

Nos. 15-1111, 15-1162

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**NEWARK ELECTRIC CORP., NEWARK ELECTRIC 2.0, INC.,
and COLACINO INDUSTRIES, INC.**

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JILL A. GRIFFIN
Supervisory Attorney

HEATHER S. BEARD
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2949
(202) 273-1788

RICHARD F. GRIFFIN, JR
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

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**ORAL ARGUMENT
NOT YET
SCHEDULED**

v.

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Respondent/Cross-Petitioner

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties

Newark Electric Corp. (“Newark Electric”), Newark Electric 2.0, Inc. (“NE 2.0”), and Colacino Industries, Inc. (“Colacino Industries”) (collectively, “the Companies”) were the respondents before the Board and are the petitioners/cross-respondents before the Court. The International Brotherhood of Electrical Workers, Local 840 (“the Union”) was the charging party before the Board. The

Board's General Counsel was also a party before the Board. There are no intervenors or amici.

B. Rulings Under Review

This case is before the Court on the Companies' petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board (Members Miscimarra, Hirozawa, and McFerran)) in *Newark Electric Corp., Newark Electric 2.0 Inc., and Colacino Industries Inc.*, Case No. 03-CA-088127, issued on March 26, 2015, and reported at 362 NLRB No. 44 (2015).

C. Related Cases

The Company relies on this Court's decision in *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir., Aug. 7, 2015), *petition for reh'g filed* (Oct. 5, 2015), which held that the designation of Mr. Solomon under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq. in June 2010 was lawful, but that he could not continue serving after the President nominated him to be General Counsel. *Id.* at 78. On October 5, 2015, the Board filed a petition for rehearing in *SW Gen., Inc. v. NLRB*, arguing that the Court's conclusion is based on a misreading of the FVRA.

/Linda Dreeben/ _____
Linda Dreeben
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street SE
Washington, DC. 20570
(202) 273-2960 (phone)

Dated at Washington, DC
this 22nd day of December, 2015

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GLOSSARY

“The Act”	The National Labor Relations Act
“Board”	The National Labor Relations Board
“Br.”	The Company’s brief to this Court
“Colacino Industries”	Colacino Industries, Inc.
“FVRA”	Federal Vacancies Reform Act
“JA”	Joint Appendix
“NECA”	National Electrical Contractors Association
“Newark Electric”	Newark Electric Corporation
“NE 2.0”	Newark Electric 2.0, Incorporated
“SA”	The Board’s Supplemental Appendix
“The Union”	International Brotherhood of Electrical Workers, Local 840

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Newark Electric Corp. (“Newark Electric”), Newark Electric 2.0, Inc. (“NE 2.0”), and Colacino Industries, Inc. (“Colacino Industries”) (collectively, “the Companies”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order finding that the Companies, as a single employer and

alter egos, violated the National Labor Relations Act (29 U.S.C. § 151) (“the Act”). The Board found that the Companies violated their duty to bargain with the International Brotherhood of Electrical Workers, Local 840 (“the Union”) and unlawfully constructively discharged Union member Anthony Blondell.

The Board had subject matter jurisdiction under Section 10(a) of the Act, as amended (29 U.S.C. § 160(a)). The Board’s Decision and Order issued on March 26, 2015, and is reported at 362 NLRB No. 44. (JA 7-23.)¹ The Board’s Order is final with respect to all parties.

The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review of Board orders may be filed in this Court. The Companies filed their petition for review on April 20, 2015. The Board filed its cross-application for enforcement on June 8, 2015. Both were timely; the Act places no time limitations on such filings.

¹ “JA” references are to the Joint Appendix filed by the Company. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF ISSUES

1. Whether the unfair labor practice complaint was properly issued.
2. Whether substantial evidence supports the Board's findings that since July 20, 2012, the Companies, as a single employer and alter egos, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, and repudiating the terms of the February 24, 2011 letter of assent and the June 2012 collective-bargaining agreement and any automatic extensions.
3. Whether substantial evidence, solidly grounded in credibility determinations, supports the Board's finding that the Companies, as a single employer and alter egos, violated Section 8(a)(3) and (1) of the Act by constructively discharging employee Anthony Blondell because he was a union member.

RELEVANT STATUTORY PROVISIONS

The attached Addendum contains the pertinent statutory provisions not already provided in the Companies' Addendum.

STATEMENT OF THE CASE

Pursuant to a complaint filed by the Regional Director on behalf of the Board's Acting General Counsel, and following a hearing, an administrative law judge found that the Companies, as a single employer and alter egos, were liable for violating Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by

failing and refusing to bargain with the Union and repudiating the relevant letter of assent and collective-bargaining agreement. (JA 10-23). The judge also found that the Companies violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by constructively discharging employee Anthony Blondell because he was a union member. In addition, the judge rejected the Companies' contention that the complaint was not validly issued. (JA 11 n.3.) On review, the Board issued a Decision and Order, affirming the judge's findings with slight modification. (JA 7-10.)

I. THE BOARD'S FINDINGS OF FACT

A. The Colacino Family and the Formation and Operation of Newark Electric and Colacino Electric

Newark Electric was run by the Colacino family for many years. Newark Electric was originally known as Colacino Electric Supply, and was created by Richard Colacino's ("R. Colacino's") father. (JA 94.) In May 1979, R. Colacino took over Colacino Electric Supply and renamed it "Newark Electric." The company operated as an electrical contractor performing traditional electrical work. James Colacino ("Colacino") worked for his father, R. Colacino, for many years. (JA 11; JA 93-94.)

In 2000, Colacino purchased Newark Electric's assets, good will, equipment, website, and customer database from his father. (JA 11; JA 93-94, JA 405-10.) Colacino did not purchase his father's business outright because he wanted to

avoid assuming his father's outstanding tax liabilities. (JA 11; JA 94.) At the same time he purchased Newark Electric, Colacino incorporated Colacino Industries. Colacino is the 100 percent owner of Colacino Industries, which performs a small portion of traditional electrical work as well as automation and systems integration work. Colacino folded the purchased assets from Newark Electric into Colacino Industries. (JA 11; JA 96, 101.) After Colacino purchased Newark Electric, R. Colacino worked for Colacino as an estimator and project manager. (JA 12; JA 121.)

Both Newark Electric and Colacino Industries were housed at 126 Harrison Street in Newark, New York, in a building owned by Colacino. The entrance doors to 126 Harrison Street displayed the logos of both Newark Electric and Colacino Industries. (JA 12, 17; JA 94.) Colacino, whose business card stated that he was the CEO and President of Newark Electric, made all the personnel decisions in the management, hiring, and retention of employees, many of whom worked for Newark Electric and Colacino Industries. (JA 17; JA 74-76, 99, 234.)

Both companies were active and shared a customer base in the marketplace. They used interchangeable invoices and purchase orders. (JA 12, 17; JA 51, 317-383.) For example, invoices show that on August 24, 2011, Colacino Industries performed a job for the Village of Newark. (JA 344.) Almost a year later, on July 30, 2012, Newark Electric performed work for this same customer. (JA 331.)

Regardless of which company performed the work, the customer addressed their orders to Newark Electric, even when the invoices list the jobs as being performed by Colacino Industries. (JA 368-69; 373-76; 377-79.) Payments were also addressed to both Newark Electric and Colacino Industries. (JA 12, 17; JA 374, 383.) Employees of both companies filled out job cards and supply requisitions that showed only the Newark Electric logo; however, their timesheets showed both the Colacino Industries and Newark Electric logos. (JA 12; JA 76, 311-14.)

Colacino used the name Newark Electric interchangeably with Colacino Industries in dealings with the public. Both companies shared the e-mail addresses newarkelectric.com and colacino.com, and used one phone system. (JA 12, 17; JA 59, 75, 366.) Newark Electric and Colacino Industries also used the same facsimile, copier and printer machine. Company vans used by Colacino Industries advertised and displayed the Newark Electric logo. (JA 12, 17; JA 75, 94, 112, 300.) Colacino also used stationery that had either the Newark Electric logo or both the Newark Electric and Colacino Industries logo on the letterhead. (JA 12, 17; JA 100.)

B. Newark Electric Signs a Letter of Assent Agreeing To Be Bound by the Collective-Bargaining Agreement Between the Union and the National Electrical Contractors Association

1. Union Organizer Mike Davis Lobbies Newark Electric To Sign a Letter of Assent Binding Newark Electric to the Union's Master Collective-Bargaining Agreement

From 2005 to July 2011, Mike Davis was an organizer for the Union.²

Davis' job was to increase union membership and to convert employers from nonunion to union contractors by signing them to the Union's master collective-bargaining agreement with the Finger Lakes NY Chapter of the National Electrical Contractors Association ("NECA").³ (JA 12; JA 48-49.) The collective-bargaining agreement between the Union and NECA defines the bargaining unit as all employees performing electrical work in the Union's jurisdiction. (JA 7-8, 14; JA 139-141.) It also contains a work preservation clause stating that a signatory company cannot subcontract to a nonunion company. (JA 13; JA 141.)

Beginning in 2006, Davis lobbied Colacino to sign a letter of assent binding Newark Electric to the relevant collective-bargaining agreement. (JA 13; JA 50.)

Such a letter of assent, which applies to employers that have never before been

² In July 2011, Davis became the Union's business manager. (JA 12; JA 48.)

³ Under Section 8(f) of the Act (29 U.S.C. § 158(f)), construction-industry employers, like the Companies, can enter into such a collective-bargaining agreement even if the Union has not shown that it has support from a majority of the unit employees. *See Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 534 (D.C. Cir. 2003).

party to a collective-bargaining relationship, is called a “Letter of Assent-C.”⁴

When an employer, like Newark Electric, signs this type of a letter of assent with the Union, it is bound to the collective-bargaining agreement between the Union and NECA for 180 days (6 months). The employer is then able to terminate the collective-bargaining relationship by giving written notice to both the Union and NECA anytime from the end of that 6-month period until 30 days before the one-year anniversary of the signing of the letter of assent. (JA 13; JA 49, 226-28.)

If the employer fails to terminate the collective-bargaining relationship during that 5-month window, then the employer is bound by the agreement until it expires. If the employer wishes to terminate the relationship at the time the agreement expires, the employer must notify the Union and NECA in writing at least 100 days prior to the agreement’s termination. Otherwise, the employer is bound to any successor agreement between the Union and NECA. (JA 13; JA 49, 226-28.)

2. Colacino Signs a Letter of Assent on Behalf of Newark Electric, Binding Newark Electric to the Master Collective-Bargaining Agreement

On February 24, 2011, Newark Electric signed a Letter of Assent-C with the Union. (JA 14; JA 50-52, 230-31.) At that time, Newark Electric had two employees performing what later became bargaining unit work for the Union. (JA

⁴ Another type of Letter of Assent, a “Letter of Assent-A,” is reserved for employers who have previously been union contractors. (JA 13; JA 49, 224.)

7 n.1, 14; JA 51-52.) The name of the firm on the letter of assent is “Newark Electric,” and the address is listed as 126 Harrison Street. (JA14; JA 230-31.) The letter of assent includes Newark Electric’s individual federal employer identification number. (JA14; JA 230-31.)

Colacino, R. Colacino, Davis, and former union business manager Clark Culver were present for the signing. Culver signed for the Union. Colacino—not his father—signed for Newark Electric. Colacino signed above the line that had his name and title as CEO. After the signing, all present went out to dinner to celebrate. (JA 14; JA 50-52; 230-31.)

At the time Newark Electric signed the letter of assent, the applicable master collective-bargaining agreement was set to expire on May 31, 2012. (JA 14, 18; JX 135.) Given that Newark Electric signed the letter of assent on February 24, 2011, it was bound to that agreement for at least 6 months, until August 24, 2011. Thereafter Newark Electric could terminate the relationship anytime from August 25, 2011 to January 24, 2012 (30 days before February 24, 2012). If Newark Electric did not terminate the relationship by January 24, 2012, it would be bound by the collective-bargaining agreement until it expired on May 31, 2012. In addition, if Newark Electric did not give notice by February 21, 2012 (100 days prior to May 31, 2012), it would be bound to any successor collective-bargaining agreement. (JA 14, 18; 230-31.)

Once Newark Electric signed the letter of assent, it began deducting and forwarding the required union dues and making fringe benefit funds contributions to the Union. (JA 12; JA 51, 241-47.)

C. Colacino Creates NE 2.0

On March 8, 2011, Colacino filed for incorporation of NE 2.0. (JA 12; JA 354-55.) Colacino is the sole owner and president of NE 2.0. Colacino claimed that he created NE 2.0 in order to perform traditional electrical work that was not Colacino Industries' main business. (JA 12; JA 93-94.) Once incorporated, NE 2.0 applied the terms of the collective-bargaining agreement, including deducting and forwarding required dues and making welfare fund contributions to the Union. (JA 51, JA 241-47.)

Colacino operated NE 2.0 out of 126 Harrison with Newark Electric and Colacino Industries. (JA 12; JA 74-76.) NE 2.0 operated interchangeably with Newark Electric and Colacino Industries, with payroll reports and union deductions and contributions reflecting all three companies. NE 2.0 also used the same phone system, facsimile, copier and printer as Newark Electric and Colacino Industries. (JA 12, 14; JA 75-76, 241-47.)⁵

⁵ The parties stipulated that NE 2.0 and Colacino Industries are a single employer and alter egos. (JA 11; JA 46-47.)

D. Colacino Signs a Letter of Assent for Colacino Industries Agreeing To Be Bound by the Collective-Bargaining Agreement Between the Union and NECA

In July 2011, Colacino asked Davis if Colacino Industries could sign its own Letter of Assent-C with the Union. Colacino explained that it was difficult to maintain accounting books with two different companies and two different sets of employees. Davis understood Colacino to be referring to Newark Electric and Colacino Industries as the two companies, because he did not know at that time that NE 2.0 existed. Davis told Colacino there should be no problem with having two letters of assent, but he would have to check with the Union. (JA 15, 19; JA 52-53, 68.)

On July 20, after Davis secured approval from the Union, he and Colacino signed a Letter of Assent-C for Colacino Industries. (JA 15; JA 52-53, 68, 249-51.) Davis signed for the Union and Colacino signed for Colacino Industries. The name of the firm on the letter of assent is “Colacino Industries” and the address is 126 Harrison Street. The letter of assent lists Colacino Industries’ distinct federal employer identification number. The letter of assent bound Colacino Industries to the master collective-bargaining agreement under the same withdrawal conditions as Newark Electric’s letter of assent, running from the date of signing. (JA 15; JA 249-51.)

E. Newark Electric Takes No Action To Terminate Its Letter of Assent

Although Newark Electric could have terminated its Letter of Assent anytime between August 25, 2011, and January 24, 2012, it did not do so. Nor did Newark Electric give the requisite 100-day notice prior to May 31, 2012, to avoid being bound to any successor collective-bargaining agreement.

F. Colacino Industries Timely Terminates its Letter of Assent with the Union; Davis Learns of the Existence of NE 2.0 for the First Time

On April 12, 2012, Colacino sent Davis a letter notifying the Union that Colacino Industries intended to terminate its July 20, 2011 letter of assent as of May 26, 2012.⁶ The letter also stated that Colacino would like to schedule a meeting with Davis to “discuss the reasons for this decision and how [the Union] can support [NEC] 2.0, Inc.” (JA 15; JA 269.) Davis was taken by surprise by the reference to NE 2.0, as this was the first time he heard of the existence of NE 2.0. Davis then tried to contact Colacino for a meeting, but was not able to reach him. (JA 15; JA 51-54, 59.)

⁶ The April 2012 notice of termination was timely, as it took place more than six months after CI signed the letter of assent on July 20, 2011, and prior to 30 days before July 20, 2012.

G. The Parties Enter into a Successor Master Agreement; Union Member Bush Asks About Resigning his Union Membership; Davis Unsuccessfully Attempts to Contact Colacino; Colacino Sends Davis a Letter on Newark Electric Letterhead Purporting to Terminate NE 2.0's Relationship with the Union

Colacino Industries continued to pay benefit funds contributions for April, May, and June, 2012. (JA 15; JA 277-292.) The parties entered into a successor master agreement with effective dates from June 1, 2012, to May 31, 2015. (JA 7-8; JA 179.)

In late June 2012, it became clear to Davis after a conversation with union member Rick Bush that Colacino was moving away from any relationship with the Union. Specifically, on June 29, Bush came to Davis' office and asked about an honorary withdrawal of his union membership. Davis gleaned from that conversation that Bush, who was not working at the time but whom Davis knew to have been "speaking with people at Newark Electric," wanted an honorary withdrawal because it was his intention to work for Newark Electric. Davis told Bush that Newark Electric was still a union shop and that if Bush relinquished his union membership, he would not be allowed to work for a union shop. After his conversation with Bush, Davis again unsuccessfully attempted to contact Colacino to determine what was happening. (JA 15; JA 54.)

Although Davis was not able to reach Colacino, two Colacino employees visited Davis on the same day he spoke with Bush. They handed Davis a letter on NE letterhead that stated, in part:

In compliance with the letter of assent dated 7/20/11, [NE 2.0] is terminating the letter of assent and the collective-bargaining agreement effective today, the 29th of June, 2012.

(JA 15; JA 55, 275.)

Following receipt of the letter, Davis attempted once again to contact Colacino. Soon thereafter, union member Scott Barra, whom Davis had referred to work for the Companies, contacted Davis. Barra said that Colacino wanted to set up a meeting. Davis arranged through Barra to meet with Colacino on July 2. (JA 15; JA 56.)

H. Colacino Asserts that Colacino Industries' Letter of Assent Superseded Newark Electric's Letter of Assent

At the July 2 meeting, Colacino asserted that he believed the second letter of assent for Colacino Industries superseded the first letter of assent that he signed. Davis replied that he would never have agreed to such an arrangement. Davis told Colacino that the first letter of assent that Colacino signed, on behalf of Newark Electric, was still in effect and that as such, Colacino was still a union contractor bound to the relevant master collective-bargaining agreement that ran from June 1, 2012, to May 31, 2015. The parties agreed to meet again on July 9. (JA 15; JA 56.)

I. Colacino Cancels the Follow-Up Meeting and Indicates He Intends To Operate as a Nonunion Contractor; Employees Barra and Bush Resign their Union Membership

On July 9, Colacino's office manager, Vicky Bliss, called Davis and cancelled the parties' follow-up meeting. Bliss also informed Davis that Colacino intended to operate as a nonunion company, effectively repudiating the master collective-bargaining agreement. That same day, Barra resigned his membership from the Union. On July 16, Bush resigned his union membership. (JA 15, 15 n.9, 18; JA 56-57; 294, 296.)

J. Colacino Constructively Discharges Union Member Anthony Blondell by Conditioning Blondell's Employment on Working for the Companies as a Nonunion Employee

Anthony Blondell was a member of the Union for over 28 years. In March 2011, after Colacino signed the February 24, 2011 letter of assent for Newark Electric, Blondell began working for the Companies as a union electrician. (JA 19; JA 71-72.)

In June 2012, Colacino told Blondell that as of July 20, 2012, he planned on no longer being a union shop. Blondell became concerned because he could not work for Colacino and retain his status as a union member if Colacino was not operating a union shop. Accordingly, on July 17 or 18, Blondell asked Colacino if he would have be laid off on July 20. Colacino responded that he would lay off Blondell if he did not reach a deal with the Union by then. (JA 20; JA 72, 74.)

By letter of July 20, Colacino laid off Blondell. The letter stated that Blondell was being laid off “due to a lack of work.” (JA 20; JA 309.) However, Blondell was in the middle of a job on July 20, and there was work available to perform. Barra, who had resigned his union membership, was not laid off. Nor was Bush, whom Colacino had recently hired. (JA 20; JA 74.)

K. Colacino Liquidates NE 2.0 and Newark Electric

On September 4, 2012, Colacino filed paperwork to liquidate NE 2.0. (JA 15; JA 111, 419.) On April 3, 2013, he liquidated Newark Electric. (JA 17; JA 117.) Colacino Industries remained.

II. THE BOARD’S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members Miscimarra, Hirozawa, and McFerran) found that the bargaining unit as set out in the master collective bargaining agreement was an appropriate unit for bargaining. (JA 7.) The Board further found, in agreement with the administrative law judge, that the three Companies had substantially identical management, operations, equipment, customers, and supervision, as well as common ownership and common control over labor relations. (JA 7.) Accordingly, the Board found that the three Companies were a single employer and alter egos. (JA 7-8, 21.)

The Board found that, as a single employer and alter egos, all three Companies violated Section 8(a)(5) and (1) of the Act since July 20, 2012, by

failing and refusing to recognize and bargain with the Union within the meaning of Section 8(f) of the Act; and failing and refusing to apply, and repudiating, the terms of the February 24, 2011 Letter of Assent and the June 1, 2012-May 31, 2015 collective-bargaining agreement and any automatic extensions. The Board also found that the Companies failed to make the required payments to the fringe benefit funds. (JA 7-8, 21.) In addition, the Board found that by discharging Blondell, the Companies discriminated 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 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). (JA 21.) Finally, the Board rejected the Companies' challenges to the validity of the complaint. (JA 7 n.1.)

The Board's Order requires the Companies to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of their statutory rights. Affirmatively, the Board Order requires the Companies to give full force and effect to the terms and conditions of employment provided in the collective-bargaining agreement with the Union, and any automatic extension or renewal of it. In addition, the Board requires the Companies to make employees whole from the Companies' failure to honor the terms of the agreement and to

remit the fringe benefit payments that have become due. The Board further ordered the Companies to bargain with the Union upon request.

The Board ordered the Companies to offer Blondell full reinstatement to his former job or the equivalent and to make him whole. In addition, the Board ordered the Companies to reimburse each affected employee, including Blondell, for any adverse income tax consequences of receiving a lump sum backpay award and to file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Finally, the Board ordered the Companies to post a remedial notice. (JA 8-10, 21.)

STANDARD OF REVIEW

This Court will uphold a decision of the Board if its findings are supported by substantial evidence. *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015). The Board’s findings of fact are “conclusive” when supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not displace the Board’s choice between two fairly conflicting views, even if the court “would justifiably have made a different choice had the matter been before it *de novo*.” *Id.* at 488; *accord UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007). “Indeed, the Board is to be reversed

only when the record is so compelling that no reasonable fact finder could fail to find to the contrary.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). Finally, this Court will accept all credibility determinations made by the judge and adopted by the Board unless those determinations are “hopelessly incredible, self-contradictory, or patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (internal quotation omitted).

Finally, the Board’s legal determinations under the Act are entitled to deference, and this Court will uphold them so long as they are neither arbitrary nor contrary to law. *Int’l Transp. Servs. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006).

SUMMARY OF ARGUMENT

The Board recognizes that under this Court’s decision in *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 78 (D.C. Cir., Aug. 7, 2015), *petition for reh’g filed* (Oct. 5, 2015), Acting General Counsel Lafe Solomon was not validly serving under the Federal Vacancies Reform Act at the time the complaint issued. The Board respectfully notes its disagreement with *SW Gen., Inc.*, which is the subject of a currently pending petition for rehearing and rehearing en banc. The Companies’ additional argument that the Board’s Order should be vacated because the Board lacked a quorum of three members when the complaint issued is misplaced because the Board’s composition does not affect the General Counsel’s authority to issue and prosecute unfair labor practice complaints.

On the merits, the Board reasonably concluded that the Companies, as a single employer and alter egos, violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union and repudiating the terms of the February 24, 2011 letter of assent and the relevant master collective-bargaining agreement. The Board, applying well-established principles, found that given the substantial overlap in operations, management, labor relations, and ownership, the Companies constitute a single employer. Moreover, given the additional shared factors of equipment, customers, and supervision among the Companies, the Board reasonably found that the Companies constitute alter egos of each other. The Companies' assertions that Newark Electric did not continue to exist, or was separately owned and controlled by Colacino's father, is contrary to abundant record evidence and the relevant case law.

As a single employer and alter ego, the Companies are responsible for each other's unfair labor practices. Rather than contest the established legal principles, the Companies rely only on discredited testimony in arguing that Colacino Industries' separate, and later, letter of assent "superseded" Newark Electric's earlier one. The Board's findings that the Companies violated Section 8(a)(5) of the Act therefore should be upheld.

In addition, the Board reasonably concluded that the Companies, as a single employer and alter egos, violated Section 8(a)(3) and (1) of the Act by

constructively discharging Blondell because he was a union member. Credited evidence demonstrates that Colacino told Blondell he would lay off Blondell if the Companies repudiated the letter of assent and collective-bargaining agreement. Shortly thereafter, that is exactly what happened. Colacino laid off Blondell purportedly for lack of work. Once again, the Companies' defense, that it laid off Blondell because he asked them to do so, was discredited. Moreover, credited evidence demonstrates that there was work for Blondell to perform. Indeed the two employees who resigned their union membership continued working for the Companies. In these circumstances, the Board reasonably found that the Companies violated the Act by constructively discharging Blondell because of his union membership. Accordingly, the Board's Order should be enforced in full.

ARGUMENT

I. THE UNFAIR LABOR PRACTICE COMPLAINT WAS PROPERLY ISSUED

The Company, relying on this Court's decision in *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir., Aug. 7, 2015), *petition for reh'g filed* (Oct. 5, 2015), argues (Br. 16-18) that the complaint was improperly issued under Acting General Counsel Lafe Solomon. The Board recognizes that *SW General* holds that the designation of Mr. Solomon under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq. in June 2010 was lawful, but that he could not continue serving after the President nominated him to be General Counsel. *Id.* at 78. The

Board respectfully notes its disagreement with *SW Gen., Inc.*, which is the subject of a currently pending petition for rehearing and rehearing en banc. (The petition is available at <http://apps.nlr.gov/link/document.aspx/09031d4581e31d37>). We acknowledge, however, that *SW General* is currently the law of this Circuit. We address the remaining arguments in this case in the event that the *SW General* opinion is subsequently modified or overruled.

Apart from their argument based on *SW General*, the Companies incorrectly contend (Br. 19-28) that the Order in this case should be vacated because the Board lacked a quorum of three members when the Regional Director issued the complaint on behalf of the Acting General Counsel. That argument evinces a misunderstanding of the express authority that the 1947 Congress granted to the General Counsel in Section 3(d) of the Act, 29 U.S.C. § 153(d), the independent nature of the office of the General Counsel that the 1947 Congress created by statutory design, and Supreme Court precedent interpreting the relevant statutory provisions and congressional history.

As the Board explained, the Board's composition does not affect the authority of the General Counsel to issue and prosecute unfair labor practice complaints. (JA 7 n.1.) Rather, by congressional design, the General Counsel is an independent officer appointed by the President with the advice and consent of the Senate to whom regional office staffs who are engaged in the issuance and

prosecution of complaints are directly accountable. *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987) (“*UFCW*”); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010). Regional Directors, in turn, issue and prosecute complaints as delegates of the General Counsel. *See United Elec. Contractors Ass’n v. Ordman*, 258 F. Supp. 758, 760 (D.C.N.Y. 1965), *aff’d*, 366 F.3d 776 (2d Cir. 1966).

As the Board further explained, the authority of the General Counsel to investigate unfair labor practice charges and to issue and prosecute complaints derives not from the Board, but rather directly from the text of Act. (JA 7 n.1.) As the Companies acknowledge (Br. 22-23), Section 3(d) of the Act states, in relevant part, that the General Counsel “shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under [Section] 10, and in respect of the prosecution of such complaints before the Board.” 29 U.S.C. §153(d). In enacting this provision in 1947 as part of the Taft-Hartley Act’s amendments to the NLRA, “Congress intended to create an officer independent of the Board to handle prosecutions, not merely the filing of complaints.” *UFCW*, 484 U.S. at 127. Contrary to the Companies’ assertion (Br. 23), it does not detract from the General Counsel’s independence that Congress included in Section 3(d) language “on behalf of the Board.” Rather, Congress included the phrase “on behalf of the Board” in Section 3(d) to make clear that the

General Counsel acts with regard to those matters for the agency. As the Supreme Court has recognized, the legislative history of the 1947 shows that the acts of the General Counsel were not to be considered “acts of the Board.” *UFCW*, 484 U.S. at 128-29.

The Companies are also incorrect (Br. 23-25) in contending that Section 10(b) of the Act, 29 U.S.C. §160(b), read together with Section 3(d), shows that the statute provides that “the power to issue complaints is a power located in the Board.” (Br. 23.) Section 10(b) was part of the original Wagner Act of 1935, which did not establish a position of General Counsel. *See* 49 Stat. at 453-54. Subsequently, with enactment of the Taft-Hartley Act of 1947 and the creation of the office of the General Counsel, Congress in Section 3(d) directly designated the General Counsel as the official within the agency with the power to issue and prosecute complaints. *UFCW*, 484 U.S. at 127-29; *see* 61 Stat. at 139. As the Ninth Circuit has explained, with the 1947 enactment of Section 3(d), Congress expressly designated the General Counsel as having “final authority, on behalf of the Board,” to issue complaints. *Frankl v. HTH Corp.*, 650 F.3d 1334, 1348-49 (9th Cir. 2011). That statutory designation “negated the Board’s ability to make the specific delegation of Board ‘power’ to issue unfair labor practice complaints contemplated by [Section] 10(b) by assigning that ‘final’ authority to the General

Counsel.” *Id.*⁷ Accordingly, the Board rightly concluded that the General Counsel’s authority in this case was not derived “from any power delegated by the Board.” (D&O 1 n.1, citing Sections 153(d) and 10(b)).

For that reason, the Companies’ discussion (Br. 24-28) of cases, including *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), that analyze the effect of a loss of Board quorum is beside the point. Here, as the Board properly found, a loss of Board quorum does not affect the statutorily-granted, independent power of the General Counsel to issue complaints. Therefore, the complaint in this case was validly issued and the Companies’ argument to the contrary should be rejected.

⁷ See also *SW General*, 796 F.3d at 78 n.7 (recognizing that Congress did not want Board members to perform the duties of the General Counsel and intentionally separated the Board’s adjudicative function from the General Counsel’s prosecutorial one).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT SINCE JULY 20, 2012, THE COMPANIES, AS A SINGLE EMPLOYER AND ALTER EGOS, VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION, AND REPUDIATING THE FEBRUARY 24, 2011 LETTER OF ASSENT AND THE JUNE 2012 COLLECTIVE-BARGAINING AGREEMENT AND ANY AUTOMATIC EXTENSIONS

The record amply supports the Board's findings that since July 20, 2012, the Companies violated the Act by unlawfully repudiating their obligations under the February 24, 2011 letter of assent, the corresponding Section 8(f) collective-bargaining agreement, and any automatic extensions of the agreement. Further, ample evidence supports the Board's findings that the Companies constitute a single employer and alter egos. As such, the Companies are jointly and severally liable for these unfair labor practice violations. The Companies' challenges to the single employer and alter ego findings ignore the credited evidence, which establishes the obvious reality that the three entities were closely intertwined and virtually indistinguishable from each other. Likewise, the Companies' claim that Colacino Industries' July 20, 2011 letter of assent superseded Newark Electric's February 24, 2011 letter of assent is contrary to the credited testimony and devoid of legal support.

A. Applicable Principles

Section 8(f) agreements are fully enforceable during their term, and an employer that refuses to give effect to an 8(f) agreement during its term violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).⁸ *John Deklewa & Sons, Inc.*, 282 NLRB 1375, 1377-78, 1389 (1987), *enf'd sub nom. Int'l Assoc. of Iron Workers, Local 3 v. NLRB*, 843 F.2d 770, 779-80 (3d Cir. 1988).

Moreover, construction-industry employers can also sign a “letter of assent,” as the Companies did here, authorizing a multiemployer bargaining group to represent the employer in negotiations with the union, and binding the employer to any Section 8(f) collective-bargaining agreement into which the multiemployer group enters.

Cox Corp. v. NLRB, 593 F.2d 261, 262 (6th Cir. 1979); *NLRB v. Black*, 709 F.2d 939, 940-41 & n.1 (5th Cir. 1983). Under *Deklewa*, 282 NLRB at 1377-78, 1389, an employer violates the Act if it repudiates or refuses to give effect to the agreement during its term. See *Int'l Union of Painters and Allied Trades, Local Unions 970 and 1144, AFL-CIO-CLC v. NLRB*, 309 F.3d 1, 3-4 (D.C. Cir. 2002).

The Board will also enforce an employer’s commitment to be bound to successor agreements or automatic renewals, notwithstanding the original agreement’s

⁸ Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their statutory rights. A violation of Section 8(a)(5) of the Act therefore results in a “derivative” violation of Section 8(a)(1). See, e.g., *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n. 4 (1983).

expiration date. *See Cowboy Scaffolding, Inc.*, 326 NLRB 1050, 1050-51 (1998); *Cedar Valley Corp.*, 302 NLRB 823, 823, *enforced*, 977 F.2d 1211 (8th Cir. 1992).

Where the Board finds two or more nominally separate entities to be a single employer for purposes of the Act, all are jointly and severally liable for remedying unfair labor practices committed by any of them. *See Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987), *enforced*, 872 F.2d 1279, 1288-87 (7th Cir. 1989).

The Board also may treat separate entities as one under the Act where those entities constitute alter egos of one another. *Fugazy Cont'l Corp. v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984). Where an alter ego relationship is established, each party to that relationship is “subject to all the legal and contractual obligations” of the other parties. *Howard Johnson Co. v. Detroit Local Exec. Bd.*, 417 U.S. 249, 259 n.5 (1974). Accord *Fugazy Cont'l Corp.*, 725 F.2d at 1419.

Although the alter ego doctrine is most typically applied “in the context of successor employers, where the new employer is ‘merely a disguised continuance of the old employer,’” it is also applicable in the case of coexisting employers.

C.E.K. Indus. Mech. Contractors, Inc. v. NLRB, 921 F.2d 350, 354 (1st Cir. 1990) (quoting *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)). The Board’s findings of single employer and alter ego status must be upheld if supported by substantial record evidence. *NLRB v. Emsing's Supermarket, Inc.*,

872 F.2d 1279, 1289 (7th Cir. 1989) (single employer); *Fugazy Cont'l Corp.*, 725 F.2d at 1419 (alter ego).

B. The Companies Are a Single Employer And Alter Egos

The Companies stipulated at the hearing that Colacino Industries and NE 2.0 are a single employer and alter egos. (JA 16; JA 46.) And, as shown below, substantial evidence supports the Board's finding that Newark Electric, Colacino Industries, and NE 2.0, constitute a single employer and are alter egos of each other. Accordingly, all three companies are jointly and severally liable for the unfair labor practices of each other.

1. The Companies are a single employer

As the Companies recognize (Br. 30), in determining whether single-employer status exists, the Board considers four factors: interrelation of operations, common management, centralized control of labor relations, and common ownership. *See IBEW Local 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *RC Aluminum Indus., Inc. v. NLRB*, 326 F.3d 235, 239 (D.C. Cir. 2003). Not all of these factors need to be present before the Board will find single-employer status, and no one factor is controlling. *See RC Aluminum Indus., Inc. v. NLRB*, 326 F.3d at 239; *Naperville Ready Mix, Inc. v. NLRB*, 242 F.3d 744, 752 (7th Cir. 2001); *NLRB v. Carson Cable TV*, 795 F.2d 879, 881-82 (9th Cir. 1986). 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.” *Hahn Motors*, 283 NLRB 901, 901 (1987).

The record amply demonstrates that at all relevant times, the operations of all three Companies were closely interrelated. (JA 12, 17.) In 2000, Colacino bought all of the assets of Newark Electric and funneled them to Colacino Industries, which, like Newark Electric, performed traditional electrical work in addition to automation and integration systems. The Board found that “Newark Electric was holding itself out to the public as an active operating company from the years 2000 to 2012.” (JA 12.) Until dissolving Newark Electric in April 2013, Colacino operated Newark Electric and Colacino Industries interchangeably, “us[ing] the name of Newark Electric in his commercial and business dealings with his customer and the general public.” (JA 17.) Indeed, invoices and customer purchase orders were “used interchangeably” between Newark Electric and Colacino Industries. Newark Electric, Colacino Industries, and NE 2.0 also used the same office. (JA 12; 17.) Logos for both Newark Electric and Colacino Industries were displayed on the shared office door and shared stationery. Both the Newark Electric and Colacino Industries logos appeared on employee timesheets and job cards. The Newark Electric logo appeared on vans used by Colacino Industries. All three Companies used the same phone system, copiers, and facsimile machine, and communications by email between the companies and the

public were interchangeable between newarkelectric.com or colacino.com. (JA 12, 17.) In addition, employees of all three companies serviced the same customers and used the same warehouse for supplies. Finally, all three Companies contributed to the employee benefits funds. (JA 14.) *See Wyandanch Engine Rebuilders, Inc.*, 328 NLRB 866, 873 (1999) (joint fund contributions indicated interrelated operations). In these circumstances, the record amply indicates that operations of the Companies were interrelated. *See Emsing's Supermarkets, Inc.*, 284 NLRB 302, 304 (1987), enforced, 872 F.2d 1279, 1287-88 (7th Cir. 1989) (companies' functional overlap and financial integration showed interrelated operations).

Additionally, Colacino commonly managed and centrally controlled the labor relations of all three Companies. Colacino made all the personnel decisions in the management of all three companies and in the hiring and retention of employees, many of whom worked for both Newark Electric and Colacino Industries. (JA 17; JA 74-76, 99.) Indeed, as noted above, employees submitted timesheets that displayed the logos of both Newark Electric and Colacino Industries. Significantly, Colacino signed for Newark Electric on the February 24, 2011 Letter of Assent binding Newark Electric to the master collective-bargaining agreement with the Union; he also signed for Colacino Industries on its July 20, 2011 letter of assent. *See Am. Stores Packing Co.*, 277 NLRB 1656, 1657 (role in

collective bargaining is strong evidence of centralized control of labor relations). Contrary to the Company's claim (Br. 32) that Colacino did not control Newark Electric, he not only signed for Newark Electric on the February 24 letter of assent, but his business card indicated he was "President and CEO" of Newark Electric. (JA 234.) Thus, the Board reasonably found that the companies shared common management and that Colacino centrally controlled their labor relations. (D&O 11.) *See RC Aluminum Indus., Inc.*, 326 F.3d at 239 (discussing management and centralized control of labor relations).

The Companies also shared common, if not identical, ownership. Colacino owned 100 percent of Colacino Industries and NE 2.0. Since 2000, while R. Colacino retained ownership over Newark Electric's prior debt, Colacino owned all of Newark Electric's assets, its customer base, and its logo. Moreover, as the Board found, contrary to the Company (Br. 32-33), even assuming the formal ownership of Newark Electric was with R. Colacino, during the relevant period, "the active control of both companies was in the hands of [James] Colacino," and this "satisfied the element of common ownership." (JA 17 n.11, citing, e.g., *Kenmore Contracting Co.*, 289 NLRB 336, 337 (1998)). The totality of the circumstances amply support the Board's finding that the Companies constitute a single employer under well-settled law.

2. The Companies are alter egos

As the Companies recognize (Br. 30), in determining whether business entities are alter egos, the Board and the courts consider factors in addition to the factors used to determine single employer status. Among the factors to be considered are “substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership between the . . . [entities in question].” *Fugazy Cont’l Corp.*, 725 F.2d at 1419; *see also Crawford Door Sales*, 226 NLRB 1144, 1144 (1976). No single one of these factors is decisive or indispensable. *Fugazy Cont’l Corp.*, 725 F.2d at 1419; *NLRB v. O’Neill*, 965 F.2d 1522, 1529-30 (9th Cir. 1992); *Liberty Source W, LLC*, 344 NLRB 1127, 1127 n.1 (2005), *enfd sub nom Trafford Distrib. Ctr. v. NLRB*, 478 F.3d 172, 182 (3d Cir. 2007). While the Board may consider 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. *Liberty Source W*, 344 NLRB at 1127; *Crawford Door Sales*, 226 NLRB at 1144.

Under those criteria, the Board reasonably determined that the Companies are alter egos. As discussed above, the Companies have closely interrelated operations, share management and labor policy, and have virtually identical ownership. Likewise, as discussed, the Companies share the same warehouse and supplies, service the same customers, and Colacino supervises all the operations of

the three companies. In sum, the record fully supports the Board's finding under well-settled law that the Companies were alter egos of each other because they "have substantially identical management, operations, equipment, customers, and supervision, as well as common ownership and common control over labor relations." (JA 7.)

3. The Companies' challenges to the Board's single employer and alter ego findings are without record support

The Companies assert (Br. 31-33) that the Companies are neither a single employer nor alter egos because Newark Electric did not continue to exist, or was separately owned and controlled by Colacino's father, R. Colacino. These arguments ignore abundant record evidence and relevant case law.

As shown on pp. 5-6, the Companies' assertion (Br. 31-32) that Newark Electric was "completely dormant since 2000" flies in the face of the overwhelming record evidence. The Board found that "Newark Electric was holding itself out to the public as an active operating company from the years 2000 to 2012, even after selling all its assets to [] Colacino Industries." (JA 12.) Colacino was not just using Newark Electric's assets for Colacino Industries, as the Companies urge (Br. 32), but "Colacino . . . continued to use the name of Newark Electric in his commercial and business dealings with his customers and the general public." (JA 17.) Newark Electric "continued to operate and generate business," as evidenced by invoices and customer purchase orders that reflected

the Newark Electric logo and by payments that were addressed to both Newark Electric and Colacino Industries. (JA 17.) In addition, employees worked for both Newark Electric and Colacino Industries on jobs for interchangeable customers, filled out timesheets with the logo for both companies, and used some forms that only showed the Newark Electric logo. (JA 17.)⁹ Thus, Newark Electric was active and operational when Colacino signed the letter of assent in Newark Electric's name on February 24, 2011. Indeed, his very signing of the letter of assent on behalf of Newark Electric itself demonstrates the Company was active. Moreover, after the letter of assent was signed, Newark Electric made its own contributions to the union funds in the name of Newark Electric. Because Newark Electric remained active until it was admittedly dissolved in April 2013, the Board reasonably found that it "was not a dormant company after 2000 when the assets were sold to Colacino." (JA 17.)

The Companies seek to undermine the Board's single employer and alter ego findings by claiming (Br. 32) that "each entity was 100% owned and controlled by different individuals." The Companies assert (Br. 32-33) that neither Colacino nor his father "had any ownership or management role in each other's company." The

⁹ In a related claim (Br. 31), the Companies misrepresent the Board's findings by suggesting that Newark Electric "had no employees at all" when it signed the letter of assent. Instead the Board corrected the judge's finding that there had been several union members employed at that time, finding that although there were no *union members* at that time, there were two employees performing "what later became bargaining unit work." (JA 7 n.1.)

record evidence solidly refutes this claim. As demonstrated above, Colacino not only held himself out as the president and CEO of Newark Electric, but also signed legal papers on behalf of Newark Electric and was responsible for managing and hiring the personnel of Newark Electric, Colacino Industries, and NE 2.0. Moreover, as discussed above at p. 32, the Board recognized that Colacino's active control of both companies was sufficient to satisfy the element of common ownership. (JA 17 n.11).

Finally, the Companies make a confusing assertion (Br. 8, 32) that the five-month time period between the signing of the two letters of assent, rather than the two months mistakenly testified to by Colacino and corrected by the Board, somehow undermines the Board's single employer finding. (JA 14, 15, 15 n.8.) In doing so, the Companies wrongly rely on a timeline to rebut the Board's single employer and alter ego findings. The Board did not base its findings on any such timeline. (JA 14, 17, 19.) Accordingly, the Companies have demonstrated no grounds to disturb the Board's reasonable determination that the Companies constitute a single employer and alter egos for purposes of liability under the Act.

C. The Companies Unlawfully Failed To Recognize and Bargain with the Union and Repudiated Their Obligations Under the February 24, 2011 Letter of Assent and the June 1, 2012-May 31, 2015 Collective-Bargaining Agreement, and Any Automatic Extensions of That Agreement

The Board reasonably found that the Companies violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union and repudiating the terms of the collective-bargaining agreement and any automatic extensions of it. Under the terms of its February 24, 2011 letter of assent, Newark Electric was bound to the original collective-bargaining agreement until August 24, 2011, and had a window of time to give notice of termination of that agreement or any extensions of that agreement. Newark Electric did not do so. The Companies do not contest the well-settled principles, discussed above at pp. 27-28, that if they failed to timely terminate the February 24, 2011 letter of assent, they are bound by the terms of the collective-bargaining agreement and any automatic extensions of that agreement. Their sole challenge (Br. 33-34) is that Colacino Industries' later letter of assent merged with and "superseded" Newark Electric's earlier letter of assent, and thus Colacino Industries' timely termination of its letter of assent was sufficient to terminate Newark's letter of assent. The Companies' argument is based on an alternate version of the facts founded on discredited testimony.

The Companies' claim (Br. 33-34) that it lawfully terminated Newark Electric's letter of assent, like earlier claims that the Companies made before the Board but have now abandoned, is founded on a discredited version of events.¹⁰ Here, the administrative law judge explicitly based his credibility determinations on "a review of the entire testimonial record and exhibits" as well as "the demeanor of the witnesses." (JA 11 n.4.) The judge expressly credited union organizer Davis over Colacino. The judge found that the parties did not agree that Colacino Industries' separate letter of assent with the Union would supersede Newark Electric's earlier letter of assent. Rejecting Colacino's claim "that the first letter of assent was dissolved, superseded, or redated with the Letter of Assent C for Colacino Industries," the judge instead found "Davis' testimony more worthy

¹⁰ Notwithstanding the abandonment of these claims, the Companies make unsupported assertions in the Statement of Facts section of their brief that were expressly discredited or rejected by the Board. For example, the Companies assert (Br. 5, 6, 7, 9-10) that Colacino signed the first letter of assent on behalf of NE 2.0 rather than Newark Electric, and refer to Davis "pressur[ing]," "stalk[ing]," "barg[ing past]," "blackmailing," "inundating" and "corner[ing]" Colacino to get him to sign the letter of assent. It is disingenuous for the Companies to make such assertions in their facts section because that they were thoroughly rejected by the Board and the Companies have abandoned the arguments before the Court. *See* JA 18-19 (discrediting Colacino's testimony that he signed the first letter of assent for NE 2.0 and observing that NE 2.0 had not even been incorporated at the time Colacino signed the first letter of assent); and JA 18-19 (finding that "Davis never forced Colacino to sign the letter in February 2011" but rather, that "Davis was friendly but persuasive"). Because the Companies do not pursue claims based on these purported facts in their argument, the Court should not consider them. *See* Fed. R. App. P. 28(a)(8)(A) (argument in brief before the Court must contain party's contention with citations to authorities and record).

of belief than Colacino's" when Davis "denied agreeing to dissolve the Letter of Assent C with Newark Electric." (JA 19.) The judge also credited Davis over Colacino that Davis did not "redate" the Newark Electric letter of assent to run from the same date as the later letter of assent with Colacino Industries, and that Davis "never had a conversation about redating the first letter of assent or that it would be superseded with the signing of the Letter of Assent C with Colacino Industries." (JA 19). The judge found that Colacino's testimony was "not worthy of belief" in light of the evidence that Davis did not have the authority to dissolve the first letter of assent, Colacino never received a copy of a redated letter of assent, and there are no notes to memorialize any such conversation. (JA 19.)

The Companies ignore these credibility findings, and fail to offer any reason to contradict them. *See Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (credibility determinations made by the judge and adopted by the Board will be upheld unless they are "hopelessly incredible, self-contradictory, or patently unsupportable"). Accordingly, this Court should not disturb them.

Thus, the Company's argument (Br. 33-34) boils down to a proposition, with no legal or record support, that because Newark Electric and Colacino Industries were later found to constitute a single employer and alter egos, Colacino Industries' later letter of assent extinguished Newark Electric's separate contract obligations under Newark Electric's earlier letter of assent. This bare assertion

should not be countenanced, particularly given the overwhelming credited evidence of the parties' contrary intent. This Court should therefore uphold the Board's findings that the Companies are liable for failing to honor the February 24, 2011 letter of assent and June 2012 collective-bargaining agreement and any automatic extensions.

III. SUBSTANTIAL EVIDENCE, SOLIDLY GROUNDED IN CREDIBILITY DETERMINATIONS, SUPPORTS THE BOARD'S FINDING THAT THE COMPANIES VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY CONSTRUCTIVELY DISCHARGING EMPLOYEE ANTHONY BLONDELL BECAUSE HE WAS A UNION MEMBER

A. An Employer May Not Discriminate Against Its Employees Based on Their Union Activities or Affiliation, Nor May It Condition Its Employee's Continued Employment on Rejection of Their Collective-Bargaining Representative

Section 7 of the Act guarantees employees "the right to engage in . . . concerted activities for the purpose of . . . mutual aid or protection . . ." 29 U.S.C. § 157. Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." ¹¹ 29 U.S.C. § 158(a)(3). An employer therefore violates

¹¹ Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1). A violation of Section 8(a)(3) constitutes a derivative violation of Section 8(a)(1). *See generally Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Section 8(a)(3) of the Act when it discharges an employee because of the employee's union activities. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395, 397-403 (1983) (approving *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981)). *Accord Frazier Indus. Co. Inc. v. NLRB*, 213 F.3d 750, 756 (D.C. Cir. 2000). An employer also violates Section 8(a)(3) and (1) of the Act when it constructively discharges employees by conditioning their continued employment on rejection of their bargaining representative. *See Hoerner Waldorf Corp.*, 227 NLRB 612, 613 (1976); *Borden, Inc. v. NLRB*, 19 F.3d 502, 513-14 (10th Cir. 1994); *J.P. Stevens & Co., Inc. v. NLRB*, 461 F.2d 490, 494 (4th Cir. 1972); *Three Sisters Sportswear Co.*, 312 NLRB 853, 872 (1993).

In evaluating the lawfulness of a discriminatory action that interferes with employees' rights to engage in protected activity, the Board applies the well-established *Wright Line* test. Under *Wright Line*, the legality of an employer's adverse action depends on its motivation. To meet the initial burden under *Wright Line*, the General Counsel for the Board must demonstrate that (i) the employee was engaged in an activity protected by Section 7 of the Act (29 U.S.C. § 157), (ii) the employer was aware of that protected activity, and (iii) "the protected activity was a motivating factor in the employer's decision to take adverse action[.]" *Citizens Inv. Serv. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005). If

substantial evidence supports the Board's finding that union activities were a motivating factor in the discriminatory treatment, the employer's action violates the Act unless the employer proves that it would have taken the same action even in the absence of those activities. *Transp. Mgmt. Corp.*, 462 U.S. at 395; *Wright Line*, 251 NLRB at 1089; *accord Bally's Park Place*, 646 F.3d at 935.

“Motive is a question of fact that may be inferred from direct or circumstantial evidence.” *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995). Factors that support a finding of illegal motivation include, among others, the employer's knowledge of the employee's union activity, the employer's demonstrated hostility toward union activity, the timing of the adverse action, disparate treatment of union supporters, and the falsity of the employer's proffered justification. *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 263 (D.C. Cir. 1993). As this Court recognizes, “[d]rawing such inferences from the evidence to assess an employer's [] motive invokes the expertise of the Board, and consequently, the court gives substantial deference to inferences the Board has drawn from the facts, including inferences of impermissible motive.” *Id.* (internal quotations marks omitted); *see also Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000) (this Court is “even more deferential when reviewing the Board's conclusions regarding discriminatory motive, because most evidence of motive is circumstantial”).

B. The Companies Constructively Discharged Blondell in Violation of the Act

Substantial evidence supports the Board's finding (D&O 15) that the Companies violated Section 8(a)(3) and (1) by constructively discharging Blondell because he was a union member. Overwhelming credited evidence demonstrates that Blondell's union membership was a motivating factor in his discharge. As shown at pp. 15-16, Colacino told Blondell that as of July 20, 2012, Colacino no longer planned on being a union shop. Shortly thereafter, Blondell approached Colacino and asked if he would be laid off if Colacino terminated the letter of assent and collective-bargaining agreement with the Union. (D&O 14.) Colacino replied that if Colacino did not work out a deal with the Union by then, he would have to lay off Blondell. True to his word, Colacino laid off Blondell for an alleged lack of work on July 20, 2012, the date that Colacino unlawfully repudiated the collective-bargaining agreement. Based on these credited facts, the Board reasonably found that "Colacino was intent in going with a nonunion shop and did not want to continue employing Blondell." (JA 20.)

Moreover, as the Board found, the Companies utterly failed to demonstrate that "regardless of Blondell's union affiliation or activities, he would have been laid off." (JA 20.) Colacino's ostensible reason for laying off Blondell—a "lack of work"—is belied by the record evidence. To the contrary, Blondell was in the middle of a job and two other employees whom, unlike Blondell, had resigned

their union membership to continue working for the Companies, were not laid off. Accordingly, the Board reasonably found that the Companies “failed to satisfy their *Wright Line* rebuttal burden.” (D&O 14-15.) *See Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966) (“It is . . . well settled . . . that when a respondent’s stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.”).

The Companies’ sole challenge to this finding (Br. 36-37) is based on the discredited testimony of Colacino and Barra that Blondell asked to be laid off “to escape the Union tug-of-war with his pension and good standing intact.” Contrary to the Company’s claim (Br. 37), the judge explained his reason for crediting Blondell over Colacino and Barra, evaluating, among other factors, the “demeanor of the witnesses” and the “probability” of the testimony in concluding that he could not “reasonably believe” that Blondell agreed to be laid-off given that Blondell was “in the middle of completing a project and there was work available for him to perform.” (JA11 n.4, 20.) The Companies have again provided no reason to overturn the judge’s credibility findings. *See Stephens Media*, 677 F.3d at 1250. Accordingly, the Board’s finding that the Companies constructively discharged Blondell in violation of the Act should be upheld.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter judgment denying the Companies' petition for review and enforcing the Board's Order in full.

Respectfully submitted,

/s/ Jill A. Griffin
JILL A. GRIFFIN
Supervisory Attorney

/s/ Heather S. Beard
HEATHER S. BEARD
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570
(202) 273-2949
(202) 273-1788

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

December 2015

ADDENDUM

STATUTORY ADDENDUM

Except for the following, all of the applicable statutes, etc. are contained in the Company's Addendum to its brief.

Relevant provisions of the National Labor Relations Act (“the Act”), 29 U.S.C. Section 151, et. seq.:

Section 7 of the Act (29 U.S.C. § 157):

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [section 158\(a\)\(3\)](#) of this title.

Section 8 of the Act (29 U.S.C. § 158):

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage

membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in [section 159\(a\)](#) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in [section 159\(e\)](#) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership

- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.
- (f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established,

maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of [section 159](#) of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to [section 159\(c\)](#) or [159\(e\)](#) of this title.

Regulations:

Federal Rule of Appellate Procedure 28(a)(8)(A):

Rule 28. Briefs:

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies

**UNITED STATES COURT OF APPEALS
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Petitioner/Cross-Respondent)	Nos. 15-1111 & 15-1162
)	
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	03-CA-088127
)	
Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,219 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 22nd day of December, 2015

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)	

CERTIFICATE OF SERVICE

I hereby certify that on December 22nd, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 22nd day of December, 2015