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Rome Electrical Systems, Inc. and Three River Electrical, Inc., d/b/a Three Rivers Electrical, Inc. and Robert D. Bollen and International Brotherhood of Electrical Workers, Local 613. Case 10–CA–35458

November 24, 2010

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND HAYES

On April 13, 2010, Administrative Law Judge George Carson II issued the attached supplemental decision. The Respondents filed exceptions, and the General Counsel filed an answering brief in opposition.

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

The Board has considered the supplemental decision and the record in light of the exceptions and answering brief, and has decided to affirm the judge’s findings¹ and conclusions and to adopt his recommended Order.²

The parties have raised several procedural and evidentiary issues. Initially, the General Counsel contends that the Respondents’ exceptions (which were not accompanied by a separate brief) do not meet the requirement in Rule 102.46(b) of the Board’s Rules and Regulations that the excepting party “concisely state the ground of [each] exception.”³ As described below, we find merit in the General Counsel’s contention as to certain of the Respondents’ exceptions, but not others. In any event, the Respondent’s exceptions lack merit.

1. The Respondents’ first exception is apparently directed at the judge’s finding that Three Rivers Electrical (Three Rivers) was a “disguised continuance” and alter ego of Rome Electrical (Rome). The Respondents assert that “the great weight of the testimony and other evidence” shows that after 1999 Rome performed work that was outside the jurisdiction of Rome’s collective-

¹ The Respondents have excepted, in effect, to a number 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.

² We clarify that the Board’s new policy of applying daily compounding of interest to backpay awards announced in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), does not apply to cases that were already in the compliance stage on the date that decision issued.

³ The Respondents were jointly represented by the same counsel.

bargaining agreement with the Union, and that the work of Three Rivers, which was created in 2007, was wholly outside the scope of that agreement. The Respondents make no further argument in support of these assertions or in opposition to the judge’s alter-ego finding.

As to the adequacy of the Respondents’ exception, in *Metropolitan Transportation Services*, 351 NLRB 657, 657 fn. 5 (2007), we found that an exception citing only “[t]he clear preponderance of all the relevant evidence” did not satisfy Rule 102.46(b). The Respondents’ exception similarly cites only “the great weight” of the evidence, and is thus insufficient.

Nevertheless, the Respondents’ factual assertions are irrelevant, even if true. Regarding the judge’s finding that Three Rivers was a disguised continuance of Rome, the issue, for the purpose of the alter-ego test, is whether Three Rivers’ business differed substantially from Rome’s in 2007, when Three Rivers was created, not whether Rome’s business had changed since 1999 or whether Rome’s or Three Rivers’ business was covered by the collective-bargaining agreement with the Union.

2. The Respondents’ second exception contends that the judge improperly relied on *A. J. Mechanical*, 352 NLRB 874 (2008), enfd. mem. sub nom. *Greene v. NLRB*, 321 Fed.Appx. 816 (11th Cir. 2009), to justify piercing the corporate veil and imposing individual liability on Rome President Robert D. Bollen. The Respondents assert that “this case is the antithesis of *A. J. Mechanical*,” arguing that the individual respondents in that case took more than \$1.8 million from their corporation while “the evidence in the instant case shows that Bollen did not take any money out of the business without consideration.” We find that this exception, although conclusory, is sufficiently particularized to comply with Rule 102.46(b). The exception is negated on its merits, however, by the judge’s factual findings, which we adopt.

3. The Respondents’ third and fourth exceptions challenge the judge’s reliance on testimony from prehearing depositions taken from two third-party witnesses: Layton Roberts, president of Etowah, a temporary employment agency used by Three Rivers; and Nan Langford, Rome’s (and later Three Rivers’) office manager. Although these two exceptions are adequately particularized for the purpose of Rule 102.46(b), they lack merit for the following reasons.

The Respondents first contend that the judge erroneously used Roberts’ deposition testimony—which the Respondents apparently regard as hearsay—to support his alter ego finding. As the General Counsel notes, however, the Respondents explicitly waived their objection to the introduction of Roberts’ deposition testimony

into the record at the hearing. See *Alvin J. Bart & Co.*, 236 NLRB 242, 243 (1978), enf. denied on other grounds 598 F.2d 1267 (2d Cir. 1979). In any event, the General Counsel introduced the deposition testimony under Federal Rule of Evidence 803(5), the exception to the exclusion of hearsay for past recollection recorded. The judge therefore properly admitted the testimony.⁴

Second, the Respondents contend that the judge erred by relying on Roberts' and Langford's pre-trial deposition testimony because the Respondents were not notified and given the opportunity to participate in those depositions. They emphasize that neither witness was protected under the Board's *Jencks* rule, since neither was employed by one of the Respondents when deposed. They further contend that their due-process rights were violated, relying on *Goldberg v. Kelly*, 397 U.S. 254, 269-270 (1970).

It is well established, however, that the General Counsel is not required to inform a respondent of the deposition of a third-party witness during a pretrial investigation. See GC Memo 00-02 fn. 1 (2000), citing *SEC v. O'Brien*, 467 U.S. 735 (1984). Indeed, the Board's "longstanding policy" is not to allow a respondent's counsel to be present at the deposition of a third-party witness. NLRB Case-Handling Manual Part 1 (ULP Proceedings) § 10058.4(c). Moreover, neither of the Respondents' cited authorities is apposite. The *Jencks* rule gives a respondent the right to review prior statements of a witness called by the General Counsel for the purpose of cross-examination.⁵ *Goldberg* established the right of a welfare recipient to a hearing prior to termination of benefits. Neither case suggests that a charged party has a right to receive notice of a deposition of a third-party witness in the course of an investigation. In any case, the Respondents were given the opportunity to review the deposition testimony and had the opportunity to rely on it or challenge it during the cross-examining of both witnesses at the hearing. They were consequently not deprived of due process.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Rome Electrical, Inc., Three

⁴ Moreover, the Board follows the Federal Rules of Evidence only "so far as practicable," and may consider probative hearsay testimony that is corroborated by other evidence or otherwise inherently reliable. See generally *Conley Trucking*, 349 NLRB 308, 310 (2007), enf. 520 F.3d 629 (6th Cir. 2008). That is true here, as Roberts' deposition testimony corroborated Bollen's own admission that in creating Three Rivers he was "trying to get away from this union stuff."

⁵ See Sec. 102.118(b)-(d) of the Board's Rules and Regulations; see also *Jencks v. U.S.*, 353 U.S. 657 (1957).

Rivers Electrical, Inc., Robert D. Bollen, and their respective officers, agents, successors, and assigns, jointly and severally, shall take the action set forth in the Order.

Dated, Washington, D.C. November 24, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Lauren Rich and Kerstin I. Meyers, Esqs., for the General Counsel.

Mark M. J. Webb and John M. Hawkins, Esqs., for the Respondent.

Norman J. Slawsky, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This compliance case was tried in Atlanta, Georgia, on February 22 and 23, 2010.¹ In the underlying unfair labor practice proceeding, *Rome Electrical Systems, Inc.*, 349 NLRB 745 (2007), the Board found that Rome Electrical had not given timely notice of withdrawal from the multiemployer association that negotiated area collective-bargaining agreements and that it violated Section 8(a)(5) of the National Labor Relations Act by failing to abide by the terms of the area agreements and by unilaterally changing the terms and conditions of employment of covered employees. The Board's order directed Rome Electrical, inter alia, to make whole bargaining unit employees for any losses suffered as a result of its failure to adhere to contracts negotiated by the multiemployer association and to make contributions to various benefit funds as required by those contracts. The Board's order was enforced by the Court of Appeals for the Eleventh Circuit on July 18, 2008. *NLRB v Rome Electrical Systems, Inc.*, 286 F. App. 697 (11th Cir. 2008). On October 6, 2009, the Regional Director for Region 10 issued the compliance specification herein setting out the backpay due to employees and the payments due to various funds of the Charging Party Union.

Rome Electrical Systems, Inc., hereinafter called Rome Electrical, ceased to abide by the terms of the effective collective-bargaining agreement on September 1, 2004. In early September 2007, Rome Electrical ceased operations. Robert D.

¹ All dates herein are in 2007 unless otherwise indicated. The unopposed motion of the General Counsel to correct the transcript and an exhibit is granted. I have designated the motion as GCExh. 35 and it is hereby received into the record. GC Exh. 5 is hereby substituted for the incomplete exhibit formerly in the record.

(Danny) Bollen, president and owner of Rome Electrical, began operating a new company, Three River Electrical, Inc., d/b/a Three Rivers Electrical, Inc., hereinafter called Three Rivers. The specification alleges that Rome Electrical, Three Rivers, and Robert D. Bollen individually are liable for the sums set out in the compliance specification. The timely answers filed by the Respondents deny liability.²

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. PRELIMINARY MATTERS

A. Background

Danny Bollen and a partner, Jackie Warner, incorporated Rome Electrical in 1988. As found in the underlying proceeding, Rome Electrical signed a letter of assent with the Union and thereafter operated as a union contractor until September 1, 2004. Bollen became the sole owner of Rome Electrical in 1997.

Bollen testified that, in the 1990s, the two largest accounts of Rome Electrical were for electrical work at an Anheuser-Busch plant in Cartersville, Georgia, and at Georgia Power and Light. It ceased performing that work in 1999. Bollen did not address the reason that work for Georgia Power and Light ceased. The work at Anheuser-Busch ceased because he lost the bid for that work. Notwithstanding the loss of those accounts, Rome Electrical continued to operate under its collective-bargaining agreement with the Union. After attempting unsuccessfully to withdraw from the multiemployer bargaining association in 2003, Rome Electrical, in 2004, informed the Union that it was withdrawing from the multiemployer bargaining association effective August 31, 2004. The Union claimed that the effort of Rome Electrical to withdraw had been untimely. Notwithstanding that claim, Rome Electrical ceased honoring the collective-bargaining agreement on September 1, 2004. The charge in the underlying proceeding was filed. The case was submitted pursuant to a stipulated record, and the Board and Court of Appeals agreed that the effort to withdraw had been untimely.

Robert Bollen continued to operate the business under the name of Rome Electrical Systems, Inc., until early September 2007. Bollen bid jobs and supervised the work force which consisted of about four employees. The adverse Board decision issued on April 12, 2007. As hereinafter discussed in greater detail, Three Rivers was incorporated on June 20. In July, Bollen spoke with Layton Roberts, president of Employment Innovations, Inc., d/b/a Etowah Employment, hereinafter called

Etowah, regarding an arrangement whereby the individuals formerly working for Rome Electrical who would be working for Three Rivers would be paid by Etowah. The forgoing agreement is unwritten.

B. Procedural Matters

Following receipt of the Respondents' answers, in which the Respondents denied liability but offered no alternative calculations in support of various general denials, the General Counsel, on November 2, 2009, filed a motion for partial summary judgment with the Board citing the failure of the answer to provide alternative calculations relating to the general denials of the amounts alleged to be due as backpay and to the various union funds. On December 3, 2009, the General Counsel moved to withdraw that motion in order to avoid delaying the hearing, and on December 11, 2009, the Board granted that motion. On January 5, 2010, the General Counsel filed the motion for partial summary judgment with the Division of Judges. That motion was referred to me upon my assignment to this case. In a conference call with all parties I advised that I would not rule upon the motion until the hearing opened. See *Calyer Architectural Woodworking Corp.*, 338 NLRB 315 (2002). I urged the parties to meet and discuss possible stipulations regarding the monetary computations. They did so. A stipulation was agreed upon at the hearing, which made the motion for partial summary judgment moot.

During the course of the hearing, both the General Counsel and Respondent made various claims and counter claims regarding cooperation in the compliance investigation. On September 26, 2008, Morris Newman, the compliance officer for Region 10, requested certain documents from the Respondent by email. At the hearing, counsel for the Respondent questioned Newman whether, prior to the email, all requests for documents had been made in telephone conversations or letters. The Region obtained accounting documents relating to Rome Electrical and Three Rivers pursuant to subpoenas served upon Read, Martin, and Slickman, the accounting firm used by both Rome Electrical and Three Rivers.

At one point in the hearing, counsel for the General Counsel moved to strike testimony given by Danny Bollen regarding work that had been performed by Three Rivers and whether that work constituted a continuation of work that had been begun by Rome Electrical. Counsel argued that there had not been compliance with a subpoena for documents that would arguably relate to Bollen's testimony. I stated that I would take the motion under advisement. Counsel for the Respondent represented that there were no documents responsive to the subpoena, and Counsel's failure to introduce any such documents in support of Bollen's testimony is consistent with that representation. I do not credit Bollen's conclusory testimony unsupported by documentary evidence, and I deny the motion of the General Counsel to strike testimony.

C. Preliminary Findings

Pursuant to the stipulation received as Joint Exhibit 1, the parties agreed to the computations set out in the compliance specification stating the amounts due to various union funds,

² The answers of the Respondents assert several affirmative defenses, including lack of jurisdiction, insufficiency of service, and laches. None of the asserted defenses were established at the hearing, nor were they argued in the brief of the Respondents. Each Respondent filed an answer to the compliance specification and jurisdiction was established in the underlying proceeding. "[L]aches may not defeat the action of a governmental agency in enforcing a public right" *Harding Glass Co.*, 337 NLRB 1116, 1118 (2002).

subject to a finding that Three Rivers is an alter ego of Rome Electrical.

The compliance specification seeks backpay for three employees: Steven Kight, Matthew Owens, and Marvin Cabrera. The specification alleges that Kight should be paid the journeyman wage rate and that Owens should be paid the unindentured apprentice wage rate. Rome Electrical, upon ceasing to abide by the terms of the collective-bargaining agreement, hired a laborer without regard to the referral provisions of the collective-bargaining agreement. Cabrera is alleged as being the individual who would have been referred if Rome Electrical had abided by the referral provisions of the collective-bargaining agreement. The specification alleges that Cabrera's backpay be calculated at the rate of \$10 an hour, the unindentured apprentice rate and the lowest rate prescribed in the collective-bargaining agreement. Respondent Rome Electrical's answer pleads that Kight was an intermediate journeyman, that Owens was a laborer, and that Cabrera was a laborer. Notwithstanding the foregoing pleadings, no alternative calculations relating the backpay were pled.

In *Harding Glass Co.*, 337 NLRB 1116 (2002), the Board held that a simple denial of employees' job classifications was insufficient but must be "supported by a counter assertion" as to what the proper job classifications should be. The decision does not address the effect of a failure to submit alternative calculations based upon the asserted correct job classifications of the employees. In view of my findings, alternative calculations in this case are unnecessary.

The General Counsel's evidence establishes that that Kight was a journeyman electrician. Kight presented documentary evidence that he had been certified as a journeyman by the State of Washington, his former residence. His credible and uncontradicted testimony establishes that, in Georgia, he passed the Union's journeyman test and continued to be fully qualified as a journeyman electrician. Rome Electrical, when operating pursuant to the collective-bargaining agreement, paid Kight the journeyman wireman rate. Rome Electrical presented no evidence in support of its pleading that Kight was not a fully qualified journeyman.

Compliance Officer Newman testified that the backpay calculations for Kight were based upon the lowest contractual journeyman wireman rate and that the calculations for Owens and Cabrera used the lowest rate provided in the contract. The Respondents presented no evidence contradicting that testimony. I find the pay rates and calculations set out in the compliance specification to be an appropriate measure of the backpay due the three employees.

The Respondents do not dispute the amounts sought as reimbursement for premiums for substitute health insurance after Rome Electrical ceased making contractually required payments in 2004. No reimbursement is sought for employee Owens nor for Cabrera, who was covered by the union plan. Reimbursement of health insurance premiums are due to Kight and two employees who are due no backpay, Keith Godfrey and Donnie Luther.

II. ALTER EGO AND PERSONAL LIABILITY

A. Facts

The central issues in this proceeding are whether the evidence establishes that Three Rivers is a disguised continuance and alter ego of Rome Electrical and whether the evidence justifies piercing the corporate veil and finding Robert Bollen individually liable.

Robert Bollen was the owner of Rome Electrical and its only manager and supervisor. He conducted the business affairs of Rome Electrical and set the wages, hours, and working conditions of the employees. Bollen bid upon jobs for Rome Electrical, and he supervised the work force that performed the jobs that he obtained. After 1999, when Rome Electrical ceased performing work for Georgia Power and Light and Anheuser-Busch, Bollen began bidding for and obtaining various commercial jobs in Rome, Georgia, and the immediately surrounding area, including jobs as the electrical subcontractor for Smithson Builders. After the loss of the work for Georgia Power and Light and Anheuser-Busch in 1999, there is no evidence that the nature and character of the work performed by Rome Electrical, light commercial work in and around Rome, Georgia, changed.

Journeyman Steven Kight began working for Rome Electrical in 2000 or 2001. At the relevant times herein, he was the only journeyman electrician on the payroll. Throughout his employment he performed "light commercial work." He was paid at the contractual wage rate until September 1, 2004, when Rome Electrical ceased honoring the collective-bargaining agreement. Bollen was Kight's only supervisor, telling him which jobs he would be working on. Kight drove a company vehicle, a GMC van, and was provided a cellular telephone. He had personal tools that "everybody has to provide as a tradesman." Larger specialized tools, including benders and pulling winches that are referred to as "tuggers," were kept in a warehouse adjacent to Rome Electrical's office at 323 East First Avenue in Rome. Bollen testified that he, not Rome Electrical, owned those specialized tools. After the creation of Three Rivers, there was no hiatus. Bollen continued to direct the work force. Kight continued to drive the same GMC van and use the company provided cellular telephone. The specialized tools continued to be kept in the same warehouse.

The Board decision finding that Rome Electrical had not timely withdrawn from the employer association issued on April 12, 2007. On June 6, Bollen reserved the name Three Rivers Electrical, Inc. On June 20, Three River Electrical, Inc., d/b/a Three Rivers Electrical, Inc., was incorporated. Bollen testified that his wife, Ruby Bollen, was the owner of Three Rivers, and the 2007 income tax return of Three Rivers shows her as the only shareholder of Three Rivers. At the hearing, Bollen was asked, "Does she have any involvement in the business?" He answered, "Absolutely none." Notwithstanding Bollen's testimony regarding ownership, the answer of Three Rivers to paragraph 4 of the compliance specification states: "The Respondent admits that Danny Bollen is the sole owner of Three Rivers Electrical, Inc."

Rome Electrical had operated out of an office located at 323 East First Avenue and an adjacent warehouse, property leased

from Jimmy Smithson, the general contractor who operated as Smithson Builders and for whom Rome Electrical often, but not exclusively, performed work as a subcontractor. The lease was unwritten. On an undisclosed date in the summer of 2007, Three Rivers leased from Smithson an office located at 325 East First Avenue in the same strip of buildings as 323 East First Avenue. That lease also is unwritten. The lease of the office at 325 East First Avenue, like the lease of the office at 323 East First Avenue, includes the warehouse in which equipment is kept. Although Office Manager Nan Langford testified that Rome Electrical never moved its office from 323 East First Avenue, on August 17, Rome Electrical filed a change of address form with the Postal Service changing its address to 325 East First Avenue "so Mr. Bollen could get the last Rome Electrical [bank] statements."

The final paychecks issued to employees by Rome Electrical was for the pay period ending September 5. Thereafter, employees began receiving paychecks from Etowah. The first checks from Etowah were for the pay period ending September 13.

Layton Roberts, president of Etowah, recalled that Danny Bollen contacted him a "couple of months" before Etowah began issuing paychecks to employees who had formerly worked for Rome Electrical. He recalled that Bollen "wanted to have employees on our payroll." In a pretrial deposition Roberts stated that Bollen explained that "the union wanted to sue him or was in the process of suing him" and that "his employees wanted him to put them on our payroll." There is not a scintilla of evidence that Bollen acted pursuant to any request of any employee, and, even if such a request had been made, there would have been no reason to change the name of Rome Electrical. Roberts agreed to put the employees who had been working for Rome Electrical on the payroll of Etowah with a "35 percent mark-up on top of the pay rate" to cover social security and Medicaid and Medicare, the FICA tax, unemployment taxes, worker's compensation, as well as Etowah's administrative costs and profit. Roberts acknowledged that Bollen "suggest[ed]" the wage rates. The rates were the same as Rome Electrical had been paying. He acknowledged that Bollen determined where the employees would work and the number of hours they would work. Bollen confirmed that he alone made all work decisions. The foregoing arrangement between Etowah and Three Rivers is unwritten.

Beginning in September, Bollen or Langford would, on a weekly basis, send a document by facsimile copy to Etowah reflecting the hours worked by each employee. Etowah would produce the employee paychecks and invoice Three Rivers for the hours worked by employees at the wage rates Bollen had set plus 35 percent of that total.

Etowah does not provide health insurance for the employees who work for Three Rivers. Rome Electrical employees began paying for substitute health insurance when Rome Electrical ceased making contributions to the Union contractual health plan. Health insurance coverage is now provided by Three Rivers under the same group number as that of Rome Electrical.

Office Manager Langford, who thought "for a short span" that Bollen was not going to have a business, was informed by him that "he was going to be starting another company that was

going to be structured a little bit different as far as jobs." He told her that if she "was interested in maintaining a part time job," she could fill out an application with Etowah. A female representative of Etowah brought her an application for herself and the employees, who were not present. Journeyman Kight recalls that Langford called him, telling him to come to the office to fill out some forms, "that we were going to be a different business name." Langford did not deny making the foregoing statement, and I credit Kight.

Kight, at some point, approached Roberts, asking him to "increase my benefits." Rogers told him that he would "have to talk to Danny [Bollen]." Kight asked Bollen about a paid vacation. Bollen replied that he "couldn't do it right now."

Prior to opening as Three Rivers, Bollen stated to Langford that he was "trying to get away from all this union stuff, that it was driving him crazy." Bollen admitted that, in a pretrial deposition, when asked why he started Three Rivers that he answered, "I was trying to get away from this union stuff . . . trying to get away from the Union and I guess that is probably the bottom line of why." At the hearing herein he amended that answer, stating that the foregoing response "was only part," that he was overwhelmed with debt and litigation. The only litigation in which Bollen was involved was the underlying unfair labor practice litigation and a lawsuit brought by the Union.

Bollen admitted that he alone made all business and work decisions with regard to Rome Electrical and made all business and work decisions with regard to Three Rivers. He had the name of Rome Electrical removed from the vehicle driven by Kight. Both Kight and employee Keith Godfry, who drove a company Ford pickup truck, had, after the creation of Three Rivers, continued to drive the same vehicles, taking them to their respective residences at night. Office Manager Langford confirmed that employees performing work for Three Rivers continued to use the same cellular telephones they had used when working for Rome Electrical.

Journeyman Kight identified eight customers for whom he performed work for Rome Electrical and for whom he thereafter performed work for Three Rivers, including general contractor Smithson. The Respondent, at the hearing, argued that, of the 40 or so customers for whom Rome Electrical performed work during the last 2 years of its existence, Three Rivers has performed work for only 10 of them.

Documentary evidence, the ledgers obtained from the accounting firm that served both Rome Electrical and Three Rivers, reveals that Smithson Builders, the general contractor from whom Rome Electrical often subcontracted electrical work, paid Rome Electrical \$330,136 in 2006 and \$50,953 in 2007. Three Rivers was paid \$47,431 in 2007, and \$567,077 in 2008 by Smithson. The brief of the General Counsel points out that the ledgers establish that, in 2006, Rome Electrical received over 80 percent of its construction/job income from 8 primary customers and, in 2007, Rome Electrical received over 90 percent of its income from the same 8 primary customers plus one new primary customer. Three Rivers, in the last 3 months of 2007 received over 75 percent of its construction/job income from seven of Rome Electrical's nine primary customers and, in 2008, received approximately 80 percent of its income from eight of Rome Electrical's nine primary customers.

At the end of August, when Rome Electrical ceased operations, it had liabilities in excess of \$200,000. Bollen testified that Rome Electrical's assets included two computers, office furniture, a lift, and four vehicles, the GMC van driven by Kight, two pickup trucks, and the GMC pickup truck driven by Bollen. Bollen did not mention a loan to Rome Electrical shareholders in the amount of \$155,803 which is reported as an asset upon the 2007 income tax return filed by Rome Electrical. The liabilities of over \$200,000 included a September 23, 2005, loan of \$116,864.12 from the Greater Rome Bank, the maturity date of which was September 20, 2007. The loan document reflects that two of Rome Electrical's four vehicles were pledged as collateral on that loan as well as a 2003 Nissan coupe, about which there was no testimony. Bollen, individually, was the guarantor of the loan. The Greater Rome Bank called for payment on the maturity date. Bollen transferred the titles of all four Rome Electrical vehicles to his name on December 12 and obtained a \$100,000 loan from Citizens First Bank in order to pay off the Greater Rome Bank loan. There is no bill of sale. When Bollen was asked whether he paid anything for the vehicles, he answered, "I assumed the debt," referring to the Greater Rome Bank note upon which two of the four vehicles had been pledged as collateral. Bollen then explained:

I had to use the titles of these vehicles as collateral on the \$100,000 that Citizens [First Bank] loaned me to pay the note that was being called in at Greater Rome Bank.

Between September 7 and November 21, checks from Three Rivers totaling over \$40,000.00 were written to Bollen and deposited in his personal checking account. Bollen then wrote checks to pay debts of Rome Electrical. Counsel for the General Counsel questioned Bollen with regard to those transactions.

Q. [Ms. Rich] You then wrote checks off your personal account to pay the debt of Rome [Electrical]?

A. [Bollen] Yes, Ma'am.

Q. Okay. My question is, this was money coming from Three Rivers, is that not correct?

A. Yes, Ma'am.

Q. Used to pay down debt of Rome [Electrical], is that correct?

A. Yes, Ma'am.

Q. Is there any particular reason that Three Rivers could not write a check directly to Rome [Electrical] creditors to pay down the debt?

A. I don't know.

Q. Well, you made the decision to write the checks to yourself personally, is that correct?

A. I did.

Q. Why did you make the decision to write the checks to yourself personally?

At that point in the testimony, counsel for the Respondent objected citing attorney-client privilege.

The liabilities of Rome Electrical also included approximately \$50,000 owned upon a line of credit from Regions Bank. On September 21, Bollen wrote a check for \$777.06 to himself on the account of Three Rivers, deposited it in his personal account, and then, on the same day, wrote a check for the identical amount to Regions Bank. In 2008, Three Rivers began

writing checks directly to Regions Bank. Counsel for the General Counsel questioned Bollen as follows:

Q. If you would look at [GC Exh. 24, pages] 107, 108, 109, 110, 111 and 112 and my question is whether Three Rivers Electrical paid down the debt owed to Regions Bank by Rome Electrical?

A. It looks like it, yes, Ma'am.

Q. So that answer is yes?

A. Yes.

Q. Is there a particular reason why in '08 you decided that Three River Electrical pay this debt directly rather than have the funds go through your personal account?

A. No Ma'am, no particular reason.

Bollen explained the reason he was having Three Rivers pay off Rome Electrical's debts as follows:

I was the personal guarantor on all the bad debts that were out there from Rome Electric. I was, I could not do business, I could not [get] credit, I could not do anything without paying these off and I had to make a living.

The 2005 income tax return for Rome Electrical, at page 4 of Form 1120S, reflects loans to shareholders in the amount of \$122,004 at the beginning of the year and in the amount of \$135,685 at the end of the year. See GC Exh 3. Bollen was the only shareholder of Rome Electrical. Counsel for the General Counsel questioned Bollen with regard to those entries.

Q. BY MS. RICH: In the middle of the page, it indicates loans to shareholders. Did you borrow at any time \$122,000.00 from Rome [Electrical]?

A. No Ma'am.

Q. Did you at any time borrow \$135,000.00?

A. No Ma'am.

Q. Do you have any idea where this is from?

A. I do not.

The 2007 income tax return for Rome Electrical, GC Exh. 28, reflects loans to shareholders in the amount of \$155,803. Counsel for the General Counsel questioned Bollen regarding that entry.

Q. BY MS. RICH: Did you ever pay back Rome [Electrical] \$155,803.00 as a loan to shareholder?

A. I never borrowed \$155,000.

...

THE WITNESS: I never borrowed it, I never paid it back.

Q. BY MS. RICH: Okay, but it's on your tax return.

A. Ma'am, like I said, I did not do this document.

JUDGE CARSON: You did sign it though.

THE WITNESS: Yes, sir, I did indeed.

B. Analysis and Concluding Findings

1. Disguised Continuance and Alter Ego

The compliance specification alleges alternatively that Three Rivers is a disguised continuance of, an alter ego of, and single employer with Rome Electrical, or a successor. The evidence establishes the disguised continuance and alter ego allegations.

The Board, in *Advance Electric*, 268 NLRB 1001 (1984), succinctly summarized the proper analysis in evaluating the issue of alter ego:

The legal principles to be applied in determining whether two factually separate employers are in fact alter egos are well settled. Although each case must turn on its own facts, we generally have found alter ego status where the two enterprises have “substantially identical” management, business purpose, operation, equipment, customers, and supervision, as well as ownership. *Denzil S. Alkire*, 259 NLRB 1323, 1324 (1982). Accord: *NLRB v. Campbell-Harris Electric*, 719 F.2d 292 (8th Cir. 1983). Other factors which must be considered in determining whether an alter ego status is present in a given case include “whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.” *Fugazy Continental Corp.*, 265 NLRB 1301 (1982).

Bollen’s admission in his deposition that he was “trying to get away from this union stuff,” an admission confirmed by his statements to President Roberts and Office Manager Langford, establish that the creation of Three Rivers was directly related to the Board order that Rome Electrical fulfill its obligations under the contract with the Union. Bollen’s assertion that the creation of Three Rivers also was motivated by the debt of Rome Electrical lacks veracity insofar as he admitted that he felt obligated to pay off the debts of Rome Electrical, the most significant being the loan from the Greater Rome Bank for which he was personally liable as guarantor. The only litigation in which Rome Electrical was involved related to its failure to meet its obligations under the union contract. Bollen had continued to operate Rome Electrical during that litigation. He ceased to do so soon after the decision of the Board on April 12. I find that the claim that Three Rivers was created for any reason other than to avoid obligations under the union contract, obligations that Rome Electrical had not fulfilled and that had resulted in litigation because of that failure, is bogus.

In June, Bollen incorporated Three Rivers, and at some point thereafter, he leased an office on behalf of Three Rivers at 325 East Main Street, which would appear to be one door down the block from the office of Rome Electrical, at 323 East Main Street, and obtained a new telephone number. According to Office Manager Langford, the Rome Electrical office was not moved, but its address with the United States Postal Service was changed on August 14. When counsel for the General Counsel sought to question Bollen regarding establishment of the Three Rivers office, counsel for the Respondent objected upon grounds of attorney client privilege. I sustained that objection, thus the record establishes only the foregoing facts.

Bollen testified that his wife owns Three Rivers, but the answer of Three Rivers admits that “Danny Bollen is the sole owner of Three River Electrical, Inc.” The foregoing contradiction is immaterial. The Board does not hesitate “to find alter ego status” when the different owners are in “a close familial relationship.” *Fallon-Williams, Inc.*, 336 NLRB 602 (2001).

Notwithstanding the acquisition of an office at a slightly different address than that of Rome Electrical, Three Rivers used the same warehouse as Rome Electrical. The former Rome Electrical employees continued to drive the same vehicles they had previously driven and continued to use the same cellular

telephones they had utilized when performing work for Rome Electrical.

Bollen was, as he had been with Rome Electrical, the only supervisor of employees working for Three Rivers. He set their wages, the checks for which were prepared by Etowah. Three Rivers, as did Rome Electrical, performed electrical work for various customers including work pursuant to subcontracts from Smithson. The absence of a total identity of customers, a repeat clientele, is attributable to the fact that, once the contracted electrical work has been performed, the customer is not going to need further electrical work absent an expansion or renovation. The most significant sources of income for Three Rivers have been Rome Electrical’s major customers. Three Rivers continues to serve the same “market area,” Rome, Georgia, and the surrounding area as Rome Electrical. See *Crossroads Electric, Inc.*, 343 NLRB 1502, 1506 (2004); *Barnard Engineering Co.*, 295 NLRB 226, 247 (1989). I find that the ownership, management, business purpose, operation, equipment, customers, and supervision of Rome Electrical and Three Rivers were and are substantially, if not virtually, identical.

The Respondents’ brief argues that Rome Electrical was unable “to win bid contracts in [the] face of competing against non-union shops.” There is no evidence whatsoever in support of that assertion. For 3 years, September 1, 2004, until early September 2007, Rome Electrical had operated as a nonunion shop, paying less than union scale to a journeyman and not making contributions to various union funds.

The Respondent argues the individuals working for Three Rivers are not employees but “independent contractors.” I disagree. Unlike the situation in *Polis Wallcovering, Inc.*, 323 NLRB 873, 879 (1997), cited in the Respondents’ brief, the individuals working for Three Rivers are not independent contractors who are hired “as needed” and paid by the job. These employees work exclusively for Three Rivers, use Three Rivers’ cellular telephones, and take Bollen’s vehicles, vehicles that were formerly Rome Electrical’s vehicles, to their residences at night. Their health insurance, for which they now must pay, is through Three Rivers under Rome Electrical’s former group plan number. Their wages, paid through Etowah, are set by Bollen.

The Board has, in at least two cases, addressed situations in which an entity has, as does Etowah herein, provide payroll and administrative services to the actual employer. In neither case was the entity that provided the administrative services found to be a joint employer insofar as the entity did not “codetermine matters governing significant and essential terms and conditions of employment” of the employees. See *Employee Management Services*, 324 NLRB 1051, 1062 (1997); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1136 (2002).

Etowah determines nothing relating to the “significant and essential terms and conditions of employment” of the employees of Three Rivers. Bollen sets their wages, tells them where to work, supervises their work, and permits them to take his personally owned vehicles to their residences. Etowah, notwithstanding the facade of employment applications, provides payroll and administrative services to the actual employer, Three Rivers. As Office Manager Langford told employee Kight, “[W]e were going to be a different business name.”

Three Rivers is a disguised continuance and the alter ego of Rome Electrical.

2. Personal Liability

The compliance specification alleges that Danny Bollen should be held personally, jointly, and severally liable to remedy the unfair labor practices of Rome Electrical.

The Board in *White Oak Coal Co.*, 318 NLRB 732 (1995), enf. 81 F.3d 150 (4th Cir. 1996), set out the following two pronged test for determining whether the corporate veil should be pierced and personal liability assessed:

Under Federal common law, the corporate veil may be pierced when: (1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct, and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.

When assessing the first prong to determine whether the shareholders and the corporation have failed to maintain their separate identities, we will consider generally (a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets, and affairs have been commingled. Among the specific factors we will consider are: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of [same] or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintain an arm's-length relationship among related entities; (8) diversion of the corporate funds or assets to noncorporate purposes, and, in addition, (9) transfer or disposal of corporate assets without fair consideration.

When assessing the second prong, we must determine whether adhering to the corporate form and not piercing the corporate veil would permit a fraud, promote injustice, or lead to an evasion of legal obligations. The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from misuse of the corporate form. Further, the individuals charged personally with corporate liability must be found to have participated in the fraud, injustice, or inequity that is found. Id at 935 [Footnotes omitted.]

The testimony of Bollen regarding financial matters was disturbing. I find it incredible that an individual would sign income tax returns reflecting that the individual had received loans from his corporation and then deny that he had received any such loans. Bollen was the only shareholder of Rome Electrical. The 2007 income tax return of Rome Electrical reports loans to shareholders of \$155,803. That entry reflects an increase in loans to shareholders from Rome Electrical's 2005 tax return which showed loans totaling \$122,004 at the beginning of the year and \$135,685 at the end of the year. Bollen denied taking any loans and gave no further explanation of the entries

stating, with regard to the 2007 tax return, which he admitted signing, "I did not do this document."

Bollen's denial that he received the loans reflected upon Rome Electrical's income tax returns defies belief. Subparagraph 13(g) of the compliance specification specifically alleges "diverting corporate funds . . . for personal and other non-corporate purposes." Bollen and his counsel were on notice that diversion of corporate assets was an issue of paramount importance in this proceeding. The tax return of Rome Electrical for 2007 reflects that it was prepared by "Reid, Martin, and Slickman, CPAs," the same firm that provided accounting services for Rome Electrical and Three Rivers. Certified public accountants file income tax returns upon information in their possession provided by the filer of the tax return. They do not report loans that were not made as assets of the corporation. I am satisfied that, if no loans were made to Bollen, the Respondents would have provided either documents or testimony from the accounting firm to corroborate Bollen's incredible denial that he received the loans reported on Rome Electrical's tax return. I find that, at the point that Bollen ceased operating Rome Electrical, he personally owed the corporation \$155,803.

The first prong of the *White Oak* analysis relates to lack of respect given to the "separate identity of the corporation . . . [so] that the personalities and assets of the corporation and the individuals are indistinct." Id. at 935. The decision notes nine factors in that analysis.

Regarding factors 1, 2, 6, and 9, Bollen's transfer of title to the four vehicles owned by Rome Electrical, two of which were pledged as collateral on the loan from the Greater Rome Bank, to himself on December 12 in order to obtain a personal loan of \$100,000 from Citizens First Bank, the proceeds of which he used to satisfy the Greater Rome Bank loan, establishes that Rome Electrical was not operated as a separate entity and that corporate assets were commingled with other assets. Bollen admitted making no payment for the vehicles, but asserted that he "assumed the debt," ignoring the fact that he was already the personal guarantor on the Greater Rome Bank loan. Bollen's writing checks on the account of Three Rivers, depositing them in his personal account, and then writing checks to pay debts of Rome Electrical establish that the corporate form was a mere shell through which Bollen operated.

Regarding factors 3, 4, and 7, the record is devoid of current corporate records. There is no document reflecting the present structure and ownership of either Rome Electrical or Three Rivers. The only minutes of a corporate meeting relating to Rome Electrical placed into evidence were the minutes of a 1988 meeting, shortly after Rome Electrical was formed, in which Ruby Bollen, wife of Danny Bollen, is named as president. When asked about that, Danny Bollen answered that he "thought that was addressed in 1997 when I bought Jackie [Warner] out." Whether it was addressed is unknown because it was not documented. There are no records of any Three Rivers corporate meeting. The Respondents disregarded legal formalities. The arrangement between Three Rivers and Etowah is unwritten. The "lease" with Jimmy Smithson for the former Rome Electrical office and warehouse was unwritten as is the "lease" of the Three Rivers office and the same warehouse.

Relative to factor 8, Bollen admitted that Rome Electrical had paid his personal membership fees at a local country club.

Relative to factor 5, the availability and use of corporate assets, I find that Bollen's decision in 2008 to use assets of Three Rivers to pay debts of Rome Electrical because he was "the personal guarantor on all the bad debts" and "I (emphasis added) could not do anything without paying these off," confirms that the identity of Bollen, Three Rivers, and Rome Electrical were indistinct.

I find that the first prong of *White Oak* has been satisfied. Assets were juggled at Bollen's direction. Vehicles belonging to Rome Electrical became vehicles owned by Bollen. Debts of Rome Electrical were paid by Three Rivers. The boundaries between and among Rome Electrical, Three Rivers, and Bollen are not only indistinct, they are nonexistent.

The second prong of the *White Oak* test requires a finding that "adhering to the corporate form and not piercing the corporate veil would permit a fraud, promote injustice, or lead to an evasion of legal obligations." *Ibid.*

The Board explained that the "showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from misuse of the corporate form" and that the individual must have "participated in the fraud, injustice, or inequity that is found." *Ibid.*

The Respondents argue that Bollen "never took one dime from the company [Rome]" and "did not treat corporate assets as his own." The foregoing argument overlooks Bollen's payment of his individual, not corporate, country club membership from Rome Electrical assets. It ignores the transaction in which Bollen transferred the title to Rome Electrical's four vehicles to his own name. Although Bollen did not put the proceeds of that transaction into his pocket, he benefited from that transaction. Bollen pledged those vehicles to Citizens First Bank for a personal loan that he used to pay off the loan to Greater Rome Bank upon which he was a personal guarantor. By taking title to the vehicles, Bollen removed those vehicles as assets of Rome Electrical and relieved himself of personal liability for the Greater Rome Bank loan. Those corporate assets ceased to be available for any other claims against Rome Electrical, specifically including any claims resulting from liability assessed pursuant the Order herein.

Although the Respondents argue that Rome Electrical is insolvent, it has not declared bankruptcy. The loan to shareholders of \$155,803, the loan which Bollen denies, is shown on Rome Electrical's 2007 tax return as an asset of the corporation. Certified public accountants do not report assets that do not exist. I find it incomprehensible that a taxpayer would sign a tax return reflecting nonexistent loans, certainly not loans in excess of \$150,000. The loan to Bollen of \$155,803, would have almost covered the note to the Greater Rome Bank and the line of credit to Regions Bank. As correctly pointed out in the brief of the General Counsel, "Bollen engaged in substantial financial transactions, juggling thousands of dollars of corporate funds and assets among Rome Electrical and Three Rivers and himself . . . so he could pick and choose which creditors to pay, based on his own financial interests and in derogation of the government's rights as a creditor."

In this case, as in *D.L. Baker, Inc.*, 351 NLRB 515, 525 (2007), Bollen "disregarded the separateness of the corporate identities, commingled funds, [and] diverted funds." The solvency of Rome Electrical is not the issue. As in *Bolivar-Tees, Inc.*, 349 NLRB 720, 730 (2007), with names of the parties substituted as indicated, "it is not the fact that . . . [Rome Electrical] is incapable of paying its debts that matters; it is the fact that . . . [Bollen] made a mockery out of separating his personal business interests . . . from . . . [Rome Electrical's] corporate form." The consequence of Bollen's actions was to diminish the ability of Rome Electrical and Three Rivers as its alter ego, "to satisfy its remedial and backpay obligations." *Id.* at 731. I find that the barely existent corporate veil herein be pierced and that Danny Bollen be held personally liable for complying with the Board's order.

CONCLUSIONS OF LAW

Robert D. (Danny) Bollen personally and Three River Electrical, Inc., d/b/a Three Rivers Electrical, Inc., a disguised continuance and the alter ego of Rome Electrical Systems, Inc., are jointly and severally liable with Rome Electrical for remedying the unfair labor practices found in the underling proceeding by complying with the Board's order of April 14, 2007, as enforced the Court of Appeals judgment dated July 18, 2008.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended³

ORDER

Rome Electrical Systems, Inc., Three River Electrical, Inc., d/b/a Three Rivers Electrical, Inc., and Robert D. (Danny) Bollen, an individual, Rome, Georgia, their officers, agents, successors and assigns, jointly and severally, shall, consistent with the compliance specification, make whole the employees named in the specification by payment to them of the amounts set out in the compliance specification and applicable appendices, plus interest accrued from October 1, 2009, to date of payment, less tax withholding required by Federal and state law, reimburse the employees named in the compliance specification for substitute health insurance premium payments, plus interest accrued from October 1, 2009, to date of payment, and remit to the various union funds the delinquent contributions and liquidated damages set out in the compliance specification and applicable appendices, plus interest accrued from October 1, 2009, to date of payment, and liquidated damages accrued from October 1, 2009, to the date of payment. As set out in the compliance specification, the amounts due as of October 1, 2009, which include interest through October 1, 2009, are:

Steven Kight	\$ 11,027
Matthew Owens	632
Marvin Cabrera	1,852
Substitute Health Insurance Premium Payments	\$12,594

³ 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.

National Electrical Benefit Fund	21,123
plus liquidated damages	11,502
Local Union 613 Health and Welfare Trust Fund	94,691
plus liquidated damages	48,976
Local Union 613 Pension Trust Fund	
\$47,429	
plus liquidated damages	24,213
National Labor-Management Cooperation Fund	438
plus liquidated damages	1,200
Administrative Maintenance Fund	2,055
Joint Apprenticeship Training Fund	7,046
plus liquidated damages	<u>3,121</u>
Total	\$287,899

Dated, Washington, D.C., April 13, 2010.