INC.  
d/b/a ADVENT HEATING & COOLING  
COMPANY<sup>1</sup>

and

SHEET METAL WORKERS'  
INTERNATIONAL ASSOCIATION,  
LOCAL UNION NO. 19, AFL-CIO

CASES 4-CA-33991  
4-CA-34000  
4-CA-34033  
4-CA-34125  
4-CA-34240

*Henry R. Protas, Esq.*, Counsel for the  
General Counsel  
*Bruce E. Endy, Esq.*, and *Robert F. Henninger, Esq.*  
(*Spear, Wilderman, Borish, Endy, Spear and Runckel*)  
of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

Statement of the Case

**MARGARET G. BRAKEBUSCH, Administrative Law Judge.** This case was tried in Philadelphia, Pennsylvania, on February 20, 2007. The original charge in 4-CA-33991 was filed by the Sheet Metal Workers' International Association, Local Union No. 19, AFL-CIO, herein Union, on July 8, 2005,<sup>2</sup> and later amended on January 18, 2006. The original charge in 4-CA-34000 was filed by the Union on July 11, 2005 and amended on August 31, 2005. The charges in Cases 4-CA-34033 and 4-CA-34125 were filed respectively on July 22, 2005, and September 9, 2005. The original charge in 4-CA-34240 was filed by the Union on October 25, 2005, and amended on January 18, 2006. On January 19, 2006, the Regional Director for Region 4 of the National Labor Relations Board, herein the Board, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing. The consolidated

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<sup>1</sup> Respondent's name was corrected in an August 9, 2006, amendment to the January 19, 2006, consolidated complaint. No answer was filed in response to the August 9, 2006 amendment.

<sup>2</sup> All dates are in 2005 unless otherwise indicated.

complaint alleges that Advanced Heating & Cooling, Inc. d/b/a Advent Heating & Cooling Company, herein Respondent, violated Section 8(a)(1) of the National Labor Relations Act, herein the Act, through the statements<sup>3</sup> of President Catherine Wurtzbacher and Supervisor Harry Perry on certain dates in July and September 2005. The consolidated complaint also  
5 alleges that Respondent violated Section 8(a)(3) and (1) of the Act by denying employee Anthony Stevens eight hours of work on July 11, 2005, and by refusing to grant Anthony Stevens a recommended wage increase on September 1, 2005. The consolidated complaint further alleges that Respondent violated Section 8(a)(5) and (1) of the Act by failing and  
10 refusing to give its Unit employees increased compensation, failing to make contributions to Union health and welfare funds, and by failing to remit work assessment fees to the Union since on or about May 1, 2005.

On February 6, 2006, Respondent filed an answer to the consolidated complaint, denying the unfair labor practice allegations. In August 2006, Respondent ceased operations.  
15 On November 6, 2006, the Regional Director for Region 4 of the Board’s office issued an order scheduling the hearing in this matter for February 20, 2007. On February 16, 2007, Respondent’s counsel submitted a letter to the undersigned on behalf of Respondent. In the letter, Respondent asserted that it was filing Chapter 7 Bankruptcy on that same date.  
20 Respondent asserted that pursuant to 11 U.S.C. § 362 of the Bankruptcy Code, its bankruptcy filing operated as an automatic stay to the commencement or continuation of the Board’s unfair labor practice proceeding.

On February 20, 2007, counsel for Respondent appeared at the beginning of the scheduled hearing, but did not enter a notice of appearance on behalf of Respondent. Counsel for the Respondent introduced himself as former counsel for Respondent and provided a copy of Respondent’s Notice of Bankruptcy Filing and Automatic Stay, documenting Respondent’s  
25 filing for bankruptcy protection under 11 U.S.C. § 301 in the United States Bankruptcy Court for the Eastern District of Pennsylvania on February 16, 2007. Counsel explained that it was his understanding that by operation of law, all rights and responsibilities resided with the bankruptcy trustee to be assigned by the Bankruptcy Court. Asserting that he had no authority to act on behalf of the bankruptcy trustee, Respondent’s former counsel withdrew  
30 from the proceeding.  
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On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by Counsel for the General Counsel, I make the following:

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<sup>3</sup> At the outset of the hearing, Counsel for the General Counsel moved to amend paragraph 6(d) of the consolidated complaint to allege that Catherine Wurtzbacher asked an employee to resign from the Union on or  
45 about July 12, 2005. The original complaint paragraph alleged an unlawful statement attributed to Supervisor Harry Perry on July 11, 2005. General Counsel’s motion was granted. At the conclusion of the hearing, Counsel for the General Counsel moved to amend paragraph 6(d) to allege a date two weeks after July 8, 2005, and to withdraw paragraph 6(b). General Counsel’s motion was granted. In his brief, Counsel for the General Counsel asserts that July 12, 2005, as alleged in the original amendment, is fully supported by the evidence.

## Findings of Fact

### I. Jurisdiction

5 Respondent, a Pennsylvania corporation, has been engaged as a residential HVAC contractor where it annually purchased and received at its Levittown, Pennsylvania, facility; goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. Respondent primarily performed installation work for contractors engaged in new construction work in the residential market. In its answer to the consolidated complaint, Respondent asserts that no responsive pleading is required to answer the consolidated complaint's assertions that the Respondent is an employer and that the Union is a labor organization within the meaning of the Act. Section 102.20 of the Board's Rules and Regulations provides that any complaint allegation that is not specifically denied or explained in an answer, unless a respondent avers that it is without knowledge, shall be deemed to be admitted as true. Inasmuch as Respondent does not dispute the Board's jurisdiction in this matter and Respondent's having failed to present evidence to the contrary, I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act. Furthermore, the total record evidence reflects that the Union negotiates collective bargaining agreements with employers and represents employees with respect to their terms and conditions of employment.

### II. Whether the Continuation of this Proceeding is Precluded by the Automatic Stay Provision of the United States Bankruptcy Code

25 The Bankruptcy Code provides that with certain identified exceptions, the filing of a petition under Section 301 of the Code will operate as a stay to the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor, that was or could have been commenced before the filing of the bankruptcy petition or to recover a claim against the debtor that arose before the commencement of the bankruptcy proceeding. The Code further provides, however, that the filing of a petition under Section 301 of the Code does not act as a stay against the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's or organization's police and regulatory power. Such action also includes the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

45 The Board has long held that the institution of bankruptcy proceedings does not deprive it of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. *Corbin Ltd.*, 340 NLRB 1001, fn. 1 (2003); *Lambeer Packaging Co.*, 339 NLRB 177, fn. 2 (2003); *Super Carbide Tools*, 307 NLRB 1062, fn. 1 (1992); *Phoenix Co.*, 274 NLRB 995, 995 (1985); *Olympic Fruit & Produce*, 261 NLRB 322, 323 (1982). The Board may process an unfair labor practice case to its final disposition, including determination of such monetary amounts as may be owed as a result of unfair labor practices. *Sonya Trucking, Inc.*, 312 NLRB 1159, 1159 (1993). In its decision in *R.T. Jones Lumber*

5 Co., the Board went on to point out that although the subsequent collection of the money owed requires a separate application to the bankruptcy court, the Board’s authority to process an unfair labor practice case to its final disposition includes the determination of such monetary amounts as may be owed as a result of the unfair labor practices. 313 NLRB 726, 726-728 (1994).

10 The circuit courts have also found that Board proceedings fall within the exception to the automatic stay provision for proceedings by a governmental unit to enforce its police or regulatory powers. *NLRB v. Continental Hagan Corp.*, 932 F.2d 828, 834-835 (9<sup>th</sup> Cir. 1991); *NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5<sup>th</sup> Cir. 1981); *Bel Air Chateau Hospital*, 611 F.2d 1248, 1251 (9<sup>th</sup> Cir. 1979).

15 In its letter of February 16, 2007, Respondent asserts that the automatic stay provisions of Section 362 of the Bankruptcy Code should prevent the continuation of the Board’s processing of the Union’s unfair labor practice charges “as the Board is not exercising its police or regulatory power.” Respondent cites *Chao v. Hospital Staffing Serv., Inc.*, 270 F.3d 374, 390 (6<sup>th</sup> Cir. 2001); a case involving a United States Department of Labor’s injunctive action brought pursuant to the Fair Labor Standards Act against a Chapter  
20 7 bankruptcy debtor. Respondent relies upon the Court’s holding that “when the action incidentally serves public interests but more substantially adjudicates private rights, courts should regard the suit as outside the police power exception.”

25 In considering whether this case provides authority on the issue at hand, I note that the case cited by Respondent involves the Department of Labor rather than the National Labor Relations Board. As correctly pointed out by Respondent, the Court found that the Secretary of Labor’s action did not come within the “police or regulatory power” exception to the automatic stay, and could be pursued in nonbankruptcy forum only if the Secretary first  
30 obtained relief from the stay. In making this determination, the Court explained that an action will be excepted from the automatic stay provision, as an action brought by a governmental entity pursuant to its “police or regulatory power,” only where the action has been instituted to effectuate public policy goals of the governmental entity, and not to protect the entity’s pecuniary interest in the debtor’s property or to adjudicate private rights. *Id* at 385 and 386.  
35 The Court found that under the facts of the case, the Secretary of Labor’s injunctive action did not prevent unfair competition or protect other workers in the economy, but was in fact, a vehicle to enforce the private rights of certain employees to receive minimum wages and was not covered by the police power exception. Respondent argues that the instant labor practice  
40 proceeding involves the vindication of two former employees’ personal monetary rights under the National Labor Relations Act, and thus would fall outside the police power exception.

45 In its decision in *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6<sup>th</sup> Cir. 1986), the Court specifically noted that the Board does not proceed on behalf of private persons. The Court explained: “No private action arises under the Labor Act. Thus, the NLRB is not functionally a forum where private parties may present labor disputes. Rather the NLRB determines which complaints it will act upon in its own name in furthering the policies of the federal labor laws.” The Board has also long held that an unfair labor practice

proceeding is not for the adjudication of private rights. *Atlanta Flour and Grain Co., Inc.*, 41 NLRB 409, fn. 11 (1942). Furthermore, in a very early decision in *National Licorice Co. v. NLRB*,<sup>4</sup> the Supreme Court noted that a Board proceeding is not an adjudication of private rights. The Court explained:

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The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment.

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Thus, while the unfair labor practice proceeding in this matter might result in monetary payment to employees for unlawfully withheld wages or benefits, the proceeding is brought to give effect to the public policy of the Act and not to vindicate the private rights of any employees.

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In its February 16, 2007 letter, Respondent asserts that the filing of a Chapter 7 bankruptcy petition is significant because, as a corporate entity, it ceases to exist and only the bankruptcy trustee has the authority to administer the corporate estate and to retain counsel on the estate’s behalf. Despite Respondent’s assertions, I do not find the filing of a Chapter 7 bankruptcy petition distinguishable with respect to the Board’s authority to proceed and the applicable exception to the automatic stay provisions of Bankruptcy Code. The Board has found that its proceedings fall within 11 U.S.C. § 362 (b)(4) and (5), the exception to the automatic stay provision for proceedings by a governmental unit to enforce its police or regulatory powers, despite the fact that a respondent has filed a Chapter 7 bankruptcy petition and ceased its operations. *Harwich Industries*, 316 NLRB 239, 239 (1995).

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Accordingly, I find that the continuation of this proceeding is not precluded by the automatic stay provision of the Bankruptcy Code.

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In the alternative to a stay in the proceedings, Respondent asserted that this matter should be continued in order to allow the Bankruptcy Court the opportunity to appoint a trustee. Respondent argued that the proceeding should be continued to allow the Bankruptcy Trustee “time to evaluate the matter, in the best interest of the creditors in the context of the assets of the Estate, and respond as he or she sees it.” In his brief, Counsel for the General Counsel asserts that the fact that a trustee has not yet been appointed is a situation created by the Respondent. Counsel for the General Counsel points out that while Respondent ceased operations in August 2006 and the hearing in this matter was set on November 9, 2006, Respondent waited until the business day preceding the scheduled hearing to file its bankruptcy petition. Counsel for the General Counsel’s argument has merit and I agree that there is no valid basis in law or fact to postpone or delay these proceedings.

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<sup>4</sup> 309 U.S. 350, 60 S. Ct. 569 (1940).

### III. Alleged Unfair Labor Practices

As discussed above, Respondent did not participate in the hearing. Respondent submitted only a copy of the February 16, 2007 bankruptcy petition and its February 16, 2007  
 5 letter to the Division of Judges. Inasmuch as Respondent presented no witnesses or any other evidence, Counsel for the General Counsel's evidence is uncontroverted.

#### A. Background

##### 1. Ownership and Management Interests

10 Bernard E. Wurtzbacher, herein B. Wurtzbacher, became the joint owner of Respondent in approximately 1994 and shared the ownership interest evenly with his wife; Catherine Wurtzbacher, herein C. Wurtzbacher. In the initial operation of Respondent's  
 15 business, C. Wurtzbacher performed primarily bookkeeping functions and B. Wurtzbacher maintained responsibility for everything else in the management of the business. Over time, however, C. Wurtzbacher assumed more management responsibilities; taking over new construction scheduling as well as service scheduling. B. Wurtzbacher testified that in May  
 20 2003, he gave all of his ownership interest to his wife and thereafter received a salary and worked part-time performing estimating and layout work. After May 2003, C. Wurtzbacher functioned as chief operating officer with one hundred percent ownership in the company. B. Wurtzbacher acknowledged, however, that even after giving his wife all of his shares in the  
 25 company, he continued to visit the facility to assist her in the operation. He was present at the facility during the NLRB conducted election on July 8, 2005. B. Wurtzbacher also admitted that even after he gave his ownership interest to his wife, he never lost his authority to hire or fire employees and he never announced to employees that he had severed ties with Respondent. He acknowledged that other than the change of title, his functions with the  
 30 company did not actually change.

In July 2005, B. Wurtzbacher purchased and began the operation of Excel Home  
 35 Comfort Systems. In July 2006, B. Wurtzbacher and C. Wurtzbacher terminated their marriage.

#### B. Bargaining History

40 On May 6, 2003,<sup>5</sup> C. Wurtzbacher signed a collective bargaining agreement with the Union on behalf of Respondent. By signing the agreement, Respondent entered into the May 1, 2001 bargaining agreement, also referred to as the building trades agreement that was previously negotiated by the Union and Sheet Metal Contractors Association of Philadelphia and Vicinity, herein SMCA.<sup>6</sup> On May 6, 2003, C. Wurtzbacher also signed a residential  
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<sup>5</sup> Union Business Agent Gary Masino testified that B. Wurtzbacher had also previously signed the agreement on behalf of the Respondent in February 2006.

<sup>6</sup> There is no dispute that SCMA is a multi-employer association that negotiates with the Union on behalf of individual employers in the sheet metal industry.

addendum agreement between the Union and the SMCA. The residential addendum agreement supplemented the May 1, 2001 building trades agreement and covered residential work that had not been referenced in the earlier building trades agreement. Both the May 1, 2001, agreement and the October 1, 2001, residential addendum were scheduled to continue through April 30, 2004. Article XXI of the May 1, 2001, agreement provides that by executing the agreement, an employer authorizes SMCA to act as its collective bargaining representative for all matters relating to the agreement. By signing the agreement, an employer further agrees that it will be a member of the multi-employer bargaining unit unless the authorization is withdrawn by written notice to SMCA at least one hundred and fifty (150) days prior to the execution of the agreement.

On May 1, 2004, the Union and SMCA entered into a new collective bargaining agreement with effective dates of May 1, 2004 through April 30, 2007. The Union and the SMCA did not, however, immediately enter into a new residential agreement. Union Business Agent Gary Masino, herein Masino, testified that the Union through SMCA notified all of the contractors who were signatory to the new 2004 agreement that the residential agreement would be extended to October 2004. Because of the extension of the residential agreement, there was no increase in wages or benefits for the work covered under the residential agreement. Masino testified that he personally met with B. Wurtzbacher and C. Wurtzbacher to confirm the extension of the residential agreement. Masino recalled that while B. Wurtzbacher had been quite pleased that there would be no increase in wages for the extension period, he had also appeared interested in the negotiation of the new residential agreement.

Although B. Wurtzbacher testified that he was not a member of SMCA, he acknowledged that he attended approximately three negotiating sessions for the new contract that was negotiated in October 2004. He testified that he was on the apprenticeship program and he recalled that during the negotiating sessions he proposed a reduction of employee costs in order to compete in the residential market. B. Wurtzbacher admitted that during these negotiation meetings, he never told anyone that he was not a member of SMCA. B. Wurtzbacher testified: "Nobody ever asked me, so it never came up. I never indicated that I was bargaining independently. I just assumed the others knew." B. Wurtzbacher also recalled that after each session that he attended, the SMCA president sent him a fax explaining what had been discussed in the negotiating session and outlining the remaining issues. On October 15, 2004, the Union and SMCA entered into a new residential agreement. The agreement, however, was back-dated to October 1, 2004, with effective dates of October 1, 2004 through April 30, 2006. Masino testified that prior to October 15, 2004, Respondent never gave any notice to the Union that it did not intend to be bound by the bargaining agreement between the Union and SMCA.

The October 2004 residential agreement contained an additional job classification identified as "residential installer." The classification of residential novice was eliminated. By virtue of the new agreement, new employees would be hired into a residential installer apprentice program. Employees who were already in an apprenticeship program remained in

5 their existing programs. Upon completion of their apprenticeship program, the employees progressed into the residential mechanic classification. Masino testified that he met with B. Wurtzbacher three to four times in November 2004 to work out the placement of employees under the change in classifications. Masino recalled that Respondent had approximately 12 novices at the time of the new agreement and it had been quite a task to determine where the employees would be placed in the installer apprenticeship.

10 Union auditor Linda Zambetti testified that in a report dated December 15, 2004, she presented Respondent with an audit of wages and benefits paid to employees for an audit period from April 2003 through October 2004. To conduct the audit, Zambetti compared the Respondent's weekly report submitted to the Union with the actual payroll records. Based upon the analysis of employees' hours, the audit reflected whether there were shortages in wages or benefit contributions. Zambetti's December 2004 audit reflected that Respondent paid the contractual wage rate during the audit period.

**C. Respondent's Compliance with the 2004 Collective Bargaining Agreement**

20 Prior to the execution of the new residential agreement in October 2004, Respondent became delinquent in some of its benefit fund contributions. In October 2004, Respondent signed a Settlement Agreement and Confession of Judgment setting out a payment schedule for the re-payment of the delinquent fringe benefit contributions. B. Wurtzbacher signed the settlement agreement on behalf of Respondent on October 21, 2004. The settlement agreement, signed by B. Wurtzbacher, provided that the employer's signatory to the agreement warranted that he or she had the authority to bind the employer and that the employer was bound by the current collective bargaining agreement with the Union. Zambetti testified that even during the period of time in which Respondent fell behind in making benefit fund contributions, it continued to submit weekly reports to the Union, acknowledging the amounts owed to each of the funds as required by the collective bargaining agreement.

35 Article XIV of the residential agreement provides for all employment referrals to come through the Union. Masino testified without contradiction that prior to May 1, 2005, Respondent hired exclusively through the Union. The Union's referral records reflect that Respondent hired nine employees through the Union's hiring hall from October 29, 2004 until May 1, 2005.

40 The October 2004 residential agreement provided for an increase in wages and benefits fund contributions for the period from October 1, 2004, through April 30, 2005, and then an additional increase in wages and benefit contributions for the period from May 1, 2005, through April 30, 2006. Upon receipt of the wage chart that covered October 1, 2004, to April 30, 2005, Respondent implemented all the required increases in wages and benefit contributions.

#### **D. Respondent’s Repudiation of the Collective Bargaining Agreement**

Masino testified that while Respondent implemented the negotiated wage and benefit increases for the period through April 30, 2005, Respondent did not implement the contractual increases in wages and benefits that were to be paid after May 1, 2005. After learning of Respondent’s failure to pay the increased wages and benefits, Masino faxed a letter to C. Wurtzbacher, informing her that there was a contractual pay increase on May 1, 2005 and attaching the wage chart reflecting the increase in wages. Masino testified that when he met with C. Wurtzbacher on May 13, 2005 he asked why she had not given the contractual wage increase. Masino testified that she had simply told him that she was not going to give the wage increase.

Masino testified without dispute that after May 1, 2005, Respondent did not pay the contractual increases in either wages or fringe benefits. Masino also recalled that on approximately March 16, 2005, Respondent stopped deducting union dues from its employees’ wages and ceased to remit the union dues to the Union.

In a letter dated May 9, 2005 C. Wurtzbacher informed Union President Joseph Sellers, Jr. that she was revoking “any and all § 8(f) prehire agreements, Addenda, Memoranda of Understanding, and/or letters, valid or otherwise” that Respondent had signed. C. Wurtzbacher further stated in the letter: “As you are aware, there has not been an election for an exclusive representative of the employees and Advent has not been presented with proof of exclusive representation. Advent has never authorized the Sheet Metal Contractors Association of Philadelphia and Vicinity to act as its bargaining representative for any Agreement or extension to the Agreement that expired April 31, 2004.”

In November 2005, Zambetti completed a second audit of Respondent’s contract compliance covering the period from November 2004 through July 16, 2005. Zambetti testified that the audit reflected that while Respondent paid the contractual wage rates prior to May 1, 2005, Respondent did not pay the May 1, 2005 contractual wage and benefit increases as required. Zambetti also confirmed that following the week ending April 30, 2005, Respondent failed to forward weekly benefit fund reports to the Union.

#### **E. The July 8, 2005 Election**

On July 8, 2005 Respondent’s employees voted in a Board-conducted election to determine whether they wished to be represented by the Union. Respondent’s employees rejected the Union as their collective bargaining representative. The results of the election were not certified until July 19, 2005.

After the ballot count, approximately fifteen employees remained in the shop area where the ballot count had been conducted. Employee Anthony Stevens testified that C. Wurtzbacher also remained in the shop area and spoke with employees. Stevens described C. Wurtzbacher as emotional and tearful when she told the employees that they were no longer a union shop that that Respondent would no longer pay anything to the Union. Stevens recalled

that C. Wurtzbacher told employees that if they wanted to leave, they could do so and there would be no hard feelings, however they were no longer a union shop. Stevens also recalled that C. Wurtzbacher stated that no union members would be working for the shop and that in order to remain employed; the employees would have to resign from the Union. When some  
 5 of the employees raised concerns about losing money because they would not be with the Union, C. Wurtzbacher assured them that Respondent would take care of everything. She added that since Respondent was no longer a union contractor, Respondent could pay employees for holidays, such as the fourth of July holiday that had just occurred. While  
 10 employees had been allowed the 4<sup>th</sup> of July holiday, they had not been entitled to pay for the holiday under the collective bargaining agreement. Stevens confirmed that Respondent paid him for July 4<sup>th</sup>, although he had not worked.

**F. The Alleged Events on July 11, 2005**

15 When Stevens arrived for work on July 11, 2005, he went immediately to Harry Perry’s office to get his assignments for the day. As of that time, Stevens had been employed by Respondent since November 2004. Although he primarily worked as a truck driver, he occasionally worked in the shop fabricating duct, storing materials, and receiving deliveries.  
 20 Stevens testified that Shop Supervisor Perry determined the jobs that he was capable of performing and assigned him his duties in the shop.

25 Stevens recalled that as he entered the shop office, C. Wurtzbacher and B. Wurtzbacher followed him into the office. Perry then told him that if he wanted to remain with the company, he had to resign from the Union and sign a resignation document.<sup>7</sup> Stevens explained that if possible, he would like to remain employed with the company and not resign from the Union. B. Wurtzbacher stated that he really wasn’t sure how they were going to handle the situation and he needed to speak with Respondent’s attorneys. B.  
 30 Wurtzbacher told Stevens that he could either wait outside in the shop area or he could go home for the day. After waiting outside in the shop for approximately a half hour, Stevens returned to the office and told B. Wurtzbacher that he would go home for the day. Stevens was not paid for July 11, 2005.

35 When Stevens returned to work on July 12, 2005, C. Wurtzbacher told him that it had been determined that he could continue to work for Respondent, however, Respondent would not pay into any union benefit funds. Stevens told her that was “fine” and that he wanted to continue to work there. Stevens was also scheduled to receive his paycheck on July 12, 2005.  
 40 As a shop employee, Stevens usually received his check from Shop Supervisor Harry Perry. Rather than giving Stevens his check, however, Perry told him that he had to meet with C. Wurtzbacher. At approximately 2:45 p.m. to 3:00 p.m. in the afternoon, Stevens reported to

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45 <sup>7</sup> Employee Thomas Boyle testified that he had been in the hallway on July 11 and observed Stevens talking with Perry and B. Wurtzbacher. Boyle recalled that Perry asked Stevens if he were going to stay with the Union. Stevens had responded that he planned to do so because he had family in the Union. Boyle also testified that Perry stated that if Stevens were going to work that day, he would have to check with someone. Boyle did hear either Perry or B. Wurtzbacher identify who would make the decision on whether Stevens worked that day.

C. Wurtzbacher’s office. Stevens observed the union resignation letter on C. Wurtzbacher’s desk. Although she gave Stevens his check, she also asked Stevens if he would like to resign from the Union and she promised that Respondent would take care of him. Stevens again told her that he was not interested in resigning from the Union.

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### G. The Events of September 1, 2005

Stevens recalled that as he was preparing to leave for deliveries on September 1, 2005, C. Wurtzbacher approached him. She told him that he had been doing a very good job and that Perry had recommended him for a raise. She added however, that she could not see giving him a raise if he was not going to be “sticking around any longer” and if the Union was going to pull him out. Stevens told her that he had no knowledge that the Union planned to pull him off the job. He asserted that if he deserved a raise, he should receive it. She reiterated that if the Union pulled him out, there was no “sense in investing” in him. Although Stevens continued working for Respondent until sometime in October 2005, he never received a raise.

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## IV. Analysis and Conclusions

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### A. Whether Respondent Unlawfully Repudiated the 8(f) Agreement

General Counsel asserts that prior to July 19, 2005, the Union was the limited exclusive collective-bargaining representative of Respondent’s employees and that on or about May 1, 2005, Respondent repudiated its 8(f) collective bargaining agreement with the Union in violation of Section 8(a)(5) of the Act. Counsel for the General Counsel further alleges that Respondent adopted the October 2004 replacement agreement that was negotiated by the Union and the SMCA and that Respondent abided by the terms of that agreement until May 1, 2005.

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Respondent admits that it entered into an 8(f) agreement with the Union and that the Union was the 8(f) representative of its employees through April 2004. While Respondent admits that the Union purports to have extended the agreement, it denies that it ever authorized the SMCA to act on its behalf. Respondent further denies that it adopted the October 2004 replacement agreement or that it followed the terms of that agreement as alleged by the General Counsel.

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Under Section 8(f) of the Act, employers and unions in the construction industry are permitted to enter into collective bargaining agreements before the union has established its majority status. Either the employer or the union is free to repudiate the collective bargaining relationship once an 8(f) agreement expires by its terms. *John Deklewa & Sons*, 282 NLRB 1375 (1987), enf. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). The Board has clearly held that an employer violates Section 8(a)(5) and (1) of the Act by failing to adhere to, or by repudiating an 8(f) agreement during its term. *Horizon Group of New England*, 347 NLRB No. 74, slip op. at 21 (2006).

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5 The Board has also held that when an employer signs a supplemental agreement in which he consents to be bound to the area association agreement and to successor association agreements, the employer is bound by the successor agreement until he serves timely notice to terminate the agreement and the delegation of bargaining authority. *Cedar Valley Corp.*, 302 NLRB 823, 830 (1991), enfd. 977 F.2d 1211 (8<sup>th</sup> Cir. 1992); *Twin City Garage Door*, 297 NLRB 119, fn. 2 (1989); *W.B. Skinner, Inc.*, 283 NLRB 989 (1987). In *Reliable Electric Co.*, 286 NLRB 834 (1987), the Board found that an employer's authorization to the multi-employer association did not terminate at the end of any existing agreement even though the authorization was in the nature of a short-form recognition agreement that was obtained by the union. The Board found that the authorization nevertheless bound the employer to future agreements and that the authorization continued until the employer took some action to effectively withdraw the association's authority to bargain on the employer's behalf.

15 The record evidence in this case demonstrates that in May 2003, Respondent designated SMCA as its collective bargaining representative. Specifically, on May 6, 2003, C. Wurtzbacher signed the collective bargaining agreement that had been negotiated by SMCA and the Union in May 2001. Section 3 of the agreement provides:

20 By execution of this Agreement the Employer authorizes the Sheet Metal Contractors Association of Philadelphia and Vicinity (SMCA) to act as its collective bargaining representative for all matters relating to this Agreement. The parties agree that the Employer will hereafter be a member of the Multi-Employer bargaining unit represented by said Association unless this authorization is withdrawn by written notice to the Association and the Union at least one hundred and fifty (150) days prior to the then current expiration date of this Agreement.

30 On May 6, 2003, Respondent also signed the residential addendum to the building trades agreement that had been negotiated by the Union and the SMCA in October 2001. The Residential Addendum provides by its terms that it remains in full force and effect for the duration of the underlying building trades agreement. Just prior to May 1, 2004, the Union and SMCA executed a successor building trades collective bargaining agreement that was effective from May 1, 2004, through April 30, 2007. In October 2004, the Union and SMCA executed the residential addendum agreement, which was to remain in effect from October 1, 2004, until April 30, 2006.

40 There is no evidence to show that at any time between May 6, 2003 and May 9, 2005, Respondent withdrew or even attempted to withdraw bargaining authority from the SMCA. The plain language and unambiguous terms of the 2001 building trades agreement and the residential addendum agreement reflect that an employer signing these agreements intended to be bound by their terms. See *Cowboy Scaffolding, Inc.*, 326 NLRB 1050, 1051 (1998). In *Kephart Plumbing*, 285 NLRB 612 (1987), the employer authorized an employer association to negotiate on its behalf with a local union of the Plumbers and Steamfitters. It was only after a new agreement had been negotiated, executed, and ratified, that the employer withdrew its authorization from the employer association to bargain on its behalf. Applying *Deklewa*,

the Board determined that the new agreement was, nevertheless, binding and was not subject to unilateral repudiation.

5 It should also be noted however that the Board has established a specific test to determine whether an employer has bound itself to the results of multi-employer bargaining when it has an 8(f) bargaining relationship with a union. In its decision in *James Luterbach Construction Co., Inc.*, 315 NLRB 976, 979 (1994), the Board explained that in the context of an 8(f) relationship, there must be more than inaction or merely the absence of a timely withdrawal in order to find that an employer has bound itself by multi-employer bargaining. 10 The Board explained that it would first examine whether the employer was part of the multi-employer unit prior to the dispute giving rise to the case. If so, it would then look to whether the employer had, by a distinct affirmative action, recommitted to the union that it would be bound by the upcoming or current negotiations.

15 Counsel for the General Counsel points out that Respondent's participation in multi-employer bargaining is established by the fact that Respondent signed the building trades agreement on May 6, 2003; which specifically provided that Respondent would become a member of SMCA and which authorized SMCA to bargain on behalf of Respondent. In 20 determining whether Respondent has also recommitted to the Union that it would be bound by SMCA's bargaining with the Union, the Board's analysis of the specific facts in *Luterbach* is especially illuminating. In *Luterbach*, the employer's president, William Luterbach, served on the multi-employer (AGC) bargaining committee for the first three bargaining sessions. In 25 finding that the employer had recommitted to be bound by the agreement, the Board noted:

30 Concededly, William Luterbach could have been wearing only an "AGC hat" and not a "Luterbach Construction hat." However, even were this so, it was not told to the Union. Luterbach's overt affirmative actions reasonably conveyed a commitment by the Respondent to continue, as it had in the past, to participate in, and be bound by, group negotiations.

35 Interestingly, the instant case involves very similar conduct by the Respondent. Respondent's President, Bernard Wurtzbacher attended three contract negotiation sessions between SMCA and the Union for the negotiation of the October 2004 residential agreement. He actively participated in the negotiation sessions by making contract proposals. He acknowledged that following each bargaining session that he attended, the SMCA president sent him a fax explaining what had been discussed in the negotiating session and outlining the remaining issues. B. Wurtzbacher admitted that at no time did he ever tell anyone that he was 40 not a member of SMCA or that he was bargaining independently. Union Business Agent Gary Masino testified without contradiction that Respondent gave no notice to the Union that it intended to end its bargaining relationship with the Union at the expiration of the 2001 collective bargaining agreement or that it did not intend to be bound by the outcome of the 45 2004 collective bargaining. As the Board said in *Luterbach, supra*, at 980, an employer that meets both parts of the test "will be deemed to have clearly and unmistakably waived its right to bargain as an individual."

5 The Board has also looked to an employer’s conduct beyond the realm of contract negotiations to determine if an employer has adopted a contract in the Section 8(f) context. Once an employer manifests an intention to abide by the terms of a successor collective bargaining agreement, the employer will be bound to the successor agreement until its expiration. *CAB Associates*, 340 NLRB 1391, 1402 (2003). In his brief, Counsel for the General Counsel cites the Board’s decision in *E.S.P. Concrete Pumping, Inc.*, 327 NLRB 711, 712 (1999) for authority in finding that Respondent adopted the 2004 successor agreement. In that case, the Board found that by its conduct, the employer adopted the successor Section 8(f) collective bargaining agreement. The employer not only applied the collective bargaining agreement to unit work for a year, but it also held itself out to others as a union contractor and acquiesced in a judgment against it for unpaid contributions to the union’s pension fund. In the instant case, Respondent engaged in similar conduct manifesting its adoption of the 2004 successor agreement. There is credible record evidence to demonstrate that Respondent implemented the increases in wages and benefits under the 2004 agreement for the period of time prior to May 1, 2005. Additionally, following the execution of the October 2004 residential agreement and prior to May 1, 2005, Respondent hired nine employees through the Union’s hiring hall. Consistent with the previous agreement, Article XIV of the October 2004 residential agreement provides that all referrals for employment would be referred through the Union. On October 21, 2004, B. Wurtzbacher signed a Settlement Agreement and Confession of Judgment setting out a schedule for the re-payment of delinquent fringe benefit contributions. Zambetti credibly testified that prior to May 1, 2005, Respondent submitted weekly reports to the Union concerning Respondent’s contributions to the Union’s benefit funds.

30 The total record evidence demonstrates, therefore, that prior to May 1, 2005, Respondent made no attempt to withdraw its membership in SMAC or to withdraw its authorization from SMCA to bargain on its behalf. Admittedly, B. Wurtzbacher participated in the 2004 collective bargaining sessions and took no action to disavow his representation of Respondent or Respondent’s membership in SMAC. Once SMAC and the Union reached the residential agreement in October 2004, Respondent implemented the necessary increases in wages and benefit fund contributions. Additionally, by entering into a settlement to repay delinquent benefit fund contributions and by its continuing use of the Union’s hiring hall procedures, Respondent’s conduct demonstrated its adoption of the 2004 successor collective bargaining agreement between the Union and SMCA and Respondent manifested its intent to be bound by the agreement. Therefore, Respondent was foreclosed under *Deklewa* from repudiating the agreement during its term. *AE12*, 343 NLRB 433, 436 (2004); *E.S.P. Concrete Pumping, Inc., supra*, at 712 (1999).

45 On May 1, 2005, Respondent failed to grant its employees the contractually mandated increases in wages or benefit fund contributions. As early as March 2005, Respondent also ceased to remit dues to the Union. In C. Wurtzbacher’s May 9, 2005, letter to the Union, Respondent further confirmed that it had repudiated, terminated, and revoked any and all agreements with the Union. Respondent took such actions not only before the July 8, 2005, election but more importantly before the July 19, 2005, certification of results of the election. Thus, by the actions described above, Respondent unlawfully repudiated the terms of the

October 1, 2004, to April 30, 2006, Residential Addendum.

### **B. Whether B. Wurtzbacher Acted as an Agent of Respondent**

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As discussed above, the totality of Respondent’s conduct supports a finding that Respondent adopted the 2004 residential agreement and that Respondent clearly manifested its intent to be bound by that agreement. This finding is based not only upon the conduct of C. Wurtzbacher, but also upon the conduct of B. Wurtzbacher. As the Board pointed out in *Cooper Hand Tools*, 328 NLRB 145 (1999), it will apply common law principles of agency when it examines whether an individual is an agent of the employer while making a particular statement or taking a particular action. Based upon the common law principles, the Board may find agency based upon either actual or apparent authority to act for the employer. The test is whether under all the circumstances, employees “would reasonably believe the alleged agent was reflecting company policy and speaking and acting for management.” *Waterbed World*, 286 NLRB 425, 426-427 (1987). The Board also considers the position and duties of the individual in addition to the context in which the behavior occurred. *Jules V. Lane*, 262 NLRB 118, 119 (1982).

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Despite the fact that B. Wurtzbacher gave his stock to his wife during the same period of time that she signed the initial building trades agreement, his role in the company remained essentially the same. Admittedly, there were no changes in his functions and he continued to have the authority to hire and fire employees. The Settlement Agreement and Confession of Judgment that he signed on October 21, 2004, specifically provides that in signing for Respondent, he warranted that he had the authority to bind the Respondent by his signature and that the Respondent was bound by the collective bargaining agreement with the Union. Even after the election, B. Wurtzbacher continued to participate in management actions and appeared to have an active role in management decisions. When Anthony Stevens met with C. Wurtzbacher and Harry Perry on July 11, 2005, B. Wurtzbacher was also present. Stevens credibly testified that B. Wurtzbacher told him that he was not sure whether Stevens could work that day and he would need to consult with Respondent’s attorney for direction. He gave Stevens the choice of waiting at Respondent’s facility or going home. Certainly, based upon his statements and conduct, Stevens or any other employee would view B. Wurtzbacher as having authority to speak for Respondent. Additionally, B. Wurtzbacher admitted that even though his ownership interest changed after May 2003, he never made any formal announcement that he had severed any ties with Respondent.

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General Counsel argues that even after May 2005, employees would reasonably believe that as a former owner and president, as well the husband of the current owner, B. Wurtzbacher had the authority to speak on behalf of Respondent. I agree, and find, that at all material times, B. Wurtzbacher was an agent of Respondent within the meaning of Section 2(13) of the Act. *Korellis Roofing, Inc.*, 341 NLRB 18, 25 (2004).

### C. Whether C. Wurtzbacher and Harry Perry are Statutory Supervisors

Paragraph 4 of the consolidated complaint alleges that C. Wurtzbacher and Harry Perry are supervisors within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. In its answer, Respondent admits that C. Wurtzbacher is Respondent's President and that Harry Perry is Shop Supervisor. Respondent further submits that the remaining allegations of the consolidated complaint paragraph assert conclusions of law, for which no responsive pleading was required. At the beginning of the hearing, Counsel for the General Counsel and Respondent's counsel discussed their prior attempts to work out a stipulation concerning these individuals' supervisory status. Respondent's counsel, however, took the position that because of Respondent's bankruptcy status, he no longer had the authority to enter into a stipulation concerning the supervisory or agency status of C. Wurtzbacher and Harry Perry.

Section 2(11) of the Act defines a supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The record reflects that that since May 2003, C. Wurtzbacher has owned one hundred percent of Respondent's stock and functioned as chief operating officer of the corporation. It is undisputed that she had the authority to hire and fire employees. There is, in fact, no record evidence that reflects any limitations in C. Wurtzbacher's authority or restrictions in her direction of Respondent's work force since May 2003. Accordingly, there being no evidence to the contrary, I find that for all material times, C. Wurtzbacher was a supervisor and agent of Respondent within the meaning of Sections 2(11) and 2(13) of the Act.

Because Respondent did not participate in the hearing and did not produce documents in response to General Counsel's subpoena, there is limited record evidence concerning the supervisory status of Harry Perry, herein Perry. The only evidence concerning Perry's supervisory status was presented through the testimony of B. Wurtzbacher and Anthony Stevens. B. Wurtzbacher testified that although Perry performed manual work, he also supervised from one to four other employees. He testified that Perry ordered and fabricated materials as well as set up and run deliveries. He could not recall if Perry had ever recommended anyone for a raise or recommended anyone for employment. He denied that Perry had the authority to hire or fire employees. While B. Wurtzbacher testified that it was Perry's "call" as to whether a shop employee cleaned or performed truck loading and unloading functions, he also confirmed that all of the shop employees were usually involved in unloading and loading when the truck arrived at the shop. Stevens testified that Perry gave him his assignments and determined the jobs that employees were capable of performing. Stevens also acknowledged, however, that he primarily worked as a truck driver making

deliveries. When there were no deliveries to be made, he worked in the shop.

In its recent decision in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 1 (2006), the Board clarified its interpretation of the terms “independent judgment,” “assign,” and “responsibility to direct” for purposes of determining supervisory status. The Board explained that they construed the term “assign” to “the act of designating an employee to a place (such as location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks to an employee.” *Id.* at 4. The Board also explained that “independent judgment” means that “an individual must at a minimum act, or effectively recommend action free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* at 8.

Counsel for the General Counsel asserts that Perry had the responsibility of assigning employees to jobs as varied as truck driving, truck loading, cleaning up, and fabricating parts. He further maintains that Perry exercised his independent judgment by considering the personal attributes, experience, and/or skills of the employees when making an assignment. In their testimony, Stevens and B. Wurtzbacher indicated that there were instances when Perry designated shop employees to perform a task. The evidence also reflected, however, that the total number of shop employees ranged only from one to four and their tasks were essentially limited in scope. Although Stevens identified Perry as the individual who determined the jobs that he was capable of performing in the shop, his testimony is primarily conclusionary. There is no evidence to indicate that there was a complexity of shop functions that required an evaluation of an employee’s skills and abilities prior to assignment or that any of the shop employees were limited in their ability to perform all shop functions. Accordingly, the record evidence does not support a finding that Perry either possessed or exercised any of the indicia of a supervisor at the time the relevant events took place.

**D. Whether C. Wurtzbacher’s Statements of July 8 and July 12 Violated the Act**

Stevens testified that C. Wurtzbacher spoke with some of the employees who had remained after the election on July 8, 2005. Stevens alleged that during the conversation she told employees that the company was no longer a union shop and that no union members would be working for the shop. If employees wanted to remain employed, they would have to resign from the Union. Additionally, she told the employees that because the company was no longer a union shop, Respondent could pay them holiday pay for July 4, 2005. Stevens confirmed that he was in fact paid for the holiday, although he would have not have received such payment under the Union contract. When Stevens received his paycheck from C. Wurtzbacher on July 12, she asked him if he would like to resign from the Union and promised that Respondent would take care of him.

It is well established that an employer is prohibited from making any unilateral changes until such time that a union is declared the loser of an election. *Jackson Hospital Corporation d/b/a Kentucky River Medical Center*, 340 NLRB 536, 544 (2003); *G.H. Bass Caribbean, Inc.*, 306 NLRB 823 (1992). In its decision in *VOCA Corporation*, 329 NLRB 591, 592 (1999), the Board found an employer’s statements to employees following its victory

5 in a decertification election violative of Section 8(a)(1) of the Act. In that case, the employer's director of operations talked with a group of employees following a decertification election and during the time when the union's objections were pending. The employer's management official promised certain benefits as soon as the decertification results were final. The Board found such statement to be in violation of Section 8(a)(1) as it was an implied promise that the employees would get this benefit if they continued to reject the union. The Board quoted its earlier ruling in *W.A. Krueger*, 299 NLRB 914, 915 (1990), in which it had held: "It is well established that election results are not final until the certification is issued. Such a rule promotes stability and certainty during the transition period when, due to the existence of objections or determinative challenges, the employees' choice of representative is in doubt."

15 In the instant case, C. Wurtzbacher made the initial statements to employees on the same day of the election. Not only had the results not been certified by the Board, there had not even been time for the Union to file objections to the results of the election. C. Wurtzbacher not only promised employees that they would be paid for the July 4th holiday, she told them that in order for them to remain employed they would have to resign from the Union. Clearly, the Board has found an employer's conditioning continued employment on an employee's resignation from the Union to be violative. *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 346 (1987). When C. Wurtzbacher solicited Stevens to resign from the Union on July 12, 2005, she promised that Respondent would take care of him. The Board has also found that an employer's promise of increase benefits in exchange for an employee's resignation from the union to be violative of Section 8(a)(1) of the Act. *Wehr Construction, Inc.*, 315 NLRB 867, 867 (1994). Although C. Wurtzbacher's statements to Stevens about his union membership are not alleged as interrogation, her statements to him on July 12, 2005, were also an inquiry as to his continuing support for the Union. By soliciting his union resignation, she was, in effect, interrogating him as the extent of his continued support for the Union. Accordingly, I find that her statements to him also constituted interrogation that was violative of 8(a)(1) of the Act.

35 Although Stevens' testimony was un rebutted because of Respondent's failure to participate in this hearing, I also found his testimony to be independently credible. His testimony appeared to be straight forward without embellishment. Thus, the undisputed record evidence supports a finding that through the statements of C. Wurtzbacher on July 8, 2005, and July 12, 2005, Respondent violated Section 8(a)(1) of the Act as alleged in consolidated complaint paragraphs 6(a) and 9. Additionally, Respondent's payment of the holiday pay for the July 4, 2005, also constituted an unlawful unilateral change and violative of Section 8(a)(5).

#### **E. Whether Perry Unlawfully Solicited an Employee to Resign from the Union**

45 Stevens testified that when he spoke with Perry on July 11, 2005, Perry told him that if he wanted to remain with the company, he would have to resign from the Union. Stevens replied that he preferred to remain employed without resigning from the Union. It is well established that an employer's statement to employees that conditions employment on giving

up union membership or activity tends to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. See *Florida Wire & Cable, Inc.*, 333 NLRB 378, 381 (2001); *Schenk Packing Co.*, 301 NLRB 487, 489 (1991); *A-1 Schmidlin Plumbing Co.*, 284 NLRB 1506 (1987).

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As discussed above, the record evidence does not support a finding that Perry functioned as a statutory supervisor during the material time period. I note, however, that Perry made this statement on July 11, 2005, in the presence of both C. Wurtzbacher and B. Wurtzbacher. There is no evidence that either C. Wurtzbacher or B. Wurtzbacher said anything to negate or disavow Perry's statement. In follow-up to Perry's statement and Stevens' response, B. Wurtzbacher told Stevens that Respondent would have to consult with Respondent's attorney before Stevens could report to work as scheduled. B. Wurtzbacher then instructed Stevens to either wait outside the shop area or leave the facility while the decision was being made about his working.

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As previously discussed above, the Board applies the common law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when the employee makes a particular statement or takes a particular action. See *Pan-Ostion Co.*, 336 NLRB 305, 306 (2001). Apparent authority results from a "manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question." *Southern Bag Corp.*, 315 NLRB 725, 725 (1994). Thus, even if Perry were not a statutory supervisor at the time of his statement, he was clearly acting as an agent of Respondent. Without a doubt, Perry's statement to Stevens, in the presence of C. Wurtzbacher and B. Wurtzbacher, created a situation in which an employee would reasonably tend to feel imperiled if he refrained from resigning from union membership. Accordingly, inasmuch as Perry acted as an agent of Respondent, his solicitation of union resignation under these circumstances violated Section 8(a)(1) of the Act.

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#### **F. Whether Respondent Unlawfully Refused to Allow Stevens to Work on July 11, 2005**

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General Counsel alleges that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to allow Stevens to work on July 11, 2005. As Counsel for the General Counsel opines in his brief, Respondent apparently believed that because the Union had lost the election, there was a legitimate issue concerning whether its employees who remain members could continue to work. Certainly, an employer's failure to hire an applicant because of his union membership is violative of the Act. *John Kopp and Natalie Kopp d/b/a N & J Construction Co.*, 348 NLRB No. 7, slip op. at 6 (2006). To refuse to allow an employee to perform the job to which he has been hired to do because of his union membership is no less violative. The unrebutted evidence demonstrates that it was only because of Stevens' union membership that he was not allowed to begin his regular work day on July 11, 2005. Stevens was instructed that he could either go home or wait for Respondent's decision as to his work status. After waiting for approximately a half-hour, Stevens opted to go home to await Respondent's decision. He did not receive pay for July 11, 2005. By refusing to allow Stevens to work on July 11, 2005, Respondent violated Section 8(a)(3) of the Act.

### G. Whether Respondent Unlawfully Refused to Grant Stevens a Wage Increase

5 Stevens testified that on September 1, 2005, C. Wurtzbacher told him that Perry had recommended him for a raise. She explained that she could not envision giving him a raise if he were not going to remain on the job or if the Union were to pull him off the job. Stevens testified that even though he insisted that he should be given a raise if he deserved a raise, C. Wurtzbacher reiterated that there was no reason to invest in him because of the possibility of the Union pulling him from the job. Counsel for the General Counsel submits that Respondent unlawfully failed to give Stevens the raise. There is no doubt that an employer's failure to grant a wage increase to an employee because of the employee's union membership and affiliation is violative of the Act. See *W.E. Carlson Corporation*, 346 NLRB No. 43, slip op. at 5 (2006). It is also violative of Section 8(a)(1) of the Act for an employer to threaten to withhold a wage increase because of the employee's union activity or membership. *Ellis Electric*, 315 NLRB 1187, 1203 (1994). The Board has also long held that an employer violates Section 8(a)(1) of the Act by promising increase wages or benefits if the employee rejects the union. *Lehigh Lumber Co.*, 230 NLRB 1122 (1977).

20 While I credit the testimony of Stevens, I find that the overall evidence indicates that that C. Wurtzbacher impliedly promised Stevens a wage increase if he resigned his membership in the Union. Such implied promise was consistent with her statements to him in previous discussions. There is no record evidence that Stevens was eligible for a wage increase or evidence to indicate that he would otherwise have been granted the wage increase based upon Perry's recommendation. There is simply insufficient evidence to demonstrate that Stevens would have received a wage increase, but for his continued Union membership. Accordingly, I find that C. Wurtzbacher impliedly promised Stevens a wage increase if he would resign from the Union in violation of Section 8(a)(1). I do not find that the evidence supports that he was denied a wage increase in violation of Section 8(a)(3) of the Act.

### 35 Conclusions of Law

40 1. Advanced Heating & Cooling, Inc. d/b/a Advent Heating & Cooling Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Sheet Metal Workers' International Association, Local Union No. 19, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

45 3. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Telling employees that they would have to resign from the Union in

order to remain employed by Respondent.

5 (b) Telling employees that they would receive benefits different than those negotiated by their limited collective bargaining representative.

(c) Interrogating employees about their union membership.

10 (d) Impliedly promising employees a wage increase if they would resign from the Union.

4. Respondent violated Section 8(a)(3) of the Act by engaging in the following conduct:

15 (a) Refusing to allow an employee to work because of his union membership.

20 5. Respondent violated Section 8(a)(5) of the Act by engaging in the following conduct:

25 (a) Withdrawing recognition from the Union as the limited collective bargaining representative of its employees covered by the agreement during the term of the collective bargaining agreement.

(b) Repudiating and refusing to adhere to the collective bargaining agreement with the limited collective bargaining representative of its employees.

30 (c) Unilaterally granting benefits to employees without notice to or bargaining with the limited collective bargaining representative of its employees.

35 6. The aforesaid unfair labor practices affect commerce within the meaning of 2(6) and (7) of the Act.

7. Respondent has not engaged in any other conduct violative of the Act.

### Remedy

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

45 I shall recommend that Respondent be ordered to honor the terms of the collective bargaining agreement between the Sheet Metal Contractor's Association of Philadelphia and Vicinity and the Sheet Metal Workers International Association, Local Union No. 19, AFL-CIO that was in effect prior to July 19, 2005. Additionally, I shall recommend that Respondent be ordered to reimburse its employees for any loss of wages or benefits suffered

5 because of Respondent's failure to adhere to the collective bargaining agreement prior to July  
19, 2005. Respondent shall also make all contractually required benefit fund contributions  
that have not been made on behalf of its unit employees and reimburse its unit employees for  
any expenses ensuing from its failure to make the required payments. *Kraft Plumbing &*  
10 *Heating*, 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9<sup>th</sup> Cir. 1981); *Merryweather*  
*Optical Co.*, 240 NLRB 1213, 1216, fn. 7 (1979); *Ogle Protective Services*, 183 NLRB 682  
(1970). Respondent shall also reimburse the Union for any fees that or payments that were  
owed to the Union under the collective bargaining agreement that were not paid prior to July  
19, 2005.

15 I shall also recommend that Respondent make whole Anthony Stevens for any loss  
that he may have suffered because of Respondent's refusal to allow him to work on July 11,  
2005.

20 On these findings of fact and conclusions of law and on the entire record, I issue the  
following recommended:<sup>8</sup>

25 **ORDER**

30 The Respondent, Advanced Heating & Cooling, Inc. d/b/a Advent Heating & Cooling  
Company, Levittown, Pennsylvania, its officers, agents, successors, and assigns, shall:

35 1. Cease and desist from:

(a) Telling employees that they must resign from the Union in order to  
remain employed.

40 (b) Telling employees that they will receive benefits different than those  
negotiated by their collective bargaining representative.

(c) Interrogating employees about their union membership.

45 (d) Impliedly promising employees a wage increase if they resign their  
union membership.

(e) Refusing to allow employees to work because of their union  
membership.

(f) Withdrawing recognition from the Sheet Metal Workers' International  
Association, Local Union No. 19, AFL-CIO as the limited collective bargaining  
representative of its unit employees.

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<sup>8</sup> 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.

5 (g) Repudiating and refusing to adhere to the collective bargaining agreement between the Sheet Metal Contractors Association of Philadelphia and Vicinity and the Sheet Metal Workers' Association, Local Union No. 19, AFL-CIO that was in effect prior to July 19, 2005.

(h) Unilaterally granting benefits to employees without notice to or bargaining with the limited collective bargaining representative of its employees.

10 (i) 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.

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

20 (a) Within 14 days from the date of this Order, make whole, with interest, the unit employees for any loss of wages or other benefits they have suffered as a result of Respondent's failure to adhere to the terms of the collective bargaining agreement, as set forth in the remedy section of this decision.

25 (b) Within 14 days from the date of this Order, make whole Anthony Stevens for any loss of wages and benefits that he suffered as a result of Respondent's unlawfully refusing to allow him to work on July 11, 2005.

30 (c) Within 14 days from the date of this Order, make whole the Sheet Metal Workers' International Association, Local Union No. 19, AFL-CIO for any losses that it may have suffered because of Respondent's failure to remit union dues or to submit any other contractually-mandated payments to the Union prior to July 19, 2005.

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

40 (e) Within 14 days after service by the Region, duplicate and mail, at its own expense, a copy of the attached notice marked "Appendix."<sup>9</sup> A copy of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be mailed to all employees employed by the Respondent at

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<sup>9</sup> 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."

any time since May 1, 2005.

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

Dated, Washington, D.C., April 25, 2007.

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Margaret G. Brakebusch  
Administrative Law Judge

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**APPENDIX**

**NOTICE TO EMPLOYEES**

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**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

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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**

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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

20

**WE WILL NOT** tell you or ask you to resign from Sheet Metal Workers' International Association, Local Union No. 19, AFL-CIO or any other union.

**WE WILL NOT** interrogate you about your union membership.

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**WE WILL NOT** tell you that you must resign from the Union in order to retain your job.

**WE WILL NOT** tell you that you will receive benefits different from those negotiated by your collective bargaining representative.

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**WE WILL NOT** impliedly promise you a wage increase if you resign your union membership.

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**WE WILL NOT** unilaterally grant you benefits different from those negotiated by your collective bargaining representative.

**WE WILL NOT** refuse to allow you to work because of your union membership.

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**WE WILL NOT** withdraw recognition from the Sheet Metal Workers' International Association, Local Union No. 19, AFL-CIO as the collective bargaining representative of unit employees during the term of the existing collective bargaining agreement.

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**WE WILL NOT** repudiate and refuse to adhere to the terms of the collective bargaining agreement with the Sheet Metal Workers' International Association, Local Union No. 19, AFL-CIO or any other union during the term of the agreement.

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

**WE WILL** make whole, with interest, Anthony Stevens for our failure to allow him to work on July 11, 2005 because of his union membership.

5 **WE WILL** make whole, with interest, any employees covered by the collective bargaining agreement for any losses they may have suffered as a result of our failure to comply with the collective bargaining agreement prior to July 19, 2005.

10 **WE WILL** make whole, with interest, the Union for any losses it may have suffered as a result of our failure to remit dues or to submit any other contractually mandated payments to the Union prior to July 19, 2005.

**ADVANCED HEATING & COOLING INC.,  
d/b/a ADVENT HEATING & COOLING  
COMPANY**

\_\_\_\_\_  
(Employer)

20 Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

25 The National Labor Relations Board is an independent Federal Agency created in 1935 to enforce the National Labor relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to an agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website:  
30 [www.nlr.gov](http://www.nlr.gov).

615 Chestnut Street, One Independence Mall, 7<sup>th</sup> Floor, Philadelphia, PA 19106-4404  
(215) 597-7601, Hours: 8:30 a.m. to 5:00 p.m.

35 **THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

40 THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER. (215) 597-7643.

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