

Engineering Contractors, Inc. and ECI of Washington, LLC, Alter Egos and Plumbers Local No. 5, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO

Engineering Contractors, Inc. and ECI of Washington, LLC, Alter Egos and Steamfitters Local 602, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO

Engineering Contractors, Inc. and ECI of Washington, LLC, Alter Egos and Sheet Metal Workers International Association, Local No. 100, AFL-CIO

Engineering Contractors, Inc. and ECI of Washington, LLC, Alter Egos and Asbestos Workers Local 24 Pension Fund, Asbestos Workers Local 24 Medical Fund, and Asbestos Workers Local 24 Apprenticeship Fund, Affiliated with the International Association of Heat and Frost Insulators and Allied Workers Local 24, AFL-CIO. Cases 05-CA-036213, 05-CA-036214, 05-CA-036216, 05-CA-036306, and 05-CA-036225

December 8, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On September 1, 2011, Administrative Law Judge Bruce D. Rosenstein issued the attached decision.¹ The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief and a motion to strike, and Charging Party Plumbers Local No. 5 and Charging Party Steamfitters Local 602 filed a joint answering brief and a joint motion to strike. The Respondent also filed an opposition to the motion to strike.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions,² and to adopt the recommended Order.³

¹ On August 5, 2011, before the judge issued his decision, the United States District Court for the District of Maryland granted the Acting General Counsel's petition, in connection with this proceeding, for a temporary injunction under Sec. 10(j) of the Act. *Gold v. Engineering Contractors, Inc.*, 2011 WL 3438078 (D. Md. Aug. 5, 2011).

² In adopting the judge's finding that the Respondents violated Sec. 8(a)(5) and (1) of the Act by failing to furnish the information requested by the Sheet Metal Workers Local No. 100 on June 15, 2010, we note that the Respondents failed to point to any record evidence supporting their exception to the judge's factual finding that they never furnished the requested information.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents Engineering Contractors, Inc. and ECI of Washington, LLC, Alter Egos of Upper Marlboro, Maryland and Washington, District of Columbia, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

Sean R. Marshall, Esq., and *Jaime A. Cohn, Esq.*, for the Acting General Counsel.

Ken C. Gauvey, Esq., of Owings Mills, Maryland, for the Respondents.

Keith R. Bolek, Esq., of Washington, DC, for the Charging Party Plumbers and Steamfitters.

Jonathan D. Newman, Esq., of Washington, DC, for the Charging Party Sheet Metal Workers.

Mayoung Nham, Esq., of Washington, DC, for the Charging Party Asbestos Workers.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on July 11 through 14, 2011, in Washington, DC, pursuant to an order consolidating cases issued by the Regional Director for Region 5 of the National Labor Relations Board (the Board). The complaint, based upon original charges and amended charges filed on various dates in 2010,¹ and 2011 by Plumbers Local No. 5, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (Plumbers or Local No. 5), by Steamfitters Local 602, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (Steamfitters or Local 602), by Sheet Metal Workers International Association, Local No. 100, AFL-CIO (Sheet Metal Workers or Local No.100), and by Asbestos Workers Local 24 Pension Fund,

In adopting the judge's finding that the Respondents violated Sec. 8(a)(3) and (1) by discharging the 38 employees named in the remedy section of the judge's decision (and others who may be identified in compliance), we reject the Respondents' argument, on exceptions, that they satisfied their *Wright Line* rebuttal burden. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). The Respondents failed to prove that, regardless of their union affiliation or activities, those employees would have been discharged around May 7, 2010, because Respondent Engineering Contractors, Inc. was no longer a viable company and/or because those employees performed substandard work. Also, we note that the judge alternately characterized the adverse actions here as discharges and constructive discharges. We find that the employees were unlawfully discharged, and thus we do not rely on the judge's constructive-discharge analysis.

³ In view of our disposition of this case, we find it unnecessary to pass on the Acting General Counsel's and two of the Charging Parties' motions to strike Respondents' exceptions and supporting brief based on their claim that the exceptions do not comport with the Board's Rules and Regulations.

¹ All dates are in 2010, unless otherwise indicated.

Asbestos Workers Local 24 Medical Fund, and Asbestos Workers Local 24, Apprenticeship Fund, affiliated with International Association of Heat and Frost Insulators and Allied Workers Local 24, AFL-CIO (Asbestos Workers or Local 24), alleges that Engineering Contractors, Inc. and ECI of Washington, LLC, Alter Egos (the Respondents, Respondent Engineering, or Respondent ECI), has engaged in certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondents filed a timely answer to the complaint denying that they had committed any violations of the Act.

Issues

The complaint alleges that the Respondents violated Section 8(a)(1) and (3) of the Act when on or about May 7, they discharged or caused the discharge of employees represented by the Plumbers, Steamfitters, Sheet Metal Workers, and Asbestos Workers because the employees engaged in concerted activities on behalf of each of those respective labor organizations. The complaint further alleges that the Respondents violated Section 8(a)(1) and (5) of the Act when on or about May 7, they withdrew recognition and repudiated the collective-bargaining agreements that they were parties to with each of the labor organizations mentioned above. Lastly, the complaint in Cases 05-CA-036216 and 05-CA-036306 alleges that the Respondents on or about June 15, refused to furnish the Sheet Metal Workers with necessary and relevant information in violation of Section 8(a)(1) and (5) of the Act.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, Charging Parties and the Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Engineering, a corporation with an office and place of business located in Upper Marlboro, Maryland, has been engaged as an engineering and mechanical contractor in the construction industry, performing maintenance and repair of HVAC and mechanical systems for industrial and commercial customers. Respondent Engineering in conducting its business operations performed services valued in excess of \$50,000 in states other than the State of Maryland. Respondent Engineering admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Plumbers, Steamfitters, Sheet Metal Workers, and Asbestos Workers are labor organizations within the meaning of Section 2(5) of the Act.

Respondent ECI, a limited liability company organized under the laws of the District of Columbia, has offices and con-

ducts business in Washington DC and Upper Marlboro, Maryland. Respondent ECI has been engaged as an engineering and mechanical contractor in the construction industry, performing maintenance and repair of HVAC and mechanical systems for industrial and commercial customers. In conducting its business operations, Respondent ECI performed services valued in excess of \$50,000 in states other than the District of Columbia. Respondent ECI admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Plumbers, Steamfitters, Sheet Metal Workers, and Asbestos Workers are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

At all material times, Steven Griffith held the positions of president of Respondent Engineering and Respondent ECI while Paul Parker held the positions of vice president of Respondent Engineering and Respondent ECI. Griffith held a 51 percent ownership position in both Respondent Engineering and Respondent ECI while Parker owns 49 percent in both companies (GC Exh. 122). On or about November 20, 2009, Respondent ECI was established. At no time were the Plumbers, Steamfitters, Sheet Metal Workers, or Asbestos Workers informed of the existence of Respondent ECI. To date, Respondent ECI continues to operate as a nonunion mechanical contractor. The record confirms, and Parker admitted, that since November 20, 2009 Respondent ECI has not applied the terms and conditions of the aforementioned collective-bargaining agreements to their employees.

At all material times, Mechanical Contractors Association of Metropolitan Washington, Inc. (MCAMW), has been an organization composed of approximately 80 employers, one purpose of which is to represent its employer-members, and employers who have authorized the MCAMW to bargain on their behalf, in negotiation and administering collective-bargaining agreements with the Plumbers, Steamfitters, Sheet Metal Workers, and the Asbestos Workers. Respondent Engineering became a member of the MCAMW in April 2009 (GC Exh. 112).

On or about November 18, 2008, and December 18, 2008, Respondent Engineering entered into Letters of Assent whereby it agreed to comply with, and be bound by, all the terms and conditions of employment contained in the then current collective-bargaining agreements between the MCAMW and the Steamfitters and Plumbers (August 1, 2007 to July 31), and any subsequently negotiated collective-bargaining agreements (August 1 to July 31, 2013, and 2014). The Letters of Assent would expire only upon Respondent Engineering's written notice to the Steamfitters and the Plumbers at least one hundred and fifty (150) days prior to the expiration date of the then-current labor agreement (GC Exh. 45 and 48).

Griffith testified that at no time prior to or after March 3, did he or any authorized official of the Respondents notify the Steamfitters or the Plumbers that they intended to terminate the Letters of Assent.

Since on or about November 14, 2008, the Sheet Metal Workers have been the designated exclusive collective-

² The record establishes that three of the Charging Parties have pending litigation in the United States District Court, Southern Division, in Greenbelt MD, involving contractual benefit funds and the Acting General Counsel has also filed a Sec. 10(j) petition. On August 4, 2011, the District Court issued a memorandum opinion granting the Acting General Counsel's petition for injunctive relief ___ F. Supp. 2d ___, 2011 WL 3438078 (D. MD. Aug. 5, 2011).

bargaining representative of the unit and since then has been recognized as the Section 9(a) representative by Respondent Engineering. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from July 1, 2009, through June 30, 2014 (GC Exh. 44).

Since on or about November 11, 2008, the Asbestos Workers have been the designated exclusive collective-bargaining representative of the unit and since then has been recognized as the Section 9(a) representative by Respondent Engineering (GC Exh. 39). This recognition has been embodied in a collective-bargaining agreement, effective by its terms from October 1, 2006, through September 30, 2009 (GC Exh. 40). By letter dated June 17, 2009, the Asbestos Workers notified Griffith of their intention to modify the parties' collective-bargaining agreement (GC Exh. 104). By letters dated May 7 and June 29, the Asbestos Workers sought to engage in negotiations for a successor agreement and notified Griffith that unless they receive a response, they intend to initiate all appropriate legal actions to compel adherence to the terms of the agreement (GC Exh. 57 and 59). Griffith admitted that the Respondents did not reply to those letters or engage in any successor collective-bargaining negotiations for a new agreement.

On or about May 7, Griffith terminated his entire union work force comprised of employees represented by the Plumbers, Steamfitters, Asbestos Workers, and Sheet Metal Workers (GC Exh. 54). Prior to and concurrent with those terminations, Respondent ECI advertised for workers and made employment applications available at its facility in Upper Marlboro, Maryland. While Griffith testified that Respondent Engineering effectively ceased field operations on May 7,³ he acknowledged that it has not filed any formal paper work with any government agency officially dissolving the business. However, Parker testified that in early July 2011, the State of Maryland revoked Respondent Engineering's Charter for not paying taxes. Official payroll records show that Respondent Engineering paid all of its employees through May 13, and on and after that date Respondent ECI assumed the payroll responsibilities for all employees in its employ (GC Exh. 116 and 117). Griffith further acknowledged that while he never complied with the terms of the collective-bargaining agreements on behalf of employees of Respondent ECI, effective with Respondent Engineering ceasing field operations on May 7 he no longer adhered to the terms and conditions of employment contained in the collective-bargaining agreements with the Plumbers, Steamfitters, Asbestos Workers, and the Sheet Metal Workers. Griffith also admitted that prior to Respondent Engineering ceasing field operations, he was in arrears with payments to the contractual benefit funds under the parties' collective-bargaining agree-

³ In his testimony Parker amplified on Griffith's testimony. In this regard, while acknowledging that Respondent Engineering has not performed any actual field work beyond May 7, he asserts it still is a viable concern as it has account receivables due and owing in excess of \$1 million from contracts and prior work performed that has not been received. Under these circumstances, Respondent Engineering continued to write checks to fund continued expenses such as rent and telephone in addition to paying for materials, subcontractors, and labor incurred by Respondent ECI (CP P/S 6-9).

ments.

B. The 8(a)(1) and (5) Allegations

1. Single Employer and Alter Ego Status

The Acting General Counsel alleges that Respondent Engineering and Respondent ECI have had substantially identical management, officers, business purpose, operations, equipment, customers, and supervision/management and are, and have been at all material times, a single employer or alter egos within the meaning of the Act.

Facts

The evidence establishes that Griffith and Parker are the principal owners of both Respondent Engineering and Respondent ECI in addition to Griffith holding the position of president for both companies and Parker serving as vice president. Additionally, Jason Absher and Dave Packianathan have served as project managers for both Respondent Engineering and Respondent ECI and Greg Absher was employed in the position of safety director for both entities while Brian Parker served as purchasing manager for both companies. The record also shows that equipment such as computers, ladders, hard hats and safety vests with the "ECI" logo were used and worn by employees of both Respondent Engineering and Respondent ECI. Moreover, the majority of the same trucks and vans used by Respondent Engineering were transferred after May 7 to Respondent ECI and are now used in the conduct of their business (GC Exh. 92, 93, 94 and 133). Records confirm that Respondent ECI continues to make the monthly payments for the lease of those vehicles. Likewise, both before and after May 7, the same office equipment such as land and mobile telephones, fax machines, and email addresses were used by employees of both Respondent Engineering and Respondent ECI. The evidence further establishes that both Respondent Engineering and Respondent ECI share common premises and facilities at their Upper Marlboro, Maryland and Washington DC locations. Indeed, even after Respondent Engineering ceased field operations on May 7, it paid the rent for Respondent ECI at its Washington DC location from October 2009, through August 20 (CP P/S Exh. 5). Both Respondent Engineering and Respondent ECI used many of the same vendors and suppliers to purchase equipment and supplies (GC Exh. 129 and 130), and both entities used Old Line Bank for their checking accounts, credit advances and loan applications (GC Exh. 128 and CP P/S Exh. 2 and 3). Additionally, the evidence shows that Respondent Engineering and Respondent ECI used the same health insurance company (Care First) and Liability/Casualty Insurance Carrier (Cincinnati Insurance and Casualty Co.), and retained the same attorneys to represent both companies for labor relations matters (GC Exh. 151-153).

The record further establishes that Respondent ECI assumed a number of open contracts signed by Respondent Engineering as of May 1. Respondent ECI completed several of those jobs, and it still continues to work on a number of the remaining assumed contracts (GC Exh. 55).

The Acting General Counsel further established that in addition to common management and supervision, two employees (Joe Burnette and Bobby Jones) worked for Respondent Engi-

neering and were then employed by Respondent ECI performing the identical work (GC Exh. 115). Likewise, the administration of a common labor policy has been established by the use of identical employment forms and personnel policies/practices that were used for both employees of Respondent Engineering and Respondent ECI (GC Exh. 62, 64, 65, 66, 105, 107, and 134).

Discussion

In determining whether two nominally separate employing entities constitute a single employer, the Board examines four factors: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) common control of labor relations. No single factor is controlling, and not all need to be present. Rather, single-employer status ultimately depends on all the circumstances. It is characterized by the absence of an arm's length relationship among seemingly independent companies. *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283–1284 (2001), and *Dow Chemical Co.*, 326 NLRB 288 (1998).

With respect to the General Counsel's theory that Respondents are alter egos, the Board utilizes additional factors and a broader standard in determining whether two 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).

The Respondents argue that the creation of an enterprise (Respondent ECI) for the purpose of obtaining nonunion work does not establish an unlawful motive. *First Class Maintenance Service*, 289 NLRB 484 (1988). The fallacy of this argument, in comparison to the facts in the subject case, is that the Board held in that case that the separate entity did not share supervision, management, or ownership, and the former company continued as a separate ongoing business. Here, as found above, Respondent ECI shares supervision, management, and ownership with Respondent Engineering but Respondent Engineering no longer continues as a separate ongoing business that performs field operations. Moreover, Griffith admitted that he never informed the Plumbers, Steamfitters, Asbestos Workers, or the Sheet Metal Workers that it established Respondent ECI, a factor that indicates unlawful motivation.

Based on the forgoing, and particularly noting that the record facts noted above conclusively establish the criteria the Board requires for an alter ego relationship, I find that the Acting General Counsel has established that Respondent Engineering and Respondent ECI are single employers and/or alter egos.

2. Refusal to negotiate, withdrawal of recognition and repudiation of collective-bargaining agreements

The Acting General Counsel alleges that since May 7, the Respondents have withdrawn recognition, refused to meet and bargain with the Plumbers, Steamfitters, Sheet Metal Workers, and Asbestos Workers and repudiated the terms and conditions of the most recent collective-bargaining agreements between the parties.

Facts

The record confirms and Griffith and Parker admitted in their testimony that Respondent Engineering did not, prior to or after March 3, give written notice as required by the Letters of Assent to cancel those agreements with the Plumbers and the Steamfitters.

Likewise, both Griffith and Parker testified that at no time since November 20, 2009, did the Respondents ever apply the then current or subsequently negotiated collective-bargaining agreements with the MCAMW and the Plumbers, Steamfitters, Asbestos Workers, and the Sheet Metal Workers to Respondent ECI. Additionally, both Griffith and Parker admitted that on and after May 7, Respondents did not adhere to the terms and conditions of the then current or subsequently negotiated collective-bargaining agreements with the MCAMW and the above labor organizations or individual collective-bargaining agreements with the Asbestos Workers and the Sheet Metal Workers. Lastly, Parker admitted that Respondents did not respond to requests of the Asbestos Workers to negotiate a successor collective-bargaining agreement.

Discussion

Based on the admitted testimony of Griffith and Parker, I find that the Respondents were bound to the then current and any subsequently negotiated collective-bargaining agreements between the MCAMW and the Plumbers and the Steamfitters. Likewise, I find that on May 7, the Respondents unilaterally withdrew recognition and repudiated the collective-bargaining agreements then in effect and subsequently negotiated agreements between the MCAMW and the Plumbers, Steamfitters, Asbestos Workers, and the Sheet Metal Workers and/or individual collective-bargaining agreements it had executed with the Asbestos Workers and the Sheet Metal Workers. See *Scheid Electric*, 355 NLRB 160 (2010) (holding that an employer is not free to unilaterally repudiate an existing collective-bargaining agreement with an incumbent union, regardless of whether the parties' agreement is based on a Section 9(a) or 8(f) relationship).

Therefore, since the Respondents have failed and refused to apply the terms and conditions of the collective-bargaining agreements between the MCAMW and the Plumbers, Steamfitters, Asbestos Workers, and the Sheet Metal Workers, they have failed and refused to bargain in good faith with the exclusive bargaining representatives of their employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(1) and (5) 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 of unfair labor practice and subsequent agreement then in effect and further ordered both respondents to pay the wage rates and make contributions to the fringe benefit funds as provided in those agreements).

3. Refusal to provide information

The Acting General Counsel alleges in paragraph 10 of the Sheet Metal Workers complaint (Cases 05–CA–036216 and 05–CA–036306) that since on or about June 16, Respondents have failed and refused to furnish Local No. 100 with necessary

and relevant information that it had requested.

Facts

By letter dated June 15, the Sheet Metal Workers requested Parker to provide necessary and relevant information to substantiate its lay off of 13 employees it represented and to determine if Respondent Engineering continued to operate under the name of Respondent ECI without complying with the collective-bargaining agreement between the parties (GC Exh. 68).

Discussion

The Board has held that a union is entitled to requested information “if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties as the employees’ exclusive bargaining representative.” *Southern Nevada Builders Assn.*, 274 NLRB 350, 351, (1985). This liberal discovery-type standard nevertheless contains an important limitation: the data must be of use in fulfilling statutory duties. The “duty to furnish . . . information stems from the underlying statutory duty imposed on employers and unions to bargain in good faith with respect to mandatory subjects of bargaining.” *Cowles Communications, Inc.*, 172 NLRB 1909 (1968).

It is long-established law that the duty to bargain in good faith embodied in Section 8(a)(5) of the Act includes the obligation of employers to provide their employees’ collective-bargaining representatives with requested information which is relevant and necessary to the representative’s duty to bargain on behalf of employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Such information may be needed for bargaining, for administering and policing collective-bargaining agreements, for communicating with bargaining unit members, or for preserving unit employees’ work, among other reasons. Information pertaining to the terms and conditions of employees in the bargaining unit is presumptively relevant, and must be provided upon request, without need on the part of the requesting party to establish specific relevance or particular necessity. *Iron Workers Local 207 (Steel Erecting Contractors)*, 319 NLRB 87, 90 (1995).

The duty to furnish information requires a reasonable good faith effort to respond to the request as promptly as circumstances allow. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). “An employer must respond to the information request in a timely manner” and [a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) as a refusal to furnish the information at all.” *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2000); see also *Newcor Bay City Division*, 345 NLRB 1229, 1237 (2005) (and cases cited there).

Both Parker and Griffith testified that Respondents did not respond to or provide the information requested in the June 15 letter. Since I find that the information requested by the Sheet Metal Workers is necessary and relevant to administer and police the parties’ collective-bargaining agreement in addition to preserving unit employees’ work, and particularly noting that the Respondents neither responded to or provided the information that was requested, I find that the Respondents violated Section 8(a)(1) and (5) of the Act. *H & R Industrial Services*, 351 NLRB 1222 (2007) (employer violated the Act by failing

to answer questions regarding the relationship between the employer and a suspected single employer/alter ego).

C. The 8(a)(1) and (3) Allegations

The Acting General Counsel alleges that on May 7, the Respondents discharged or caused the discharge of employees represented by the Plumbers, Steamfitters, Sheet Metal Workers, and Asbestos Workers because of their concerted activities on behalf of each of those labor organizations.

Facts

The record evidence confirms that on May 7, Respondent Engineering ceased field operations and terminated all of its bargaining unit employees represented by the Plumbers, Steamfitters, Asbestos Workers and Sheet Metal Workers.

Journeyman sheet metal worker Corey Young testified that Respondent Engineering Superintendent Troy Naylor gave him his discharge notice on May 7, and informed Young that the doors will be closing. On that same day, Young met with Griffith and Parker in their office. Parker apologized for having to close the shop. During the conversation, Parker asked Young whether he would work under the table as a nonunion employee. Young responded that it would not be in his best interest. Parker replied that he understood.

Sheet Metal Workers Business Agent Milo Chaffee testified that he spoke with Parker on May 7 in the office of Respondent Engineering. Parker informed Chaffee that Respondent Engineering could no longer afford to pay the union employees and he was going nonunion.

Asbestos Worker Bobby Jones was terminated on May 7 along with the other union represented employees of Respondent Engineering. He testified that his foreman, Joe Burnette, informed him that Respondent Engineering was going nonunion, and inquired whether Jones had any interest to stay on and become an employee of Respondent ECI. On May 12, Jones filled out an application on behalf of Respondent ECI (GC Exh. 56). On the same day, Jones commenced employment at Respondent ECI and filled out required employment forms in addition to receiving Respondent ECI policies (EEO Action Plan, Inclement Weather, Safety Wear, Drug and Alcohol, and Attendance) that were identical to those that he had executed when employed by Respondent Engineering (GC Exh. 62–65, 107, and 135).

Jones testified that while employed with Respondent ECI he observed that some of the same trucks and vans previously used by Respondent Engineering were used in the regular course of business by Respondent ECI. He also noted that while working for Respondent ECI, he wore the same hard hat and safety vest with the ECI logo that he wore when employed at Respondent Engineering.

Jones remained employed with Respondent ECI until June 11, when he was terminated (GC Exh. 67).

In May 2010, Elry McKnight testified that he saw an advertisement on behalf of Respondent ECI on “Craigslis” seeking certified plumbers. He replied to the advertisement and Griffith contacted him to set up an interview at the Upper Marlboro facility. During the course of the interview, and before he was hired to work for Respondent ECI, Griffith asked McKnight whether he was a member of a union. Despite being a member

of the Plumbers, he answered no. McKnight commenced employment with Respondent ECI in the third week of May 2010, and was assigned to the Bread for the City jobsite in Washington DC (GC Exhs. 55 and 60). McKnight testified that while employed at Respondent ECI he wore a hard hat and safety vest that had an ECI logo.

Sandra Rice testified that she was hired in August 2009 by Respondent Engineering Insulation Foreman Joe Burnette and worked for the company on the Towson University job until being laid off on November 24, 2009. She returned to work in December 2009, and worked as a journeyman asbestos worker until May 5, when Burnette informed her that because Respondent Engineering was going out of business she was being terminated along with all other union represented employees. Rice proceeded to the Upper Marlboro facility to pick up her final paycheck and while in Respondent Engineering's outer office took an application for employment at Respondent ECI from a stack that was placed on an adjacent podium desk. While waiting for her paycheck, Parker and Griffith inquired whether Rice was interested in working at Respondent ECI but informed her that it would be in a nonunion capacity. Rice did not respond one way or the other but took the Respondent ECI application to the asbestos workers union office. Rice ultimately decided not to apply for a position at Respondent ECI.

Parker, during his testimony, admitted that in and around May 7, he spoke to a number of Respondent Engineering employees who were selected for discharge, and informed them that they were welcome to stay on after that date but employment at Respondent ECI would be in a nonunion setting. Two employees, Burnette and Jones accepted the offer and commenced employment at Respondent ECI.

Discussion

In *Wright Line*, 251 NLRB 1083 (1980), enfd, 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) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient 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 National Labor Relations Act, 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 em-

ployee'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). 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 on or about May 7, Respondent Engineering terminated its entire work force including all employees that were represented by the Plumbers, Steamfitters, Asbestos Workers, and Sheet Metal Workers. Employees Young and Rice credibly testified, without contradiction, that Parker asked them whether they would work under the table or work nonunion after Respondent Engineering ceased its field operations on May 7. Parker admitted that he spoke to a number of employees in and around May 7, and inquired whether they would be willing to work nonunion going forward with wages and benefits substantially less than under the parties' existing collective-bargaining agreements.

In essence, Parker offered the employees the disabling choice of being terminated or accepting terms and conditions of employment that would be substantially reduced if they commenced working for Respondent ECI in a nonunion setting. This is a classic case of discriminating against employees because of their current terms and conditions of employment by discouraging membership in a labor organization.

Under these circumstances, I find that the Respondents violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Local No. 5, Local 602, Local No. 100 and Local 24 are labor organizations within the meaning of Section 2(5) of the Act.
3. By discharging employees Thomas H. Alston, Thomas M. Bistodeau, Donald Brown, Richard Emery, Francis Hill, Jeffrey Lehman, Jeremy Nicholas, Lovelle Proctor, Brandon Sewell, Tristin Swann, Timothy Capps, Clinton Cupples, Phillip "Andy" Fowler, David Hall Jr., David Hall Sr., Nicholas Hamilton, Gary Harper Jr., Thomas Kay, Clinton W. Parker, Arrington Baines, Gregory F. DeSibour, Florence Gjoka, Dwayne O. Lyons, Eric M. Martin, Scottie L. Moomau, Jr., Troy T. Naylor, Corey Young, John F. Prescott, Charles W. Seville III, David L. Tabron, Frank R. Young, Victor A. Zeyala, Joe Burnette, Curtis Clark, Bobby Jones, Frank Keeler, Sandra Rice, Sean Sprouse, and other employees presently unknown, 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)(1) and (3) of the Act.⁴

⁴ The Acting General Counsel also alleged that on May 7 employees' _____ Frey Jr., Michael Hamilton, Gary Wood, and Gabi Holley were unlawfully discharged. However, the Acting General Counsel did not submit any evidence to substantiate their discharges. Indeed, these

4. By refusing to provide Local No. 100 with necessary and relevant information that it requested on June 15, 2010, by withdrawing recognition and repudiating the collective-bargaining agreements with Local No. 5, Local 602, Local No. 100, and Local 24, and failing to continue in effect all the terms and conditions of employment of its collective-bargaining agreements including by ceasing to make contributions to the health and welfare funds and the local pension funds, the Respondents have been failing and refusing to bargain collectively and in good faith with the limited and Section 9(a) representatives of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondents are a single employer or alter egos who engaged in certain unfair labor practices, 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(a)(1) and (3) of the Act by discharging Thomas H. Alston, Thomas M. Bistodeau, Donald Brown, Richard Emery, Francis Hill, Jeffrey Lehman, Jeremy Nicholas, Lovelle Proctor, Brandon Sewell, Tristin Swann, Timothy Capps, Clinton Cupples, Phillip "Andy" Fowler, David Hall Jr., David Hall Sr., Nicholas Hamilton, Gary Harper Jr., Thomas Kay, Clinton W. Parker, Arrington Baines, Gregory F. DeSibour, Florence Gjoka, Dwayne O. Lyons, Eric M. Martin, Scottie L. Moomau, Jr., Troy T. Naylor, Corey Young, John F. Prescott, Charles W. Seville III, David L. Tabron, Frank R. Young, Victor A. Zeyala, Joe Burnette, Curtis Clark, Bobby Jones, Frank Keeler, Sandra Rice, Sean Sprouse, and other employees presently unknown,⁵ I shall order the Respondents to offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed. Further, the Respondents shall make the aforementioned employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondents shall also be required to expunge from its files any and all references to the unlawful discharges of the aforementioned employees and to notify them in writing that this has been done and that the unlawful discharges will not be used against them in any way.

Having further found that the Respondents violated Section 8(a)(1) and (5) by withdrawing recognition from Local No. 5 and failing, from about May 7, 2010, to continue in effect all the terms and conditions of the Local No. 5 agreement, I shall order the Respondents to recognize Local No. 5 as the limited exclusive bargaining representative of employees in the unit

employees were not provided separation notices (GC Exh. 54) nor do they appear on Respondent Engineering list of employees (GC Exh. 114).

⁵ I will leave to the compliance stage the identification of any other employees who were unlawfully discharged by the Respondents.

and to apply all the terms and conditions of the Local No. 5 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 Local No. 5 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* and *Kentucky River Medical Center*, supra.

Having also found that the Respondents violated Section 8(a)(1) and (5) by withdrawing recognition from Local 602 and failing, from about May 7, 2010, to continue in effect all the terms and conditions of the Local 602 agreement, I shall order the Respondents to recognize Local 602 as the limited exclusive bargaining representative of employees in the unit and to apply all the terms and conditions of the Local 602 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 Local 602 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* and *Kentucky River Medical Center*, supra.

Having found that the Respondents violated Section 8(a)(1) and (5) by withdrawing recognition from Local No.100 and failing, from about May 7, 2010, to continue in effect all the terms and conditions of the Local No. 100 agreement, I shall order the Respondents to recognize Local No. 100 as the exclusive Section 9(a) bargaining representative of employees in the unit and to apply all the terms and conditions of the Local No. 100 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 Local No. 100 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* and *Kentucky River Medical Center*, supra.

Having also found that the Respondents violated Section 8(a)(1) and (5) by withdrawing recognition from Local 24 and failing, from about May 7, 2010, to continue in effect all the terms and conditions of the Local 24 agreement, I shall order the Respondents to recognize Local 24 as the exclusive Section 9(a) bargaining representative of employees in the unit and to apply all the terms and conditions of the Local 24 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 Local 24 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* and *Kentucky River Medical Center*, supra.

In addition, I shall order the Respondents to make all contractually-required contributions to the Plumbers, Steamfitters, Sheet Metal Workers, and Asbestos Workers health and welfare

funds and local pension funds that have not been made, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Further, the Respondents shall reimburse unit employees for any expenses ensuing from its failure to make any required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons* and *Kentucky River Medical Center*, supra.⁶

Finally, having found that the Respondents violated Section 8(a)(1) and (5) by failing to provide Local No. 100 with necessary and relevant information, I shall order the Respondents to furnish Local No. 100 with the information requested in Local No. 100's letter of June 15, 2010.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondents, Engineering Contractors, Inc. and ECI of Washington, LLC, Alter Egos of Upper Marlboro, Maryland and Washington, DC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they form, join, or assist the Plumbers, Steamfitters, Sheet Metal Workers, and Asbestos Workers, or any other labor organization, or engage in concerted activities, or to discourage employees from engaging in these activities.

(b) Failing and refusing to recognize and bargain with the Plumbers and Steamfitters as the limited exclusive bargaining representative of employees in the unit during the term of their collective-bargaining agreements and any automatic extensions thereof, and with the Sheet Metal Workers and Asbestos Workers as the Section 9(a) exclusive bargaining representative of employees in the unit during the term of their collective-bargaining agreements and any automatic extensions thereof.

(c) Repudiating and failing and refusing to continue in effect all the terms and conditions of its collective-bargaining agreements with the Plumbers, Steamfitters, Sheet Metal Workers,

⁶ To the extent an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondents delinquent contributions during the period of the delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a set-off to the amount that the Respondents otherwise owes to the fund. In addition, as argued by the Plumbers and Steamfitters in their posthearing brief, I find that all employees that were hired by Respondent ECI (GC Exh. 18), should be made whole for their losses suffered as a result of the Respondents' unfair labor practices (difference between what Respondent ECI paid them and the contractual wage rates, along with the benefit contributions required by the collective-bargaining agreements. See *Williamette Industries*, 341 NLRB 560, 564 (2004) (Board granted make-whole remedy to effectuate the purposes of the Act even if not requested by the General Counsel).

⁷ 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.

and Asbestos Workers including by failing, since about May 7, 2010, to make payments to the health and welfare funds and the local pension funds.

(d) Failing and refusing to furnish the Sheet Metal Workers with requested information that is necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of employees in the unit.

(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.

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

(a) Within 14 days from the date of this Order, offer the employees set forth and named in the remedy section reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the employees set forth and named in the remedy section whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files all references to the unlawful discharges of the employees set forth and named in the remedy section, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful discharges will not be used against them in any way.

(d) Recognize and bargain in good faith with the Plumbers and the Steamfitters as the limited exclusive collective-bargaining representative of the employees in the unit and honor and comply with the terms of the Plumbers and Steamfitters agreements with any automatic extensions thereof, and recognize and bargain in good faith with the Sheet Metal Workers and the Asbestos Workers as the Section 9(a) exclusive collective-bargaining representative of employees in the unit and honor and comply with the terms of the Sheet Metal Workers and the Asbestos Workers agreements with any automatic extensions thereof.

(e) Make whole all bargaining unit employees and all contractually-required fringe benefit funds for any loss of income contributions, or benefits, and for any expenses incurred in connection with those benefit fund losses by those employees, in the manner set forth in the remedy section of this decision.

(f) Make the unit employees whole for any loss of earnings and other benefits, if any, they may have suffered as a result of the Respondents failure to bargain since May 7, 2010, with interest, in the manner set forth in the remedy section of this decision.

(g) Furnish the Sheet Metal Workers with the information requested in its letter of June 15, 2010.

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

due under the terms of this decision.

(i) Within 14 days after service by the Region, post at its facilities in Upper Marlboro, Maryland, and Washington, DC, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 5, 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. In addition to physical posting of paper notices, 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 communicate with their employees by such means. *Picini Flooring*, 356 NLRB 11 (2010). Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, 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 Respondent at any time since May 7, 2010.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

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 Federal labor law and has ordered us to post and obey 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 benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees because they form, join, or assist the Plumbers, Steamfitters, Sheet Metal Workers and the Asbestos Workers, or any other labor organization, or engage in concerted activities, or to discourage employees from engaging in these activities.

WE WILL NOT fail or refuse to recognize and bargain in good faith with the Plumbers and the Steamfitters by repudiating our

collective-bargaining agreements with them and by withdrawing recognition from them as the limited exclusive collective-bargaining representative of the unit and WE WILL NOT fail or refuse to recognize and bargain in good faith with the Sheet Metal Workers and the Asbestos Workers by repudiating our collective-bargaining agreements with them and by withdrawing recognition from them as the Section 9(a) exclusive collective-bargaining representative of the unit.

WE WILL NOT fail or refuse to continue in effect all the terms and conditions of the collective-bargaining agreements with the Plumbers, Steamfitters, Sheet Metal Workers, and the Asbestos Workers including by failing to make contributions to their health and welfare funds and local pension funds on behalf of our unit employees.

WE WILL NOT fail to furnish the Sheet Metal Workers with requested information that is necessary and relevant to its role as the exclusive collective-bargaining representative of our unit employees.

WE WILL offer Thomas H. Alston, Thomas M. Bistodeau, Donald Brown, Richard Emery, Francis Hill, Jeffrey Lehman, Jeremy Nicholas, Lovelle Proctor, Brandon Sewell, Tristin Swann, Timothy Capps, Clinton Cupples, Phillip "Andy" Fowler, David Hall Jr., David Hall Sr., Nicholas Hamilton, Gary Harper Jr., Thomas Kay, Clinton W. Parker, Arrington Baines, Gregory F. DeSibour, Florence Gjoka, Dwayne O. Lyons, Eric M. Martin, Scottie L. Moomau, Jr., Troy T. Naylor, Corey Young, John F. Prescott, Charles W. Seville III, David L. Tabron, Frank R. Young, Victor A. Zeyala, Joe Burnette, Curtis Clark, Bobby Jones, Frank Keeler, Sandra Rice, Sean Sprouse, and other employees presently unknown full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make the above named employees whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest.

WE WILL, within 14 days, from the date of this Order, remove from our files all references to the unlawful discharges of the above named employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful discharges will not be used against them in any way.

WE WILL recognize and bargain in good faith with the Plumbers, Steamfitters, Sheet Metal Workers and Asbestos Workers as the collective-bargaining representatives of our unit employees, and comply with the terms of our collective-bargaining agreements with each of them.

WE WILL make whole unit employees for any loss of earnings or other benefits they may have suffered as a result of our failure, since about May 7, 2010, to continue in effect all the provisions of our collective-bargaining agreements with the Plumbers, Steamfitters, Sheet Metal Workers, and Asbestos Workers, with interest.

WE WILL continue in effect all the terms and conditions of our collective-bargaining agreements with the Plumbers, Steamfitters, Sheet Metal Workers and Asbestos Workers, including by making contributions to the health and welfare and the local pension funds that have not been made since May 7, 2010, and WE WILL reimburse unit employees for any expenses

⁸ If this Order is enforced by a judgment of a 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."

ensuing from our failure to make these required payments.

WE WILL furnish the Sheet Metal Workers with the information it requested in its letter of June 15, 2010.

ENGINEERING CONTRACTORS, INC., AND ECI OF WASHINGTON, LLC, SINGLE EMPLOYER/ALTER EGOS