# No.12-1410

# UNITED STATES COURT OF APPEALS
## FOR THE FOURTH CIRCUIT

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**and**

**ASBESTOS WORKERS LOCAL 24 APPRENTICESHIP FUND, ASBESTOS WORKERS LOCAL 24 PENSION FUND, and ASBESTOS WORKERS LOCAL 24 MEDICAL FUND**

**Intervenors**

**v.**

**ENGINEERING CONTRACTORS, INC., and ECI OF WASHINGTON, LLC, alter egos**

**Respondents**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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**ROBERT J. ENGLEHART**
***Supervisory Attorney***

**GREGOIRE SAUTER**
***Attorney***

***National Labor Relations Board***
**1099 14th Street, N.W.**
**Washington, D.C. 20570**
**(202) 273-2978**
**(202) 273-1714**

**LAFE E. SOLOMON**
***Acting General Counsel***
**CELESTE J. MATTINA**
***Deputy General Counsel***
**JOHN H. FERGUSON**
***Associate General Counsel***
**LINDA DREEBEN**
***Deputy Associate General Counsel***

***National Labor Relations Board***

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## JURISDICTIONAL STATEMENT

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce its Decision and Order issued on December 8, 2011, and reported at 357 NLRB No. 127. (Board Decision and Order [hereinafter D&O].) The Board's Decision and Order is final with respect to all parties under Section 10(e) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. §§ 151 *et seq.*, 160(e).

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). The Board's application for enforcement is timely, as the Act places no time limitation on such filings. This Court has jurisdiction over this application for enforcement pursuant to Section 10(e) because the unfair labor practices occurred in Maryland. *Id.* § 160(e).

## STATEMENT CONCERNING ORAL ARGUMENT

The Board believes that this case involves the application of well-settled legal principles to uncontested facts and, therefore, that argument would not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests to participate and submits that 10 minutes per side would be sufficient.

## STATEMENT OF ISSUES

1. Whether the violations found by the Board, which Respondents do not challenge, are entitled to summary enforcement; and
2. Whether the Court lacks jurisdiction to hear Respondents' challenge to the Board's remedial order, which, in any event, is without merit.

## STATEMENT OF THE CASE

This case originated from a series of unfair labor practice charges filed against Engineering Contractors, Inc. ("Engineering"), and ECI of Washington, LLC ("ECI") (together, "Respondents"), by Plumbers Local No. 5, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO ("the Plumbers"), Steamfitters Local 602, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO ("the Steamfitters"), Sheet Metal Workers International Association, Local No. 100, AFL-CIO ("the Sheet Metal Workers"), and Asbestos Workers Local 24 Pension Fund, Asbestos Workers Local 24 Medical Fund, and Asbestos Workers Local 24 Apprenticeship Fund, affiliated with International Association of Heat and Frost Insulators and Allied Workers Local 24, AFL-CIO ("the Asbestos Workers") (together, "the Unions"). The Board's General Counsel investigated these charges and issued four complaints alleging that Respondents are a single employer and/or

alter egos who violated the Act by committing a variety of unfair labor practices. Respondents denied the General Counsel's allegations.

After a hearing in which the parties fully participated, Administrative Law Judge Bruce D. Rosenstein issued a recommended Order finding that Engineering and ECI are a single employer and/or alter egos under the Act. (D&O 3-4.) The judge also found that Respondents discharged at least 38 employees (collectively, "the discriminatees") because of their concerted activities on behalf of their respective unions, in violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1). (D&O 5-6.) Lastly, the judge determined that Respondents violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by withdrawing recognition from the Unions, refusing to negotiate and repudiating existing collective-bargaining agreements, and by refusing to provide information requested by the Sheet Metal Workers. (D&O 4-5.) After reviewing the record and considering Respondents' exceptions to the administrative law judge's decision, the Board (Chairman Pearce and Members Becker and Hayes) affirmed the judge's rulings, findings and conclusions and adopted his recommended order. (D&O 1.)

In a separate but related action commenced while the administrative law judge's decision was pending, the Board's Regional Director filed for a preliminary injunction against Engineering and ECI under Section 10(j) of the Act,

29 U.S.C. § 160(j), in the District of Maryland. *See Gold v. Eng'g Contractors Inc.*, 831 F. Supp. 2d 856 (D. Md. 2011). The district court granted the injunction, finding reasonable cause to believe that Engineering and ECI are a "single-integrated enterprise"; that ECI was created for the sole purpose of avoiding Engineering's collective-bargaining obligations; and that Engineering terminated all union-affiliated employees and ceased to recognize and bargain with their union representatives. *Id.* at 861-62. The Board's Order in this case pretermitted further proceedings before the district court, because the court's Section 10(j) jurisdiction ends once the Board issues a final order.

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACT

The Board made the following findings of fact, which are uncontested.

#### A. Engineering Contractors, Inc.

Engineering is a mechanical and engineering contractor incorporated in 1991 under Maryland law, with its offices in Upper Marlboro, Maryland. (D&O 2; GC Ex. 37 (Engineering Articles of Incorporation), GC Ex. 38 at 1 (Engineering website).)[1] Engineering installs, maintains, services and repairs mechanical systems that provide heat, ventilation, and air conditioning ("HVAC") for

[1] "GC Ex." refers to the General Counsel's exhibits at the administrative hearing and "CP P/S" to the exhibits of the Plumbers and Steamfitters. "Tr." cites are to the hearing transcript and "Br." to Respondents' opening brief.

industrial, commercial and government clients in the Washington, D.C., metropolitan area. (D&O 2; GC Ex. 37 at 2, GC Ex. 38 at 3-4; Tr. 375-77.) Engineering's president is Steven Griffith, who owns 51% of the company's stock. (D&O 2; GC Ex. 123 at 5 (Engineering's 2009 tax return).) The remaining 49% is owned by Engineering's vice-president, Paul Parker. (D&O 2; GC Ex. 123 at 6.)

**B. Engineering Signs Collective-Bargaining Agreements with Unions**

On November 18, 2008, Engineering signed a Letter of Assent authorizing a multi-employer association, the Mechanical Contractors Association of Metropolitan Washington, Inc., ("MCAMW") to represent it in its collective-bargaining relationships with the Plumbers. (D&O 3; GC Ex. 45 (Letter of Assent).) Under the terms of this letter, Engineering agreed to be bound by, and comply with, the collective-bargaining agreement between the Plumbers and MCMWA, as well as any successor agreement between them, and to contribute to the Plumbers' fringe-benefit funds. (D&O 3; GC Ex. 46 (then-existing agreement between Plumbers and MCAMW), GC Ex. 47 (current agreement between Plumbers and MCAMW), GC Ex. 45 at ¶¶ 1-2.) In order to terminate the Letter of Assent, Engineering was required to give written notice to the Plumbers and MCAMW at least 150 days prior to expiration of the collective-bargaining agreement in force at the time. (D&O 3; GC Ex. 45 at ¶ 1.) Engineering never

gave written notice of its intention to cancel the Letter of Assent or the agreement with the Plumbers. (D&O 3, 4; Tr. 40-41, 382.)

On December 13, 2008, Engineering signed a similar Letter of Assent authorizing MCAMW to represent it in its collective-bargaining relationships with the Steamfitters. (D&O 3; GC Ex. 48 (Agreement of Assent).) In so doing, Engineering agreed to be bound by, and comply with, MCAMW's existing and successor agreements with the Steamfitters, and became a contributing employer to the various fringe-benefit funds associated with the Steamfitters. (D&O 3; GC Ex. 49 (then-existing agreement between Steamfitters and MCAMW), GC Ex. 101 (current agreement between Steamfitters and MCAMW), GC Ex. 48 at ¶¶ 1-2.) Engineering also agreed not to terminate the Letter of Assent or the collective-bargaining agreement without giving at least 150 days written notice. (GC Ex. 48 at ¶ 1.) Engineering never gave any notice of its intention to cancel the Letter of Assent or the agreement. (D&O 3, 4; Tr. 118-19, 382.)

On November 14, 2008, Engineering signed the collective-bargaining agreement in existence between the Sheet Metal Workers and the Sheet Metal Contractors' Association of the District of Columbia ("SMACNA"). (D&O 3; GC Ex. 43 (then-existing agreement between Sheet Metal Workers and SMACNA).) Engineering also signed the successor agreement between the Sheet Metal Workers and SMACNA. (D&O 3; GC Ex. 44 (current agreement between Sheet Metal

Workers and SMACNA).) By signing these agreements, Engineering became a contributing employer to the Sheet Metal Workers' fringe-benefit funds. (GC Ex. 43 at 47-53, GC Ex. 44 at 23-25.) Engineering never expressed an intention to terminate its agreement with the Sheet Metal Workers. (D&O 3, 4; Tr. 530.)

On November 11, 2008, Engineering signed the collective-bargaining agreement existing between the Asbestos Workers and the Insulation Contractors' Association of Washington, DC ("ICA") and recognized the Asbestos Workers as the exclusive bargaining representative of Engineering's insulators. (D&O 3; GC Ex. 39 (Recognition Agreement), GC Ex. 40 (then-existing agreement between Asbestos Workers and ICA).) Engineering also became a contributing employer to the fringe-benefit funds associated with the Asbestos Workers. (GC Ex. 103 (Asbestos Workers' medical & pension fund participation agreement).) The agreement between the Asbestos Workers and ICA expired in September 2009 and was replaced by a new agreement a month later. (D&O 3; GC Ex. 102 (successor agreement between Asbestos Workers and ICA).) Although Engineering never formally ratified the new agreement, around October 2009, the company began to pay wage rates and fund contributions as provided by the new agreement. (Tr. 178, 196.) Engineering never indicated any intention not to be bound by ICA's agreements with the Asbestos Workers. (D&O 3, 4; Tr. 179-80, 530.)

### C. Creation of ECI of Washington, LLC

ECI is a limited liability company formed in November 2009 under District of Columbia law. (D&O 2; GC Ex. 122 (ECI Articles of Organization).) Like Engineering, ECI installs, maintains, services and repairs HVAC systems in the Washington metro area. (D&O 2; GC Ex. 122 at 4; Tr. 275.) At the time of its creation, ECI leased an office in the District of Columbia. (D&O 2; GC Ex. 127 (Washington office lease).)

### D. Engineering Discontinues Field Operations, Discharges its Union Employees, Withdraws Recognition from the Unions and Repudiates its Collective-Bargaining Agreements While ECI Begins Operating with a Nonunion Workforce

On Friday, May 7, 2010, Engineering ceased operating and discharged its entire union workforce, at least 38 individuals. (D&O 3, 7; GC Ex. 54 (separation notices); Tr. 41-42, 92-93, 119-20, 180-82, 211, 382-83, 547.) The discharged workers were told to go to Upper Marlboro to return company materials and pick up their final paychecks. (Tr. 67, 213-14, 326-27.) While there, they were also able to fill out job applications for ECI. (D&O 3, 6; GC Ex. 56 (ECI job application); Tr. 327-28, 333-34.) Two individuals discharged by Engineering testified that they were asked to join ECI as nonunion employees (D&O 5, 6; Tr. 144-45, 328-29, 331-32), and Paul Parker confirmed that he offered several former Engineering employees to work for ECI in a nonunion setting (D&O 6; Tr. 549-50). Two such employees, Bobby Jones and Joe Burnette, accepted offers to work

for ECI. (D&O 4, 6; GC Ex. 54 at 14, 16, GC Ex. 115 (ECI telephone list); Tr. 188-89, 239-42, 332.)

As of May 7, 2010, Engineering ceased to comply with all of its collective-bargaining agreements. (D&O 3, 4; Tr. 419.) Prior to that date, Engineering was already in arrears concerning payments owed to fringe-benefit funds under its agreements with the Plumbers, Steamfitters, Asbestos Workers, and the Sheet Metal Workers. (D&O 3; Tr. 91-92, 102-03, 175-76; 226-27; 427.) Engineering did not notify the Unions in advance that it was ceasing operations. (D&O 2; Tr. 385, 530.) However, in conversations with workers and Union representatives on or after May 7, 2010, Griffith, Parker and other management employees stated that Engineering was going nonunion. (D&O 5; Tr. 43, 67, 71, 212, 239, 386-87.)

The following Monday, May 10, 2010, ECI began performing engineering and construction work with nonunion labor. (Tr. 504.) Payroll records show that Engineering paid its employees through May 13, 2010, and that ECI began to pay wages on the same date. (D&O 3; GC Ex. 116 at 22 (Engineering payroll report), GC Ex. 117 at 1 (ECI payroll report).) ECI never adhered to, or complied with, the collective-bargaining agreements signed by Engineering. (D&O 3, 4; Tr. 419-23, 492-93.) Engineering still exists as a corporate entity, but the State of Maryland has revoked its charter for failing to pay taxes. (D&O 3; Tr. 390-91, 544.)

### E. Engineering and ECI are a Single Employer and/or Alter Egos

Engineering and ECI have the same owners and upper management. Both companies share the same president (Steven Griffith) and vice president (Paul Parker) who own respectively 51% and 49% of each company's stock. (D&O 2, 3; GC Ex. 122 at 7; GC Ex. 123 at 5-6; Tr. 371, 372-73, 408.) Griffith and Parker have identical duties and responsibilities in both companies. (Tr. 408-09, 428-29, 543.) As stipulated by Respondents, several of Engineering's former supervisors work in the same capacity for ECI, including Jason Absher and Dave Packianathan (project managers), Greg Absher (safety director) and Brian Parker (purchasing manager). (D&O 3; Tr. 11-12.)

Engineering and ECI share common premises and facilities in Upper Marlboro and Washington. (D&O 4; GC Ex. 38 at 1.) The Upper Marlboro facility consists of several offices, a warehouse for storing tools and vehicles and a sheet-metal shop. (Tr. 61-62, 72, 311-12, 480-82.) Engineering continues to lease the facility despite ceasing operations in May 2010. (GC Ex. 126 (amendment extending Engineering's lease on Upper Marlboro facility until August 31, 2012); Tr. 478-79, 545.) The lease for the Washington office bears ECI's name, but Engineering made all rent payments until August 20, 2010. (GC Ex. 127 at 1, CP P/S Ex. 5 (rent checks for Washington office); Tr. 500-01, 568-69.)

The bulk of ECI's operations are run out of the Upper Marlboro facility and ECI's employees spend little time, if any, at the Washington office. Witnesses employed by ECI testified that they had never been to the Washington office and always went to Upper Marlboro to get assignments and supplies. (Tr. 258-59, 308-09, 311-13.) ECI's estimator testified that he spends only one day per week at the Washington office, and the other four in Upper Marlboro. (Tr. 278, 294.) The Washington location is a single office with no place to house tools or vehicles. (Tr. 313, 482.) Most of ECI's tools, equipment and vehicles are stored in Upper Marlboro. (Tr. 480-81.)

After Engineering ceased operating, most of its trucks, vans and other vehicles were transferred to ECI, which continued to make monthly leasing payments and used them in the conduct of its business. (D&O 3; GC Ex. 95 (list of vehicles owned or leased by Engineering), GC Ex. 133 at 1 (vehicles listed as Engineering's tax assets), GC Ex. 133 at 9 (list of Engineering's vehicles in ECI's possession as of Nov. 20, 2010); Tr. 44-47, 464-71, 488-89, 494-99.)

ECI assumed a number of contracts that Engineering had signed but had not fully performed, or begun to perform, when it ceased operations on May 7, 2010. (D&O 4; GC Ex. 55 (list of contracts assumed by ECI from Engineering); Tr. 384-85, 389, 587-88.) ECI completed several of these projects and continues to work

on others. (D&O 4; Tr. 438-49.) ECI also continues to work regularly for companies that were previously clients of Engineering. (Tr. 449-50.)

Besides having the same ownership and upper management, occupying the same premises, using the same vehicles in the course of business, and working on the same projects for the same clients, Engineering and ECI share common work policies,[2] vendors and equipment,[3] and use the same insurance companies, bank, and attorneys for labor-relations matters.[4] Lastly, Engineering and ECI use the same logo and share very similar names.[5]

### F. Failure to Provide Relevant Information

By letter dated June 15, 2010, the Sheet Metal Workers requested Parker to provide necessary and relevant information to substantiate the termination of 13 of its members by Engineering. (D&O 5; GC Ex. 68 (Sheet Metal Workers'

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[2] (D&O 4; GC Ex. 63 (ECI Drug & Alcohol Testing Release, addressed to "all employees and future employees of Engineering Contractors Inc."), GC Exs. 66, 135 (Equal Employment and Affirmative Action Plans for ECI and Engineering), GC Ex. 134 (Engineering and ECI policies for cell phones, office phones, voicemail, e-mail, internet access and computer files.)

[3] (D&O 3-4; GC Ex. 133 at 2-3; Tr. 150, 261-65, 303, 353, 456-63, 484, 489, 491, 544-45.)

[4] (D&O 4; GC Ex. 128 (commitment letter signed July 27, 2010, identifying Engineering and ECI as co-borrowers on a loan); CP P/S Exs. 2-3 (account information for Engineering and ECI with Old Line Bank); GC Ex. 151 at 1 (joint workers' compensation and employer's liability policy from Guard Insurance Group), GC Ex. 152 at 2 (joint workers' compensation and employer's liability policy from Cincinnati Casualty Co.), GC Ex. 153 at 1 (joint auto insurance from Cincinnati Insurance Co.); Tr. 484-87, 545, 564-65.)

[5] (GC Ex. 138 (Engineering and ECI letterhead); Tr. 81, 136, 265, 320, 395.)

information request); Tr. 224-26.) The Sheet Metal Workers also requested information to determine whether Engineering continued to operate under the name ECI without honoring the parties' collective-bargaining agreement. (*Id.*) Respondents did not respond to the June 15 letter or provide the requested information. (D&O 5; Tr. 423-24, 584-85.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On December 8, 2011, the Board adopted the administrative law judge's recommended order in full, over Respondents' exceptions. (D&O 1, 3-4; Respondents' Exceptions to the Decision of the Administrative Law Judge [hereinafter Respondents' Exceptions].) More specifically, the Board affirmed the judge's finding that Engineering and ECI are a single employer and/or alter egos. (D&O 1, 3-4.) The Board agreed with the judge's determination that Respondents discharged at least 38 employees because of their union affiliations, in violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1). (D&O 1, 5-6.) The Board also upheld the judge's finding that Respondents violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by withdrawing recognition from and refusing to negotiate with the Unions, by repudiating existing collective-bargaining agreements, and by refusing to provide relevant information requested by the Sheet Metal Workers. (D&O 1, 4-5.)

The Board also adopted the administrative law judge's proposed remedies. In particular, the Board required Respondents to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in their exercise of their statutory rights. (D&O 1, 8.) The Order further requires Respondents to take, *inter alia*, the following affirmative actions: (1) offer all discriminatees reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed; (2) make the discriminatees whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges; (3) recognize and bargain in good faith with the Unions and honor and comply with existing collective-bargaining agreements; (4) compensate the discriminatees and all contractually required fringe-benefit funds for any loss of income contributions, or benefits, and for any expenses incurred in connection with those losses; (5) provide the information requested by the Sheet Metal Workers; and (6) post a remedial notice. (D&O 1, 8-9.)

## SUMMARY OF ARGUMENT

Respondents do not contest the Board's finding that Engineering and ECI are a single employer and/or alter egos, and that Respondents violated the Act by discharging at least 38 employees because of their union membership. Nor do

Respondents dispute that they unlawfully withdrew recognition from the Unions, repudiated collective-bargaining agreements and refused to negotiate in good faith. Lastly, Respondents do not object to the Board's determination that they failed to provide relevant information requested by the Sheet Metal Workers.

Additionally, this Court is without jurisdiction to hear Respondents' challenge to the remedial portion of the Board's Order because Respondents failed to raise this issue before the Board. In any event, the language of the Board's remedial order does not preclude Respondents from showing, in subsequent compliance proceedings, that they do not have work for 38 employees and that they no longer employ workers in each trade represented by the Unions. Finally, *Mingo Logan Coal Co. v. NLRB*, 67 F. App'x 178 (4th Cir. 2003), on which Respondents rely to oppose to the Board's remedial language, is inapposite because it involved two companies functioning as joint employers, whereas Engineering and ECI are a single employer and/or alter egos.

In sum, although Respondents preserved their ability to challenge the Board's Order on the merits, they forfeited these arguments by failing to raise them in their opening brief. Instead, Respondents opted to contest the Board's choice of remedy, an issue they neglected to preserve below. The result is a singular case in which there is nothing for the Court to decide. Therefore, the Court should grant the Board's application and summarily enforce the Decision and Order in full.

## ARGUMENT

### I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS ORDER

The Federal Rules of Appellate Procedure require Respondents to present in their opening brief their "contentions and the reasons for them, with citations to the authorities and parts of the record on which" they rely. Fed. R. App. P. 28(a)(9)(A). It is well established that when a party fails to challenge certain aspects of a Board order on appeal to this Court, the Board is entitled to summary enforcement of those undisputed portions of the order. *See WXGI, Inc. v. NLRB,* 243 F.3d 833, 839 n.4 (4th Cir. 2001) ("Because petitioners have not pursued a challenge to this violation on appeal to this court, the Board's order with regard to it is entitled to summary enforcement." (citing *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 509 (4th Cir. 1991))).

Respondents do not dispute any of the Board's factual determinations or legal conclusions. Therefore, the Board is entitled to summary enforcement of its Order in full with respect to the violations found. In any event, as summarized below, substantial evidence supports each of the Board's findings.

#### A. Engineering and ECI Are a Single Employer and/or Alter Egos

Respondents do not contest the Board's finding that Engineering and ECI have the same ownership and upper management, share common premises and office equipment in Upper Marlboro and Washington, pursue the same type of

business activity, use the same bank, insurance companies, attorneys, vendors and suppliers, and have the same work policies, names and logos. Nor do they dispute that ECI assumed contracts originally signed by Engineering, continues to work for Engineering's former clients and uses Engineering's vehicles to conduct its business.

These facts amply support the Board's finding that Engineering and ECI are a single employer. (D&O 4.) It is well established that two business entities found to constitute a single employer under the Act are "jointly and severally liable to remedy the unfair labor practices committed by" either company. *Vance v. NLRB*, 71 F.3d 486, 494-95 (4th Cir. 1995). *See id.* at 490 ("[T]he controlling criteria in determining . . . single employer [status] are (1) common ownership, (2) interrelation of operations, (3) common management, and (4) centralized control of labor relations.").

The facts also support the Board's determination that Engineering and ECI are alter egos of each other. (D&O 4.) Under the alter-ego doctrine, "nominally separate business entities" can be treated "as if they were a single continuous employer" when necessary to prevent "an employer from gaining an unearned advantage in his labor activities simply by altering his corporate form." *Alkire v. NLRB*, 716 F.2d 1014, 1018 (4th Cir. 1983). *See id.* at 1020 (explaining that alter-ego analysis considers "whether substantially the same entity controls both the old

and new employer" and whether transferring business operations to the new employer "resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations.").

### B. Respondents Violated the Act by Discharging Employees Based on their Union Membership

The Board found that Engineering unlawfully discharged at least 38 union employees on or around May 7, 2010, because they were represented by the Unions and covered by collective-bargaining agreements. The Board also found that Griffith and Parker told various employees and union representatives that Engineering was going nonunion, and that several individuals were offered continued employment with ECI only if they were willing to work in a nonunion setting. Section 8(a)(3) of the Act bars employers "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3); *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995).

### C. Respondents Violated the Act by Refusing to Negotiate with the Unions, Withdrawing Recognition and Repudiating their Collective-Bargaining Agreements

The Board found that Engineering consented to be bound by MCAMW's collective-bargaining agreements with the Plumbers and Steamfitters and never gave notice of intent to terminate either agreement. Likewise, Engineering signed the agreement between SMACNA and the Sheet Metal Workers and did not

express any intention to withdraw. The Board also found that Engineering had fallen behind on fringe-benefit payments to several funds before May 7, 2010, and ceased complying altogether with the collective-bargaining agreements after that date. Lastly, ECI—as a single employer and/or alter ego of Engineering—never complied with the collective-bargaining agreements signed by Engineering. Respondents do not contest any of these findings. It is well settled that an employer violates Section 8(a)(1) and (5) of the Act by withdrawing recognition from, or refusing to bargain with, a union representing its employees, or by repudiating a collective-bargaining agreement with that union. *See NLRB v. HQM of Bayside, LLC*, 518 F.3d 256, 263 (4th Cir. 2008).

### D. Respondents Violated the Act by Failing to Provide Information Requested by the Sheet Metal Workers

The Board found that Respondents unlawfully failed to provide necessary and relevant information requested by the Sheet Metal Workers on June 15, 2010. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). The duty to bargain requires employers to provide "relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *accord Walter N. Yoder & Sons, Inc. v. NLRB*, 754 F.2d 531, 535 (4th Cir. 1985).

## II. THE COURT LACKS JURISDICTION TO HEAR RESPONDENTS' CHALLENGE TO THE BOARD'S REMEDIAL ORDER, WHICH, IN ANY EVENT, IS WITHOUT MERIT

Although Respondents do not dispute the Board's finding that they violated the Act, they challenge the language of the Board's remedial order. Specifically, Respondents argue that the Board's Order improperly requires them to reinstate all 38 discriminatees, even though some of those positions no longer exist, and to recognize and bargain with all the Unions, even if Respondents no longer perform work covered by each individual labor organization. But Respondents never argued to the Board that the language of the Order forecloses them from making either showing. Consequently, under Section 10(e) of the Act, the Court is without jurisdiction to entertain this attack on the Board's standard remedial language.

The Board ordered Respondents to reinstate the 38 discriminatees and to recognize and bargain with their respective unions. The Board's remedy adheres to Section 10(c) of the Act, which "expressly authorizes the Board 'to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of [the Act].'" *ABF Freight Sys. v. NLRB*, 510 U.S. 317, 324 (1994) (alteration in original) (quoting 29 U.S.C. § 160(c)).

The Board adopted this remedial language from the administrative law judge's recommended order. Respondents excepted to various aspects of the administrative law judge's decision. However, they did not contest any aspect of

the judge's proposed remedy, which the Board adopted in full. (Respondents' Exceptions.) More specifically, nowhere in their exceptions did they argue that the judge's recommended order contained language preventing them from proving they no longer had work for all the discriminatees or requiring them to recognize and bargain with unions that no longer represent their employees.

Section 10(e) of the Act states that "[n]o objection that has not been urged before the Board . . . shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). The Supreme Court has consistently read the statutory language to mean that a litigant's failure to raise an objection to the Board precludes appellate courts from subsequently asserting jurisdiction over that issue. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982); *accord Parts Depot, Inc. v. NLRB*, 260 F. App'x 607, 611 (4th Cir. 2008) (noting that Court lacks jurisdiction to consider arguments not previously raised before the Board); *NLRB v. Daniel Constr. Co.*, 731 F.2d 191, 198 (4th Cir. 1984) (same).

In any event, we note that, while the Board's Order requires reinstating all 38 discriminatees, the language of the Order does not foreclose Respondents from showing, in subsequent compliance proceedings,[6] that any particular position "was

[6] It is the Board's practice to leave the particulars of reinstatement and backpay obligations to a separate set of proceedings known as the compliance stage. *See*

eliminated for substantial and bona fide reasons." *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967). *See, e.g.*, *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 602 (7th Cir. 1982) (enforcing Board decision which left for the compliance proceeding the determination as to the availability of work), *aff'd*, 467 U.S. 883, 902 (1984); *Packing House & Indus. Servs., Inc. v. NLRB*, 590 F.2d 688, 700 (8th Cir. 1978) (the Board "at the compliance hearing will determine whether the employees were not rehired because of antiunion animus or 'because of legitimate considerations [such] as a reduction in force . . . .'") (Ross, J., concurring) (quoting the Board).[7]

Finally, we note that *Mingo Logan Coal Co. v. NLRB*, 67 F. App'x 178 (4th Cir. 2003), on which Respondents' rely (Br. 12-15), is similarly barred from court consideration under Section 10(e) because it allegedly supports the argument Respondents failed to raise to the Board. In any event, it does not even support that argument. *Mingo Logan* addresses an issue unique to that case, and for which

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*Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984); *see also NLRB v. White Oak Manor*, 452 F. App'x 374, 383 (4th Cir. 2011).

[7] This, of course, will entail examining whether some of those positions still exist, not at Engineering or ECI, but with a successor, assign, or a newly created alter ego or single employer of Respondents. And if Respondents can show that they no longer employ workers within the jurisdiction of one or more unions, they will not have to recognize and bargain with those unions going forward, although they will owe reimbursements to those unions for the period during which they employed workers within each union's jurisdiction. The salient point is that Respondents' right to assert at compliance that one or more of the 38 discriminatees' jobs was eliminated due to "substantial and bona fide reasons," is not a basis to deny enforcement of the Board's Order directing the reinstatement of those employees and directing recognition and bargaining with their unions.

there is no equivalent here. In *Mingo Logan*, the Court was concerned that the Board's reinstatement order improperly presumed that a joint employer,[8] which was responsible for the unlawful discharge of workers employed by another company, would be required to instate those employees on its own payroll when it had never hired them in the first place. *Id.* at 186-88. There can be no such concern here, where the employees were discharged by entities that are a single employer and/or alter egos.[9] Under either approach, the discriminatees are viewed as having been on the payroll of both Engineering and ECI at the time of their discharge. *See, e.g.*, *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942) ("[T]here is no reason to grant [an alter-ego employer] relief from the Board's order of reinstatement; instead there is added ground for compelling obedience."). Therefore, requiring Respondents to *re*-instate employees they unlawfully discharged is not akin to forcing them to instate workers they never employed.

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[8] A joint-employer relationship arises when separate and legally distinct businesses "*share* or co-determine those matters governing the essential terms and conditions of employment." *NLRB v. Browning-Ferris Indus. of Penn., Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982) (citations omitted). *See generally* 2 Am. Bar Ass'n ("ABA"), *The Developing Labor Law* 2366-68 (John. E. Higgins, Jr. ed., 6th ed. 2012).

[9] Under the single-employer doctrine, two separate and ongoing businesses that are owned and operated as a single unit can be treated as a single employer for purposes of applying labor laws. For its part, the alter-ego analysis applies in situations where one company functions as a continuation of a predecessor entity, which has ceased to operate. *See generally* 1 ABA, *The Developing Labor Law* 1260-63 (comparing alter-ego status with single-employer status).

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court summarily enforce the Board's Decision and Order in full.

Respectfully submitted,

s/ Robert J. Englehart
ROBERT J. ENGLEHART
*Supervisory Attorney*

s/ Gregoire Sauter
GREGOIRE SAUTER
*Attorney*

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-1714

LAFE E. SOLOMON
*Acting General Counsel*
CELESTE J. MATTINA
*Deputy General Counsel*
JOHN H. FERGUSON
*Associate General Counsel*
LINDA DREEBEN
*Deputy Associate General Counsel*

October 2012

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**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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(s) Linda Dreeben

Attorney for National Labor Relations Board

Dated: October 18, 2012

**UNITED STATES COURT OF APPEALS**
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| NATIONAL LABOR RELATIONS BOARD | ) | |
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| Petitioner | ) | |
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| and | ) | No. 12-1410 |
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| ASBESTOS WORKERS LOCAL 24 APPRENTICESHIP FUND, ASBESTOS WORKERS LOCAL 24 PENSION FUND, and ASBESTOS WORKERS LOCAL 24 MEDICAL FUND | ) | Board Case No. 05-CA-36213 |
| Intervenors | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| ENGINEERING CONTRACTORS, INC., and ECI OF WASHINGTON, LLC, alter egos | ) | |
| | ) | |
| Respondents | ) | |

## CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2012, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001
(202) 273-2960

Dated at Washington, D.C.
this 18th day of October, 2012