

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CONDITIONED AIR SYSTEMS, INC.

and

PLUMBERS AND GAS FITTERS LOCAL
UNION NO. 5, UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUSTRY
OF THE UNITED STATES AND CANADA,
AFL-CIO

Case 05-CA-079299

**BRIEF IN SUPPORT OF EXCEPTIONS
OF RESPONDENT CONDITIONED AIR SYSTEMS, INC.**

STATEMENT OF THE CASE

After hearing testimony from James Edward Killeen III (“Killeen” or “Mr. Killeen”), business manager / financial secretary / treasurer of Local 5 (the “Union”) and Richard Putnam (“Putnam” or “Mr. Putnam”), the president / owner of Conditioned Air Systems (“Systems”), the Administrative Law Judge (“ALJ”) found merit to the unlawful labor practice charge filed by the Union and concluded that Systems has violated and continues to violate Section 8(a)(5) and (1) of the National Labor Relations Act (the “Act”) by failing and refusing to provide the Union with the information it requested on March 22, 2012. The ALJ also found that Systems was bound to the 2010-2014 collective bargaining agreement between the Union and the Mechanical Contractors Association of Metropolitan Washington (the “Association”) by virtue of signing the letter of assent in 2008, and by Systems’s failure to timely withdraw its authorization of the Association to collectively bargain with the Union. In connection with these findings, the ALJ

ordered that Systems cease and desist from failing and refusing to bargain in good faith with the Union, and to provide the Union with the information it requested on March 22, 2012.

The record compiled during the September 6, 2012 hearing demonstrates that these findings and conclusions of law are without merit. First, the ALJ erred in its application of the law and misinterpreted the facts, which led to its decision that Systems violated Section 8(a)(1) and (5) of the Act by refusing to provide the Union with the information it requested on March 22, 2012. Specifically, Systems' refusal to provide the Union with the information it requested was not a per se violation of the Section 8(a)(1) and (5) because the Union's request was not related to Systems, or involve members employed by Systems. Further, even if the Board finds that the Union did request relevant information, their request was in bad faith, and Systems made a good faith effort to discuss the requested information in light of the Union's request. Accordingly, the ALJ's finding that Systems violated the Act must be reversed.

Second, the ALJ erred by misinterpreting the facts and misapplying the law in determining that Systems was bound to the 2010-2014 collective bargaining agreement by its failure to timely withdraw its authorization of the Association to collectively bargain with the Union. Specifically, the 2008 Letter of Assent contains ambiguous language, and Systems should not have been bound to any subsequent collective bargaining agreements. Additionally, unusual circumstances prevented Systems from being bound by the 2010-2014 collective bargaining agreement, which allowed its withdrawal from the Association as Systems' bargaining representative.

QUESTIONS PRESENTED

1. Whether the ALJ erred in determining that Conditioned Air Systems violated Sections 8(a)(1) and (5) of the Act by refusing to provide the Union with the information it requested on March 22, 2012. See Exceptions 2, 3, 4, 5, 6, 11, 12, 13.

2. Whether the ALJ erred in determining that Conditioned Air Systems was bound to the 2010-2014 Collective Bargaining Agreement by its failure to timely withdraw its authorization of the Association to collectively bargain with the Union. See Exceptions 1, 17, 18, 9, 10.

BACKGROUND FACTS

Systems is a registered small business with the Maryland Department of General Services and performs business in the State of Maryland as a contractor or subcontractor in the plumbing and steamfitting industry. The Union represents employees working in the plumbing service and building and construction industry in the Washington, DC, Maryland, and Virginia. Virginia Merrigan (“Merrigan” or “Ms. Merrigan”), Secretary–Treasurer for Systems, signed a letter of assent, authorizing the Association as its “collective bargaining representative for all matters contained in or pertaining to the current *or* subsequently negotiated labor agreements” between the Union and the Association. ALJD 2:9-19. On July 29, 2010, Mr. Killeen mailed Mr. Putnam a letter informing him that the Union and the Association had negotiated and ratified a new four year agreement. ALJD 2:25-27. The letter states, “Enclosed are two (2) copies of the Assent Letter that must be signed by each of our contractors.” The letter requests that a signed copy of the assent letter be returned to the Union. *Id.* at 30-34. By the time Mr. Putnam received the new letter of assent, Systems was already having substantial financial difficulties. Beginning in the middle of 2010, Systems had problems remitting fringe benefit payments, payments for

health and welfare, payments for pension, and payments for retirement savings to the Union and the national pension fund. Tr. 13:15-19. Since Mr. Putnam's documented financial struggles mounted, he did not want to be bound by the additional terms in the new CBA. Accordingly, he refused to sign the new letter of assent. In September 2010, Mr. Putnam, Mr. Killeen, and other representatives from Local 602 and O'Donoghue and O'Donoghue (counsel to both the Union and Local 602) met to discuss a plan for Systems to "get caught up" on the money owed. *Id.* at 19-25. Systems signed the settlement agreement that arose from the meeting on December 14, 2010, and as part of the settlement, Putnam signed a consent motion for the garnishment of his bank account. Tr. 61:17-21. At first, Systems managed to adhere to the agreement by making the monthly payments. Tr. 16:15-17. However, Systems continued to suffer from financial difficulties and was unable to stay current with the necessary payments. *Id.* at 17-19.

On May 9, 2011, Mr. Killeen and the Union sent Mr. Putnam another letter demanding that he sign the 2010 Letter of Assent. ALJD 2:37-38. The letter references the July 2010 letter and was written in what Mr. Killeen described as "a threatening manner." Tr. 34:12. The letter informs Mr. Putnam that if the Union does not receive the signed letter of assent "by the close of business on May 18, 2011 this matter will be turned over to [the Union's] attorneys, O'Donoghue and O'Donoghue, L.L.C. In that event, [Systems's] Union represented employees may be pulled from work." ALJD 2:40-46. Again, Mr. Putnam did not sign or return the letters of assent. Systems did not intend to be bound by the new CBA, and Putnam did not intend to be threatened into assenting to a CBA that, because of financial reasons, he could not accept.

Despite the ongoing financial struggles and pending lawsuits, Systems showed the intention to negotiate by meeting with the Union at the end of December 2011 to discuss another proposal to pay the money that was owed. Tr. 49:18-19. Systems made a proposal to pay the

money back, but the Union rejected the proposal. *Id.* at 18-20. On January 29, 2012, the Union made a counter proposal. On January 31, 2012, Mr. Putnam went into the hospital for serious medical treatment. Mr. Putnam remained in the hospital for the entire month of February and was not able to respond to the Union's counter proposal because he was on a morphine pump. *Id.* at 21-24. Mr. Putnam requested that the Union back off while he recovered from surgery through the month of March, and soon after, "all of [Systems's] accounts and seven of [Systems's] construction jobs [were] garnished." Tr. 43:13-14; 49:25; 50:1-2.

On March 22, 2012, while Mr. Putnam was still recovering from surgery, the Union mailed the Request for Information ("RFI"). Tr. 24:5; 43:12-15. Mr. Putnam reviewed the document when he returned to work and had the document reviewed by several attorneys. Tr. 43:21-24. Putnam was advised by counsel that the Union was requesting the information in order to receive more confidential information about Systems and Solution than it already had in its possession. Tr. 43:25; 44:1-4. Mr. Putnam attempted to call the Union several times to notify the Union of the status of the RFI responses. Tr. 56:17-18. Mr. Putman spoke with Joe Savia from Local 602; however, no one from the Union returned his numerous phone calls. *Id.* at 18; *Id.* at 25; 57:1-2. At the time the RFI was mailed to Mr. Putnam, Complete Air Solutions ("Solutions") never had a single employee. Tr. 44:16-18. Solutions was only in the process of filing for minority business status. *Id.* at 20-21.

Less than one month after mailing the RFI, the Union filed the charge with the NLRB that led to these proceedings on April 20, 2012. ALJD 1.

ARGUMENT

I. SYSTEMS'S REFUSAL TO RESPOND TO THE UNION'S REQUESTS FOR INFORMATION WAS NOT A *PER SE* VIOLATION OF NLRA §8(a)(1) OR §8(a)(5)

The ALJ found that Systems violated the Act by failing and refusing to provide the Union with the information it requested on March 22, 2012. ALJD 6:34-35. To the contrary, the record shows that Systems complied with all of its statutory obligations to provide information to the Union. Accordingly, the ALJ's decision finding that Systems violated the Act must be reversed.

1. Systems was not obligated to respond to the Union's RFI because the information sought was not relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative.

An employer's failure to produce information relevant to the union's role as bargaining representative is not a *per se* unlawful refusal to bargain. *Shell Oil Co. v. N.L.R.B.*, 457 F.2d 615 (9th Cir. 1972). The duty imposed upon an employer includes the duty 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. N.L.R.B.* 440 U.S. 301, 303 (1979). Information sought that does not directly relate to bargaining unit employees is deemed not to be presumptively relevant. *N.L.R.B. v. Wachter Const., Inc.*, 23 F.3d 1378, 1388 (1994)(citing *NLRB v. Postal Service*, 888 F.2d 1568, 1570 (11th Cir.1989); *Walter N. Yorder & Sons v. NLRB*, 754 F.2d 531, 535 (4th Cir.1985); *Oil Chemical & Atomic Workers v. NLRB*, 711 F.2d 348, 359 (D.C.Cir.1983)). The Board has held that, in cases where the employer has no statutory duty to bargain about a particular subject, the employer has no duty to furnish information on that subject. *See, e.g., California Pacific Medical Ctr.*, 337 NLRB 914 (employer had no obligation to furnish information regarding census and staffing data because it was not relevant to

bargaining); *BC Industries*, 307 NLRB 1275 (1992) (employer not obligated to provide information about plant closings, where there was no obligation to bargain over decision to close plant); *Druwhit Metal Products Co.*, 153 NLRB 346, 347 (1965) (employer not obligated to provide information concerning sale of operation, where Union had no right to bargain over sale).

Here, the information requested by the Union was not relevant information needed by a labor union to effectuate proper performance of its duties as the employees' bargaining representative. The Union's questions relate to a second company, Solutions, which has no bargaining relationship with the Union. At the time the RFI was mailed to Mr. Putnam, Solutions never had an employee. Tr. 44:16-18. Solutions was only in the process of filing for minority business status. *Id.* at 20-21. The Union asked for Mr. Putnam's relationship with Solutions, the owners and officers of Solutions, and the jobs on which Solutions was working on December 31, 2011, and also the date of the response to the RFI. Tr. 25:18-26:11. The RFI also asked questions regarding the identity of employees, equipment, transactions, and licenses held by each company. ALJD 3:38-44. Mr. Killeen explains that the purpose for asking all of the questions was to find out what type of relationship Systems and Mr. Putnam had with Solutions. Tr. 26:13-25. In other words, Killeen suspected an alter ego existed, but had no evidence of such.

The ALJ cites the standard for union requests of information; however, the ALJ fails to properly apply the law to our facts.

When union requests information relating to an alleged single-employer or alter-ego relationship, the union bears the burden of establishing the relevance of the requested information. *Reiss Viking*, 312 NLRB 622, 625 (1993); *Bentley-Jost Electric Corp.*, 283 NLRB 564, 568 (1987), citing *Walter N. Yoder & Sons*, 754 F.2d 531, 536 (4th Cir. 1985). A union cannot meet its burden based on a mere suspicion that an alter-ego or single-employer relationship exists; it must have an objective, factual basis for believing that the relationship exists. See *M. Scher & Son, Inc.*, 286 NLRB 688, 691 (1987).

Under current Board Law, however, the union is not obligated to disclose those facts to the employer at the time of the information request. *Baldwin Shop N' Save*, 314 NLRB 114, 121 (1994); *Corson & Gruman*, 278 NLRB 329, 333-334 fn. 3 (1986). Rather, it is sufficient that the General Counsel demonstrate at the hearing that the union had, at the relevant time, a reasonable belief. ALJD 4:36-5:2

Most importantly, a union cannot meet its burden based on a mere suspicion that an alter-ego or single-employer relationship exists; it must have an objective, factual basis for believing that the relationship exists. *M. Scher & Son, Inc.*, 286 NLRB 688, 691 (1987). The Union does not meet this standard with regard to the existence of an alter-ego. In the record, Mr. Killeen discusses a “rumor at the time that Mr. Putnam was opening another company called Complete Air Solutions and that he was...hiring non-union people to work on both [System’s] projects and [Solutions’s] projects.” Tr. 20:24-21:2. Mr. Killeen received this information from a Maryland State Pipe Trades employee who was also a member of the Union, Jim Stacho. Jim Stacho explained that Mr. Putnam was “opening up another company as what he *thought* was an alter ego due to the fact that he was hiring non-union employees to utilize the same tools, equipment, material, the vehicles...” [emphasis added] Tr. 21:11-14. Jim Stacho also told Mr. Killeen that Systems was moving members off of the Northern Virginia Community College job and onto another job in Fairfax County. Tr. 22:2-3. Jim Stacho is not a Systems’s employee and he had no inside knowledge of the “rumors” that he was spreading.

Each of these rumors and claims by Jim Stacho to Mr. Killeen were untrue, and the Union could not have reasonably believed the information to be accurate. When the RFI was sent to Mr. Putnam, Solutions did not have any employees and did not even have a set of books. Tr. 49:15-17. Solutions was not even a functioning company at the time, so any rumors regarding Solutions as an alter ego were baseless. Tr. 50:18-20. The ALJ should have noted that rumors and thoughts are mere suspicions, and not objective, factual bases for questioning

whether an alter ego exists; especially given the facts that at the time Solutions was nothing but a name.

The only physical piece of evidence that the Union relies on to justify its inquiry was the letter from Whiting-Turner Construction Company that was given to Mr. Killeen by Mr. Stacho, who received the document from Keith Brunner. Mr. Brunner, an office employee with Systems violated his employment agreement with Systems and breached a signed confidentiality agreement when he provided the documents to Mr. Stacho. Tr. 22:12-23:5. The information that the Union received to make these allegations was incorrect and was third and fourth-hand information. Tr. 42:8-10. The letter from Whiting Turner rescinded any intent to give Systems a contract due to its falling behind on the schedule, bonding, and other issues. Tr. 41:22-24. The subcontract agreement that was given to Solutions to complete the project (by subcontracting the work) had nothing to do with Systems or the Union. Tr. 41:25-42:3. The ALJ states that the documents indicated “that Whiting-Turner, the general contractor, had shifted work from Systems to Solution but this analysis is not accurate. The documents reflect that Systems could not do the work and that Solutions could subcontract the work to another entity. Systems was in financial turmoil, which was well documented, and it fell behind on the schedule, and lost the work. Tr. 41:22-24. Solutions, a separate entity, was given the contract to subcontract the work in order to complete the project. Tr. 41:25-42:3. The union presented no facts demonstrating that members working at Systems lost work due to this change in contract award. The Union presented no facts demonstrating that the work under the contract could have been performed by Systems. Drawing conclusions from documents received through bad acts of Union members is not sufficient justification for the RFI. As such, the Union still had mere suspicions that an alter ego existed with no objective, factual basis for believing an alter ego relationship existed. As

such, the Union requested information that was not relevant to the Union's role as bargaining representative, and Mr. Putnam was not obligated to respond to any such request.

2. Systems Did Not Commit an Unfair Labor Practice Under the NLRA by Failing to Provide Information That Was Requested in Bad Faith by the Union

An employer is not compelled to respond to a union's request for information without violating §8(a)(5) of the NLRA where the union made such a request in bad faith. *N.L.R.B. v. Hawkins Const. Co.*, 857 F.2d 1224 (8th Cir. 1988); *N.L.R.B. v. Wachter Const., Inc.*, 23 F.3d 1378, 1388 (1994). "Even when the information is objectively relevant, however, a union's request may be denied if its compilation would be unduly burdensome." *N.L.R.B. v. Wachter Const., Inc.*, 23 F.3d 1378, 1388 (1994)(citing *Safeway Stores, Inc. v. NLRB*, 691 F.2d 953, 956 (10th Cir. 1982).

In *NLRB v. Wachter*, the Union requested information from the Employer that included detailed job information, including location, name of subcontractor, and other work related details, such as payroll information. *Id.* at 1381. Along with the detailed business records that the Unions were requesting, the Court found that the union had ulterior motives for requesting the information. *Id.* at 1388. In deciding *NLRB v. Wachter*, the 8th Circuit agreed with the 9th Circuit's decision in *Shell Oil Co. v. NLRB*, 457 F.2d 615, 618 (9th Cir. 1972), that the Board is in error if it is asserting that once information is deemed relevant, the Company must produce such information and any failure to produce is per se an unlawful refusal to bargain. *NLRB v. Wachter* at 1388-1389. The Court held that the employers did not commit unfair labor practice under the NLRA by failing to provide the bulk of the information requested, because the union made its requests in bad faith. The union's bad faith motive in requesting the information alleviated the employers' duty to respond. *Id.* at 1389.

Given the timing of the RFI, the questions asked, and the circumstances surrounding Systems and Mr. Putnam, individually, it is clear that the Union acted in bad faith when requesting the information regarding Solutions. First of all, much like the union in *NLRB v. Wachter*, the Union requests detailed business records and job related questions, such as who received health insurance, office employee information, transfers of funds, banking and personal business information, payroll information, and information related to jobs on which Systems or Solutions worked on December 31, 2011 and also the date of the response to this request. Tr. 50:14-51:5; 26:9-12. The Union's questions were designed to collect confidential information about Solutions, when Solutions had no contract with the Union and did not employ its members.

The ulterior motives of the Union are even more clear when the timing of the request is considered. By March 22, 2012, Systems has already had multiple law suits pending against it, and the Union was well aware of System's financial troubles, including debt exceeding two million dollars. Tr. 49:11-14. In the months preceding the RFI, Systems and the Union were attempting to negotiate proposals to pay back the owed money. *Id.* at 19. The Union rejected Systems's proposal and submitted a counter proposal on January 29, 2011. *Id.* at 20-21. Mr. Putnam was in the hospital for the entire month of February, during which time the Union demanded Mr. Putnam commit to the counter proposal, which he clearly could not do because of his condition. *Id.* at 21-24. During the month of March, Mr. Putnam was at home recovering from surgery which led to the delay in his review of the RFI. Tr. 43:13-16. As soon as Mr. Putnam could review the RFI, he did so with several attorneys and tried to contact the Union on several occasions to discuss his concerns. The Union never returned Mr. Putnam's phone calls. Tr. 43:21; 56:17-18. Despite the delay caused by Mr. Putnam's hospital stay and recovery, as

well as the overall “falling apart” of Systems, the Union filed the charge with the NLRB less than one month after mailing the RFI. Tr. 43:15; ALJD Pg. 1.

Based on the detailed and confidential nature of the information requested, as well as the timing of the RFI, it is clear that the Union acted in bad faith by making a request that was unduly burdensome given the totality of the circumstances, and that Systems was not obligated to respond.

3. Systems Made A Good Faith Effort In Offering To Discuss The Request For Information In Light Of the Union’s Request

When deciding cases involving unfair labor practices, Courts have reasoned that “each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.” *N.L.R.B. v. Truitt Manufacturing Co.*, 351 U.S. 149, 153-154 (1956); *N.L.R.B. v. Wachter Const., Inc.*, 23 F.3d 1378, 1389 (1994). Specifically, in regards to requests for information, unions are not necessarily entitled to the information that they request in the precise form that they request it in. *Shell Oil Co. v. N.L.R.B.*, 457 F.2d 615 (9th Cir.1972); *Emeryville Research Center v. Shell Development Co.*, 441 F.2d 880 (9th Cir. 1971).

In *Emeryville*, the Union requested salary grade curves and merit ratings for 430 professional scientists and engineers in the bargaining unit. *Emeryville Research Center v. Shell Development Co.*, 441 F.2d 880, 881-882 (9th Cir. 1971). The employer expressed its concerns and fears regarding the burden of having to compile the requested data, as well as the danger that it could no longer assure the confidentiality of the salary survey data, which would result in companies ceasing to participate in the survey. *Id.* at 882. Instead of flatly refusing to furnish the information requested, the employer, however, offered to meet with the union to discuss the

requests, at which time it asked the union to state specifically why it needed the information so that the parties could work together in a way that would satisfy both parties. *Id.* at 882-883. The union made another demand, and the employer again proffered another reasonable and conciliatory response. The union then filed an unfair labor practice charge with the NLRB. *Id.* The Court held that when the Company raises bona fide objections to the requests and offers to negotiate the information that is given, the union must do more than rely on general avowals of relevance in order to establish its right to the information. *Id.* at 885.

In *Shell Oil Co. v. N.L.R.B.*, the court used *Emeryville* as a guide to assess the good faith standard of employer compliance with union requests. *Shell Oil Co. v. N.L.R.B.*, 457 F.2d 615, 619 (9th Cir.1972). The Court stated that the following factors moved the court to decline enforcement of a board decision: 1) the employer stated specific objections to furnishing the information in the information request, and there was no suggestion of bad faith or that the reasons given were disingenuous or put forward for delay on the part of the employer; 2) the employer did not flatly refuse to comply; and 3) the union did not take up the offer to discuss a mutually satisfactory form for the information sought, instead, it went immediately to the Board. *Shell Oil Co. v. N.L.R.B.*, 457 F.2d 615, 619 (9th Cir.1972).

Not unlike the employers in *Emeryville* and *Shell Oil*, Systems clearly made a good faith effort to discuss the information requested by the Union. Tr. 47:8-12. First, Systems had specific objections to furnishing the information in the RFI. *Id.*; 57:3-6. Putnam had strong concerns regarding the confidential information requested by the Union, and he wished to raise bona fide objections regarding the form of the information requested. *Id.* There was no alter ego corporation, and as such, there was no suggestion of bad faith on Mr. Putnam's part. Tr. 42:23-43:2. Mr. Putnam has shown a willingness to bargain and negotiate in the past, and there are no

facts on the record to suggest that he was purposefully trying to put forward for delay. Second, Mr. Putnam did not flatly refuse to comply. Mr. Putnam admitted that he was advised not to answer the requests for information, but he did not refuse to communicate with the Union all together. Tr. 56:9-12. In fact, Mr. Putnam called the Union on several occasions to discuss the RFI, but he was never given the opportunity to discuss the requests with the Union. *Id.* at 17-18. Third, the union did not take up the offer to discuss a mutually satisfactory form for the information sought. By calling several times, Mr. Putnam made a good faith effort to discuss the RFI. The Union, however, by not calling Mr. Putnam back, did not make a good faith effort to discuss a mutually satisfactory form for the information sought. To the contrary, rather than calling Mr. Putnam back and possibly avoiding additional litigation, the Union filed the charge with the NLRB.

Systems should not be punished for the Union's unwillingness to bargain with Systems. By calling the Union several times to discuss the RFI and not receiving a single phone call back, Mr. Putnam made a good faith effort to discuss the information requested by the Union.

II. SYSTEMS WAS NOT BOUND TO THE 2010-2014 COLLECTIVE BARGAINING AGREEMENT BY SIGNING THE 2008 LETTER OF ASSENT BECAUSE OF AMBIGUITY IN THE CONTRACT LANGUAGE

An ambiguity exists in a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations. *Pacific AG Group v. H. Ghesquiere Farms, Inc.*, 420 Fed.Appx. 278 at 280-281 (4th Cir. 2011). Ambiguity can be definitively resolved by reference to extrinsic evidence. *Red Roof Inns, Inc. v. Scottsdale Ins. Co.*, 419 Fed. Appx. 325 (4th Cir. 2011)

Virginia Merrigan signed the 2008 letter of assent on behalf of Systems. The letter stated,

In signing this letter of assent, the undersigned firm (Employer) does hereby authorize the Mechanical Contractors Association of Metropolitan Washington (hereinafter called "Association") as its collective bargaining representative for all matters contained in or pertaining to the current *or* subsequently negotiated labor agreements between the Association and Plumbers Local Union No. 5..." ALJD Pg. 2:15-19

The second word "or" in the phrase "...for all matters contained in or pertaining to the current *or* subsequently negotiated labor agreements between the Association and Plumbers Local Union No. 5..." (emphasis added) is ambiguous by the standards set forth in Maryland. In Maryland, ambiguity will be found if, to a reasonable person, the language used is susceptible to more than one meaning. "To determine whether a contract is susceptible of more than one meaning, the court considers 'the character of the contract, its purpose, and the facts and circumstances of the parties at the time of the execution.'"

In this Letter of Assent, the word "or" is ambiguous because the contract could have very different interpretations depending on which definition of "or" is used. Merriam-Webster Dictionary defines "or" as: used as a function word to indicate an alternative; the equivalent or substitutive character of two words or phrases; or approximation or uncertainty.

The Letter of Assent uses the first definition of "or" listed above: used as a function word to indicate an alternative. Systems signed this Letter of Assent in 2008, when the 2007-2010 CBA was the current CBA. Systems agreed to be bound to the then current CBA. Had no CBA been ratified at the time the Letter of Assent was signed, then the Letter of Assent would have bound Systems to subsequently negotiated labor agreements. However, Systems was not bound to both, because the word "and" would have been used.

The Union's own conduct defends this interpretation of the contract. When the new CBA was negotiated in 2010, the Union sent Mr. Putnam a letter requesting that he sign the new Letter of Assent. In 2011, after Mr. Putnam had refused to sign the 2010 Letter of Assent, the Union sent him a threatening letter, demanding that he sign the Letter of Assent or the matter would be

turned over to the Union's attorneys and that union members could be pulled from jobs. As Mr. Putnam asked Mr. Killeen during the hearing, "Why would that be sent out with such strong language to be threatened with the attorney if this wasn't something that really needed to be signed?" Tr. 31:10-13.

It is the Union's practice to send a new letter of assent to be signed every time there are changes to the CBA. Tr. 34:18-21. Based on the Union's standard procedure, a plain reading of the contract, and the Union's letters to Mr. Putnam threatening legal action if he did not sign the new Letters of Assent, Mr. Putnam should be found to not have been bound by 2010-2014 CBA, because he never signed a letter of assent to authorize the Association to bargain on his behalf.

III. UNUSUAL CIRCUMSTANCES PREVENT SYSTEMS FROM BEING BOUND BY ITS FAILURE TO TIMELY WITHDRAW ITS AUTHORIZATION TO COLLECTIVELY BARGAIN WITH THE UNION

In the ALJ's Decision, under the section titled *Did Respondent have any contractual obligations to the Union?*, the ALJ found that Systems was bound by its failure to timely withdraw its authorization of the Association to collectively bargain with the Union, therefore binding Systems to the 2010-2014 collective bargaining agreement by virtue of signing the letter of assent in 2008. ALJD 6:21-29. The ALJ failed to consider the unusual circumstances that allowed Systems to withdraw its authorization after the start of negotiations. Accordingly, the ALJ's conclusion that Systems was bound by the 2010-2014 CBA should be corrected.

It has been well established that employers are permitted to withdraw from a multiemployer bargaining unit after negotiations have begun, with a showing of unusual circumstances. *Retail Associates*, 120 NLRB 388, 395 (1958); *Local Union 30, United Union of Roofers, Waterproofers and Allied Workers v. D.A. Nolt, Inc.*, 625 F.Supp.2d 223, 232 (E.D.Pa. 2008); *Iron Workers Tri-State Welfare Plant v. Carter Const., Inc.*, 530 F. Supp.2d 1021, 1031

(N.D.II. 2008); *United Elec. Contractors Ass'n v. N.L.R.B.*, 258 Fed.Appx. 331, 332 (D.D.C. 2007); *Expert Elec., Inc. v. N.L.R.B.*, 258 Fed.Appx.335 (D.D.C. 2007); *Hi-Way Billboards, Inc.*, 206 NLRB 22 (1973). The Board has limited application of the term “unusual circumstances” to those cases in which the withdrawing employer has been faced with *dire* economic circumstances, i.e., circumstances in which the very existence of an employer as a viable business entity has ceased or is *about* to cease. *Hi-Way Billboards, Inc.* 206 NLRB 22.

An employer is said to be facing dire economic circumstances where the employer is faced with the imminent prospect of such adverse economic conditions as would require it to close its plant. See *Spun-Jee Corp and The James Textile Corp.* 171 NLRB 55 (1968); *Hi-Way Billboards, Inc.*, 206 NLRB 22, *2 (1973). In *Spun-Jee Corp*, the company was struggling and was having financial difficulty, such that the company president requested a one year extension of contract terms with the union business manager. *Spun-Jee Corp and The James Textile Corp.* 171 NLRB 55 *1 (1968). The union refused to give the company the one year extension, and the company made the union aware that without the extension, the company would have to shut down and relocate. *Id.* The company resigned from the multi-employer bargaining association, and phased out its operations. *Id.* at 2. The union intended to hold the company to the new CBA; however, the Board found that the company’s withdraw, although untimely, was valid because of the unusual circumstances, including the company’s evident hardship and the union’s knowledge of the hardship. The Board held that the company was not bound by the contract negotiated by the union with the multi-employer bargaining association. *Id.*

As previously discussed, Systems was having well documented financial difficulties. Systems has been behind on payments for health and welfare, fringe benefits payments, payments for pension, and payment for retirement savings to the Union since before the new

collective bargaining agreement was negotiated. Tr. 13:19-14:2. Systems was sent two demands to sign new letters of assent on the newly negotiated CBA, and because of Systems's ongoing financial struggles, as well as the uncertainty of Systems's future, Mr. Putnam refused to sign both of them. Mr. Putnam entered into settlement negotiations with the Union in December 2010, still worrying about paying the wages and contributions that were owed. Tr. 17:2-6. Having rejected the offered letters of assent, Mr. Putnam did not know that he was bound by the 2010-2014 CBA.

Through failed settlements and numerous law suits against Systems, Systems continued to fall apart from 2011 – 2012. Mr. Putnam has not “filed for bankruptcy yet, but there is just nothing left at this point in that company. [He] has lost the office. The trucks are repossessed, the ones that did have liens on them.” Systems has over \$2 Million in debt. Tr. 49:8-11.

Systems has been on the path towards bankruptcy, and has failed to make payments to the Union since 2010. These unusual circumstances of Systems's dire economic circumstances should allow for Systems's untimely withdraw from the Association, by Mr. Putnam's refusal to sign the two Assent Letters that were mailed to Mr. Putnam in connection with the 2010-2014 CBA.

CONCLUSION

For the reasons stated, the ALJ erred in its Conclusions of Law against Systems. The Complaint should be dismissed in its entirety, and Systems should be found not to have been bound by the 2010-2014 CBA.

Conditioned Air requests ADR of this matter.

Date: February 15, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of February, 2013, served a copy of these Exceptions by email service upon the following:

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