

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

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

and

Case No. 03-CA-088127

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 840

Claire T. Sellers, Esq., of Buffalo, New York,
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for the General Counsel.
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(*Harris Beach, PLLC*),
for the Respondent-Employer.

DECISION

Statement of the Case

Kenneth W. Chu, Administrative Law Judge. This case was tried on August 26 and 27, 2013¹ in Buffalo, New York pursuant to a complaint and notice of hearing issued by the Regional Director for Region 3 of the National Labor Relations Board (NLRB or Board) on May 30, 2013 (GC Exh. 1).² The complaint, based upon charges filed by the International Brotherhood of Electrical Workers (IBEW), Local 840 (the Charging Party or Union), alleges that Newark Electric Corp., (Respondent Newark Electric), Newark Electric 2.0, Inc., (Respondent Newark 2.0) and Colacino Industries, Inc., (Respondent Colacino) (collectively, the Respondents) are a single employer or alter egos and the Respondents violated Section 8(a)(5), (3) and (1) of the National Labor Relations Act (NLRA or Act).

The Respondents filed timely amended answers to the complaint denying the material allegations in the complaint and asserting several affirmative defenses.³

¹ All dates are in 2012 unless otherwise indicated.

² Testimony is noted as “Tr.” (Transcript). The exhibits for the General Counsel and Respondent are identified as “GC Exh.” and “R Exh.” The closing briefs are identified as “GC Br.” for the General Counsel and “R Br.” for the Respondent.

³ Counsel for the Respondents moved to dismiss the complaint and asserted at trial (Tr. 11, 12) and in its brief that the Board and those who represent it, had no authority to issue this complaint and prosecute this action because the Board did not have a quorum of three of its five members in order to issue a complaint and to take other actions, citing *Noel Canning v. NLRB*, 705 F.3d 490, 499 (D.C.Cir. 2013), cert. granted, 133 S. Ct. 2861 (June 24, 2013) and *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2645 . However, as the court acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir.2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962).

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Issues

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

After the close of the hearing, the briefs were timely filed by the parties, which I have carefully considered. On the entire record, including my observation of the demeanor of the witnesses⁴, I make the following

Findings of Fact

I. Jurisdiction and Labor Organization Status

At all material times, the Respondent Newark Electric, a New York corporation, has been an electrical contractor in the construction industry with an office and place of business in Newark, New York. At all material times, the Respondent Newark 2.0, a New York corporation, has been an electrical contractor in the construction industry with an office and place of business in Newark, New York. At all material times, the Respondent Colacino Industries, a New York corporation, has been an electrical contractor in the construction industry and a provider of information technology services with an office and place of business in Newark, New York. During a representative 1-year period, Respondents Colacino Industries and Newark 2.0 purchased and received goods at its Newark, New York facility valued in excess of \$50,000 directly from enterprises within the State of New York, each of which other enterprises had received the goods directly from points outside the State of New York.⁵

Thus, the Board has rejected this argument, as the issue regarding the validity of recess appointments “remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act.” See *G4S Regulated Security Solutions*, 359 NLRB No. 101, JD slip op. at 1, fn. 1 (2013), citing *Belgrove Post Acute Care Center*, 359 NLRB No. 77, JD slip op. at 1 fn. 1 (2013). The Respondent’s alternate argument is that the complaint should be dismissed because Acting General Counsel Lafe Solomon could not properly be appointed under the Federal Vacancies Reform Act (FVRA) and therefore lacked authority to issue the complaint in this case, citing *Hooks v. Kitsap Tenant Support Svces., Inc.*, 2013 U.S. Dist. LEXIS 114320 (W.D. Wash. Aug. 12, 2013) (R Exh. 1). The General Counsel argues that AGC Solomon was properly appointed under the FVRA. Contrary to the Respondent’s assertion, the express terms of the FVRA make it applicable to all executive agencies, with one specific exception inapplicable here, 5 U.S.C. § 3345(a); see 5 U.S.C. § 105 (“Executive agency” defined to include independent agencies), and to all offices within those agencies, such as the office of General Counsel, that are filled by presidential appointment with Senate confirmation, 5 U.S.C. § 3345(a). *Belgrove Post Acute Care Center*, above. I am bound only to apply established Board precedent which the Supreme Court has not reversed, notwithstanding contrary decisions by the lower courts. *Waco, Inc.*, 273 NLRB 746, 749 fn.14 (1984). As such, the Respondents’ motion to dismiss the complaint is denied. Moreover, the Board now has five members and a General Counsel who have been confirmed by the Senate.

⁴ The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was not credible and unworthy of belief.

⁵ The attorney for the Respondents and the General Counsel stipulated that Respondents Colacino

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

II. The Alleged Unfair Labor Practice

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a. Background

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

Colacino maintained that Newark Electric was always 100 percent owned by his father, Richard Colacino. (Tr. 170-173; 243-245). Colacino denies being an owner or company officer of Respondent Newark Electric (Tr. 171). According to Richard Colacino, Newark Electric has not been operating as a business since its assets were sold in 2000 and was subsequently dissolved on April 13, 2013 after resolving its tax liabilities (Tr. 174-175; 285-288).

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

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

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

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

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Industries and Newark 2.0 are single employer/alter egos for the purpose of the hearing and that the Board has jurisdiction over them (Tr. 7, 8).

after selling all its assets to Respondent Colacino Industries. The record shows that Respondents Colacino Industries and Newark Electric are housed at 126 Harrison Street. The entrance doors to 126 Harrison Street are stenciled with the Newark Electric and Colacino Industries logos (Tr. 173); the Colacino Industries stationery also contained the Newark Electric logo; the company vans for Colacino Industries company continued to advertise and display the Newark Electric logo (although Colacino was allegedly working on the “next generation” logo (Tr. 174, 246; GC Exh. 19); and the customer purchase orders and invoices were addressed to Respondents Colacino Industries and Newark Electric (GC Exh. 34, 32, 31).

Further, the employees of Colacino Industries completed time sheets that showed the Colacino and Newark Electric logos. Employees filling out their job cards and supply requisitions only showed the Newark Electric logo. The employer’s contributions to the union funds came from Newark Electric (GC Exh. 9).

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

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

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

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

Davis has been the business manager for the Local 840 since July 2011 and is responsible for enforcing the collective-bargaining agreements between the Union and employers. Prior to holding that position, Davis was a union organizer from 2005 to 2011.

Davis said that his objective as a union organizer was to increase union membership and to convert employers from nonunion to union contractors (Tr. 15, 16).

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

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

25 Davis testified that he knew James and Richard Colacino since 2005 and does not deny trying to sign up Respondent Newark Electric as a union contractor (Tr. 21, 22, 64). Davis testified that he was aware that the elder Colacino sold Newark Electric to James Colacino. Davis also believed that Colacino then became president of Newark Electric because Colacino gave him a company business card containing the Newark Electric logo. The record shows that the business card stated the name of James Colacino and his title has “President/CEO” (Tr. 64-67; GC Exh. 7). Davis testified that was not aware of the existence of Newark Electric 2.0 during the time when he was trying to sign up Newark Electric as a union shop (Tr. 58, 65, 299).

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

40 *b. The Letters of Assent*

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

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

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

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

A letter of assent C bounds the employer to the master agreement for 180 days from the effective date of the letter.⁶ The employer, after the first 180 days and within the first 12 months of the effective date, may terminate the letter of assent and the master collective-bargaining agreement by giving written notice at least 30 days prior to the selected termination date to the NECA and Union. At the earliest point in time to terminate, the employer would be required to give written notice on the 181st day from the effective date.

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

If the employer desires to terminate the letter of assent and does not intend to comply with and be bound by all the provisions in any subsequent agreements, the employer must notify the NECA and Union in writing at least 100 days prior to the termination date of the then current agreement (GC Exh. 5; Tr. 20, 21).

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

Davis has been trying to convince Colacino to sign a letter of assent C for Respondent Newark Electric since 2006 (Tr. 19-21). Davis said he finally convinced Colacino to sign the letter of assent C in February 2011. Davis testified that it was his understanding that the letter of assent C signed by Colacino was for the Respondent Newark Electric. Davis said the letter of assent was signed in the evening on February 24, 2011 at the Newark Electric offices and

⁶ The letter of assent A played no significant role in this complaint (GC Exh. 4).

approved by the NECA on May 6, 2011 (GC Exh. 6). Davis said that Colacino signed on behalf of Newark Electric and that Richard Colacino was also presented for the signing. Davis indicated that Clark Culver, who was the former business manager, signed for the Union. Davis said that everyone then went to dinner to celebrate the signing (Tr. 21-29). Colacino testified that his father was there for the signing because “he likes to eat” and everyone went to dinner afterwards (Tr. 232).

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

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

The effective date of the letter of assent C was February 24, 2011. Pursuant to the contract provisions of the letter, the Respondent Newark Electric was bound to the terms of the letter for the next 180 days and would then have the opportunity from August 24, 2011 to January 24, 2012 to terminate the letter of assent by providing the 30-day written notice to both the Union and NECA. At the very latest date that the Respondent Newark Electric could terminate the letter of assent C and the collective-bargaining agreement was on January 24, 2012, which would be 30 days prior to the 1-year anniversary of the letter of assent.⁷

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

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

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

⁷ The counsel for the General Counsel inadvertently noted February 24, 2011 as the expiration date of the letter of assent, which actually should read February 24, 2012. See GC Br. at 11.

agreed with Colacino that the union members would finish up their assignments under the nonunion terms and conditions of employment and thereafter, they would begin to receive union wages and benefits in accordance with the letter of assent and the master collective-bargaining agreement. Davis recalled that Blondell, Mike Bebernitz (Bebernitz) and Mark Patterson
5 (Patterson) were three employees already performing bargaining unit work at Respondent Newark Electric. Davis said that eventually these three and others would become union members after performing their obligatory 1,000 hour probationary period (Tr. 25-28).

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

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

25 Colacino explained that for accounting and administrative reasons, he was not able to segregate the finances and insurance for the two companies. Colacino said, for example, that he did not have the cash reserves to pay salaries for the Newark Electric 2.0 employees and that the premiums were extremely high to insure a new company. Colacino said that he raised the difficulties in operating two companies under one financial and administrative roof with Davis and he purportedly told Colacino that his problems would be resolved if Colacino also sign up Respondent Colacino Industries to a letter of assent C (Tr. 183-185).
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Colacino testified that it was his intent that the letter of assent C binding Respondent Colacino Industries would supersede the letter of assent signed earlier with Respondent Newark Electric 2.0. Colacino said that Davis told him that the letter of assent for Newark Electric would essentially just dissolve. Colacino testified that Davis told him a single company could not have
35 two concurrent letters, but that he (Davis) would nevertheless check with IBEW. Colacino said that Davis informed him about 30 days later that the easiest way to resolve this issue was to re-date the letter of assent with Respondent Newark Electric so that it would follow the same time frame as the letter of assent for Colacino Industries. He testified that that Davis unexpectedly called him and said that the Union had re-dated the letter of assent C for Respondent Newark
40 Electric to match the July 20 date (Tr. 184-192). Colacino testified that he never received the re-dated letter of assent, but it was his understanding that it was accomplished. He never gave another thought about the re-dating of the letter of assent C (Tr. 223, 224).

45 According to Davis, it was Colacino who approached him in July 2011 and suggested to Davis about signing up Respondent Colacino Industries to a letter of assent C. Davis testified that Colacino explained to him that it was difficult to maintain the accounting books with two different companies and two different set of employees. Davis testified that it was his understanding that Colacino was referring to Respondents Colacino Industries and Newark Electric as the two companies with accounting issues. Davis insisted that Colacino never
50 mentioned Respondent Newark Electric 2.0 as being the second company as having the bookkeeping problems. According to Davis, since he was not yet aware that Newark Electric 2.0 existed, he told Colacino that there should be no problems with two letters of assent, but

would have to first check with IBEW. Davis testified that the letter of assent C for Respondent Colacino Industries was approved and Colacino signed the letter on July 20, 2011⁸ (Tr. 29-32, 92; GC Exh. 10).

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

d. The Termination of the Letters of Assent

15 Davis testified that Colacino notified him by letter dated April 12 that Respondent Colacino Industries was terminating its letter of assent C and the collective-bargaining agreement with the Union effective on May 26. A copy of the notice to terminate was also sent to the NECA, Finger Lakes chapter. Colacino also requested a meeting with Davis to discuss
20 the "...the reasons for this decision and how the IBEW can support NEC 2.0, Inc." (GC Exhs. 12, 33). Davis said he was taken by surprise because this was the first occasion he heard of a company named Newark Electric 2.0. Davis attempted to contact Colacino for a meeting, but was never able to reach him (Tr. 36, 37, 58).

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

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

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

45 In compliance with the letter of assent dated 7/20/2011, Newark Electric 2.0 is terminating the letter of assent and the collective-bargaining agreement effective today, the 29th of June, 2012.

Davis said he knew nothing about Newark Electric 2.0 and insisted that the Union never

50 ⁸ Colacino testified that he signed the letter of assent C for Respondent Colacino Industries "two months later"(after the February 24, 2011 letter of assent C for Respondent Newark Electric), which was obviously mistaken testimony (Tr. 183).

signed a letter of assent with Newark Electric 2.0 (Tr. 41, 42). Davis testified that eventually, Scott Barra (Barra) contacted him and arranged for a meeting with Colacino for July 2. Davis said that Barra was a union member referred to Colacino to perform collective-bargaining work.⁹

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

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

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

35 Colacino also said that the employee who had wrote the letter to terminate the letter of assent for the Newark Electric 2.0 mistakenly typed in June 29 as the effective termination date, when it should have been July 29. Colacino again insisted that the letter of assent C was signed for Respondent Newark Electric 2.0 and not for any other company (Tr. 221-224).

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Discussion

a. Single Employer and Alter Egos Status

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The General Counsel argues that Respondents Colacino Industries and Newark Electric are either a single employer entity or alter egos. The General Counsel contends that if Colacino Industries and Newark Electric are single employer/alter egos, then Respondent Colacino

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⁹ Barra, like Bush, also resigned from the Union in order to work for Colacino (Tr. 48, 49; GC Exh. 16).

Industries is bound to the letter of assent C between the Respondent Newark Electric and the Union.

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

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

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

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

30 Not all of the criteria need be present to establish a single employer status and no single criterion is controlling. Single employer status “ultimately depends upon ‘all circumstances of the case’ and is characterized by the absence of an ‘arms-length relationship found among unintegrated companies.’” *Mercy Hospital of Buffalo*, 336 NLRB No. 134, JD slip op. at page 3 (December 18, 2001); also, *Hahn Motors*, 283 NLRB 901 (1987).

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

40 The Board and the courts have applied the alter ego doctrine in those situations where one employer entity will be regarded as a continuation of a predecessor, and the two will be treated interchangeably for purposes of applying labor laws. The most obvious example occurs when the second entity is created by the owners of the first for the purpose of evading labor law responsibilities; but identity of ownership, management, supervision, business purpose, operation, customers, equipment, and work force are also relevant in determining alter ego status. See *Fallon-Williams Inc.*, 336 NLRB No. 54 (2001), *C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 354 (1st Cir. 1990). While the Board considers whether one entity was created in an attempt to enable another to avoid its obligations under the Act, the Board has consistently held that such a motive is not necessary for finding alter ego status. *Crawford Door Sales Co.*, above. In looking at the various factors shared by the entities, the Board has noted that no one factor is controlling or determinative. *NLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971). Like the single employer doctrine, the existence of such status ultimately depends on “all circumstances of the case” and

is characterized as an absence of an “arms’ length relationship found among unintegrated companies.” *Operating Engineers Local 627 (South Prairie Construction) v. NLRB*, 518 F.2d 1040, 1045-1046 (D.C. Cir. 1975), *affd.* in relevant part sub. nom.

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

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

Colacino Industries was created to perform commercial and residential software and to
20 design and build automation and integration systems, but also to perform electrical work.¹⁰ Contrary to the Respondents’ assertions, Respondent Newark Electric was not a dormant company after 2000 when the assets were sold to Colacino. The record shows that Newark Electric was not legally dissolved until 2013, but the company continued to operate and
25 generate business as evidenced by the invoices and customer purchase orders that mostly reflected the Newark Electric logo and payments that were addressed to both Respondents Colacino Industries and Newark Electric. It is clear that invoices and purchase orders were used interchangeably between Respondents Newark Electric and Colacino Industries.

Further, Colacino continued to use Respondent Newark Electric logo, stationery and
30 other identifying aspects as a division of Respondent Colacino Industries. Though Colacino denies ownership of Newark Electric, Colacino’s business card given to Davis stated that James Colacino (and not Richard Colacino) as the president and CEO of Newark Electric. Colacino also testified that he wanted Newark Electric to be a division of Respondent Colacino Industries and some stationery logos reflected this fact.¹¹ Most significantly, Colacino ultimately made all
35 the personnel decisions in the hiring and retaining of employees and in the management of all three companies.

In addition, Respondents Colacino Industries and Newark Electric were housed in the
40 same premises at 126 Harrison Street. The entrance doors to 126 Harrison Street have the logos of Newark Electric and Colacino Industries; there was one facsimile, copier and printer machine for all three companies and one phone system with Newark Electric keeping its own phone number and incoming calls are identified through either the Newark Electric or Colacino Industries ID number; the Respondent Colacino Industries company vans continued to display the Newark Electric logo; and communications by emails between the Respondents and the
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¹⁰ Colacino had testified that his programmers would also perform electrical work although he insisted that all electrical work was being performed by the Respondent Newark Electric 2.0.

¹¹ Even assuming that formal ownership of Respondent Newark Electric was with Richard Colacino, during the period of formal ownership of Newark Electric, the active control of both companies was in the
50 hands of James Colacino. This satisfies the element of common ownership. See *Kenmore Contracting Co.*, 289 NLRB 336 (1988); also *Milford Services, Inc.*, 294 NLRB 684 (1989).

public were interchangeable between newarkelectric.com and colacino.com.

The record further shows that the employees of Colacino Industries completed their time sheets and job cards having the Colacino and Newark Electric logos. Employees completing supply and parts requisition forms only showed the Newark Electric logo and one warehouse were used to provide the supplies for all three companies. The employer's contributions to the union funds had the name of Newark Electric.

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

I also find that at all material times, as a single employer, the Respondents Colacino Industries and Newark Electric have a common officer, ownership, management and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for each other; have interchanged personnel with each other, have engaged in common purchasing, and have held themselves out to the public as a single-integrated business enterprise. *Emsing's Supermarket, Inc.*, above; *Park Avenue Investments LLC*, above.¹²

b. Repudiation of the Collective-Bargaining Agreement

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

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

¹² In the alternative, the General Counsel argues that regardless of the alter egos/single employer status of Respondents Colacino Industries and Newark Electric, the Board has jurisdiction over Respondent Newark Electric as a separate entity. The counsel for the General Counsel alleges that the Board has jurisdiction over Respondent Newark Electric because it is a corporation with an office and place of business in New York and that it had purchases and received goods valued in excess of \$50,000 from other enterprises located within the State of New York and from points outside of the State of New York (Tr. 162-166). The Respondents deny that Respondent Newark Electric is a corporation with an office and place of business in New York and maintain that Respondent Newark Electric has not operated since 2000 (Tr. 162-165). The General Counsel had subpoenaed the Respondents' invoices. Rather than to submit the entire record of invoices, the parties agreed that the General Counsel would submit a sample of all invoices for 2011 and 2012 (Tr. 163-165). A review shows that the invoices during a representative sample of jobs from August 28, 2011 to October 20, 2012 indicated that Respondent Newark Electric was operating and performing jobs with gross revenues valued in excess of \$100,000 dollars from various entities engaged in interstate commerce. The invoices contained the logo of Newark Electric as being a division of Colacino Industries. There is no mention of Newark Electric 2.0 on any of the invoices (GC Exh. 26, 27). Respondent Newark Electric in conducting its business operations and performed services valued in excess of \$50,000 from enterprises located within the State of New York has engaged in interstate commerce. As such, I agree with the General Counsel and find that the Board has jurisdiction over Respondent Newark Electric as a separate enterprise engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

had the name of the firm as “Newark Electric;” the name of the individual signing on behalf of Newark Electric was “James R. Colacino;” his title under his signature was “CEO;” and the federal tax identification number provided was for Newark Electric. The objective record also shows that Newark Electric 2.0 was not incorporated until March 8, 2011 and did not have its own federal tax number in February.

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

I do not credit the testimony of Colacino on this point. I find that Colacino’s testimony that Newark Electric 2.0 had signed the letter of assent C lacks credibility.¹³ At the time that the letter of assent C was signed, Colacino knew that Newark Electric 2.0 did not exist or at best, he was in the process of incorporating the new company. Colacino also knew that Newark Electric 2.0 did not have a federal tax number at the time of the February signing. Colacino denied being an officer of Newark Electric, but nevertheless signed the letter as the CEO of Newark Electric and had provided a business card to Davis indicating he was the president and CEO of Newark Electric. Colacino (or for that matter, Richard Colacino, who was also present at the signing) could have raised all this misinformation to the Union so that the letter could be corrected to his satisfaction. Instead, Colacino did not raise any “red flags” and proceeded to sign the letter of assent C.

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

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

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

¹³ The General Counsel notes that a Board judge had found that Colacino lacked credibility in his testimony in another case (GC Br. at 25). However, my credibility findings are based on this record and not on the findings of another judge.

100 days prior to the expiration date (May 31) of the master agreement. However, since Newark Electric failed to provide such timely notice to the NECA and the Union, Newark Electric was bound until May 31, 2015, which is the expiration date of the then successor agreement.

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

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

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

c. The Respondents' Defenses

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

 I find that Colacino was not forced, duped or fraudulently induced in signing the letters of assent C for Newark Electric and Colacino Industries. I find no meritorious evidence that Davis had agreed to re-date the letter of assent C for Newark Electric or that he represented to
40 Colacino that the first letter of assent C was superseded by the signing of the letter of assent C for Colacino Industries

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

50 It is also equally clear from the record that Colacino knew he could not timely terminate the letter of assent C for Newark Electric and would be bound by the successor bargaining agreement until 2015. However, by claiming that the first letter of assent was dissolved,

superseded or re-dated with the letter of assent C for Colacino Industries, Colacino believed that he could then return to a nonunion shop once the letter of assent C for Colacino Industries was timely terminated.

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

15 With regard to the re-dating of the letter of assent C with Newark Electric to July 20, Davis also credibly denied telling Colacino that he had re-dated the letter of assent C. Colacino said that Davis called him "out of the blue" to tell him that he had re-dated the letter of assent C for Newark Electric.

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

d. The Layoff of Anthony Blondell

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

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

Blondell testified that he was terminated on June 29 after receiving his final paycheck from Respondent Colacino Industries.¹⁴ The letter of termination stated that Blondell was discharge for disclosing company information without consent. The termination letter was signed by Colacino (Tr. 108, GC Exh. 21). Blondell said he was surprised with his discharge and went to see Bliss, the office manager. According to Blondell, Bliss told him that Blondell allegedly purloined a document off the desk in Colacino's office. Blondell denied taking any document and wanted to meet with Colacino. Blondell met with Colacino the following day, on June 30. Blondell explained to Colacino that he did not take any documents and that Colacino should have spoken to him first before terminating him. Colacino believed Blondell, apologized to him and rescind the letter of termination. Blondell's termination was rescinded by letter dated July 5 (Tr. 109, 110, 115; GC Exh. 22).

Blondell testified that after his termination was resolved, he continued to discuss with Colacino about other matters. Blondell said that Colacino told him that he was having difficulties making the letter of assent work and that July 20 was going to be the last date for the letter of assent for Respondent Colacino Industries. Blondell said that about an hour into their meeting, Barra arrived and became part of the conversation regarding the July 20 date. Blondell said that Barra was also aware that Colacino intended to terminate the letter of assent on July 20 (Tr. 110-113).¹⁵

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

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

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

¹⁴ The termination of Blondell, although initially filed as a charge by the Union, was subsequently not alleged in the complaint of the General Counsel (Tr. 99, 100).

¹⁵ Davis testified above that he was trying to reach Colacino when he received a telephone call from Barra. It was at the June 30 meeting that prompted Barra to make a call to Davis to arrange a meeting with the Union for July 2.

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

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

Discussion

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

The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

Under the NLRA, a traditional constructive discharge occurs when an employee quits because his employer has deliberately made the working conditions unbearable and it is proven that (1) the burden imposed on the employee caused and was intended to cause a change in the employee's working conditions so difficult or unpleasant that the employee is forced to resign, and (2) the burden was imposed because of the employee's union activities. *Grocers Supply Co.*, 294 NLRB 438, 439 (1089). Here, under the Hobson's choice theory, an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition. *Hoerner Waldorf Corp.*, 227 NLRB 612, 613 (1976).

The evidence establishes that just prior to July 20, Respondent Colacino Industries terminated Blondell and at least two other bargaining unit employees voluntarily resigned their union membership in order to continue working for Colacino. Blondell credibly testified that he approached Colacino and asked whether he would be laid-off on July 20, knowing that Colacino was terminating the letter of assent and the collective-bargaining agreement on that date. Blondell credibly testified that Colacino replied by saying he would have to terminate Blondell's employment by laying him off. Given this choice, Blondell accepted his layoff because he wanted to remain with the union. I do not credit the testimony of Colacino and Barra on this

point. It is difficult for me reasonably believe that Blondell asked to be laid-off as testified by Barra and Colacino. Blondell credibly testified that he was in the middle of completing a project and that there was work available for him to perform. It is also difficult for me to accept the testimony of Colacino and Barra that Blondell would agree to be laid-off by Colacino so he could not be used as a tool between the union and Colacino.

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

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

CONCLUSIONS OF LAW

1. At all material times, Respondents Colacino Industries, Newark Electric 2.0 and Newark Electric are corporations with an office and place of business located at 126 Harrison Street in Newark, New York, and have been engaged in the construction industry as electrical contractors.

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

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

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

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

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

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

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

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

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

REMEDY

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

Having found that the Respondents violated Section 8(5) and (1) of the Act by withdrawing recognition from IBEW Local 840 and failing from July 20, 2012 to continue in effect all the terms and conditions of the IBEW and NECA agreement, I shall order the Respondents to recognize Local No. 840 as the exclusive bargaining representative of employees in the unit and to apply all the terms and conditions of the IBEW agreement, and any automatic extensions thereof. I shall also order the Respondents to make whole, unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondents failure to continue in effect all of the terms and conditions of the IBEW Local No. 840 agreement in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F. 2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded* and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Having also found that the Respondents violated Section 8(a)(3) and (1) of the Act by discharging Anthony Blondell, I shall order the Respondents to offer him full reinstatement to his former job or, if the job no longer exists, to a substantially equivalent job, without prejudice to seniority or any other rights or privileges previously enjoyed. Further, the Respondents shall make the aforementioned employee whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356, above. The Respondents shall also be required to expunge from its files any and all references to the unlawful discharge of the aforementioned employee and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

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

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On these findings and of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

1. Cease and Desist from

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

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

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

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

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

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

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

45

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

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¹⁶ 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.

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

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

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

15 (g) Within fourteen (14) days, post at the Respondents' Newark, New York facility, a copy of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facilities involved in these proceedings, or sold the business or the facilities involved herein, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since July 20, 2012.

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

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

Kenneth W. Chu
Administrative Law Judge

50 ¹⁷ If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

NOTICE TO EMPLOYEES

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefits and protection
- Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to bargain in good faith with the collective-bargaining representative of our employees in the appropriate bargaining unit described below:

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

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

WE WILL NOT lay off or condition your employment on working for a nonunion company.

WE WILL NOT in any similar manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

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

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

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

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

Newark Electric Corp., Newark Electric 2.0, Inc., and Colacino Industries, Inc.

(Employer)

Dated _____ By _____
(Representative) (Title)

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

130 S. Elmwood Avenue
Suite 630
Buffalo, New York 14202
Hours: 8:30 a.m. to 5 p.m.
716-551-4931.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.