Engineered Steel Concepts, Inc. and ESC Group Limited, alter egos *and* General Drivers, Warehousemen, and Helpers Union Local 142, International Brotherhood of Teamsters. Case 13–CA–43235

MAY 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On July 3, 2007, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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,[1] and conclusions[2] and to adopt the recommended Order.[3]

[1] In adopting the judge's finding that the laid-off union drivers were entitled to perform the work that the Respondents contracted out, we rely solely on his findings that the Respondents failed to show that they had a history of subcontracting unit work while the union drivers were in layoff status, and failed to show that they would have subcontracted the work in dispute in the absence of the drivers' unlawful termination.

In adopting the judge's finding that Martin Surdell was a supervisor within the meaning of Sec. 2(11) of the Act, we rely solely on the judge's finding that Surdell hired and discharged employees.

The Respondents have implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that the parties' collective-bargaining agreement was governed by Sec. 9(a) of the Act, we agree with his finding that *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), is inapposite. Under the Act, collective-bargaining agreements generally are governed by Sec. 9(a). Sec. 8(f) creates an exception for certain collective-bargaining agreements between employers engaged primarily in the building and construction industry and unions having members employed in that industry. Thus, the threshold question in determining the applicability of Sec. 8(f) is whether the employer is engaged primarily in the building and construction industry. The burden of establishing that status lies with the party seeking to avail itself of the 8(f) statutory exception. *Bell Energy Management Corp.,* 291 NLRB 168, 169 (1988). The employer in *Nova Plumbing* met that burden. The Respondents, which principally haul steel by-product between steel mills, did not. Thus, Sec. 8(f) is inapplicable.

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Engineered Steel Concepts, Inc., and ESC Group Limited, East Chicago, Indiana, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

Lisa Friedheim-Weis, Esq., for the General Counsel.
Steven A. Johnson, Esq. and *Jennifer J. Monberg, Esq.,* of Merrillville, Indiana, for the Respondents.
Steve Parks, of Gary, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Chicago, Illinois, on February 12 and 13, 2007. The charge and amended charge were filed by the General Drivers, Warehousemen, and Helpers Union Local 142, International Brotherhood of Teamsters (the Union or Local 142) on March 13 and 17, 2006, respectively, against Engineered Steel Concepts, Inc. (ESC) and ESC Group Limited (Group), alter egos (jointly referred to as Respondents).[1] The complaint was issued on November 30, alleging that ESC established Group for the purpose of evading its responsibilities under the National Labor Relations Act (the Act), and that ESC and Group are alter egos. The complaint, as amended at the hearing, alleges that Respondents through Martin Surdell promised employees jobs with Group on the condition that they work for nonunion wages and without union benefits in violation of Section 8(a)(1) of the Act, that in February, Respondents discharged/laid-off employees Anthony Miletich, Marc Roop, and Steve Wagner in violation of Section 8(a)(1) and (3) of the Act; that in February or early March, Respondents continued their operation of ESC in the disguised continuance of Group, in order to avoid their collective-bargaining obligation with the Union, that since that time Respondents have refused to recognize the Union, have refused to abide by and repudiated their collective-bargaining agreement with the Union, and have subcontracted bargaining unit work, all without prior notice to the Union or giving it the opportunity to bargain over the decisions or their effects on employees, and that this conduct was violative of Section 8(a)(1) and (5) of the Act.

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

[1] All dates are in 2006, unless otherwise indicated.

[2] In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.,* 179 F.2d 749, 754 (2d Cir. 1950), reversed on other grounds 340 U.S. 474 (1951). All testimony has been considered, if certain aspects of a witness' testimony are not mentioned it is because it was not credited, or cumulative of the credited evidence or testimony set forth above.

FINDINGS OF FACT

I. JURISDICTION

ESC, a corporation, with a place of business in East Chicago, Indiana, has been engaged in the business of hauling by truck steel-related by products within the steel industry. Group, a corporation, with an office and place of business in East Chicago, Indiana, has been engaged in the business of hauling by truck steel-related by products within the steel industry. During the past calendar year, ESC and Group have each provided services valued in excess of $50,000 for Mittal Steel USA (Mittal), an enterprise itself directly engaged in interstate commerce within State of Indiana. Respondents admit and I find that ESC and Group are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Tom Anderson is the founder and sole owner of ESC. Anderson met Martin Surdell and Ronald Callihan as fellow members of management while they were working in the steel industry. Anderson's most recent employer in the steel industry was a company called LTV. Anderson left LTV in 2002 as a result of a plant shutdown. Anderson started ESC after leaving LTV. Anderson testified ESC remained in existence at the time of the unfair labor practice trial in February 2007. At that time, ESC supplied drill bits and shafts to some Mittal Steel plants and to some other steel companies. Anderson testified that ESC also provides technology to US Steel such as thermal and visual cameras, tour monitoring devices, refractory monitoring, and furnace technology.

Anderson was in an automobile accident in April 2003, sustaining a brain injury. He testified the injury affects his short- and long-term memory, temperament, and tolerance levels. Anderson testified that, after the injury, Surdell helped him with the operation of ESC. Anderson testified that Surdell "would drive me around and attempt to help me in whatever needed to be done." Anderson testified Surdell was never employed by ESC and he never received a salary or any compensation for his work. Anderson testified Surdell helped him out until December 2006, when Surdell had back-related surgery. Anderson estimated Surdell is 77 or 78 years old. Surdell was given a business card and title with ESC. Anderson testified Surdell made calls on behalf of the Company, but claimed Surdell did not make the calls independently stating, "He'd always checked with me first."

ESC purchased 100,000 tons of c-fines on October 7, 2004, from International Steel Group (ISG). C-fines are finely granulated steel refuse that are recycled by steel mills. ISG was eventually sold to Ispat-Inland, a steel company which at the time of the hearing was taken over [by] Mittal. ESC did not have its own trucks or drivers at the time it purchased the c-fines. Anderson used other trucking companies to deliver the material. Anderson concluded if he delivered the material with his own trucks there would be better service and possible cost savings. As a result, ESC purchased three trucks and trailers.

Anderson contacted Local 142 to inquire about drivers for the trucks and he, along with Surdell, met with Local 142 Business Agent Steve Parks on March 8, 2005, at the union hall. On that date, Anderson, on behalf of ESC, signed a contract with Local 142, entitled "General Construction of Building, Heavy & Highway Projects." The contract's effective dates were June 1, 2003, to May 31, 2006. During the meeting, Anderson and Surdell presented their ESC business cards to Parks listing Anderson as the general manager and Surdell as the national sales manager. Parks credibly testified that it was explained to him by Anderson and Surdell that Surdell would be taking care of the day-to-day operations of ESC.[3] Parks did not sign the collective-bargaining agreement on behalf of the Union. Rather, it was presigned by the Union's principal officers who did not attend the meeting.

Parks credibly testified that: During the March 8, 2005 meeting, Anderson and Surdell asked Parks what contracts were available for the type of work they were going to do. They explained that they were going to be hauling commodities from one steel mill to the other, which at the time was between ISG and Inland Steel.[4] Anderson mentioned something about having a contract for a large of amount of work, that this was just going to be the first contract and that he hoped to have a good relationship with the Union in the future.[5] Parks explained the Union had a commodity hauling agreement or ESC could also be placed under the Union's general construction agreement. Parks stated he would rather see a commodity agreement for this type of work because it really was not onsite construction work. Anderson did not like the wage and benefit structure in the commodity agreement for which employees are paid on a weekly basis as opposed to the construction agreement in which they are paid for the hours worked. The commodity agreement also had seniority, holiday, and vacation language not contained in the construction agreement. Anderson preferred the construction agreement since if he only had work for 3 or 4 days, then he only had to pay the benefits on the hours actually worked. Parks went along with Anderson's request for the construction agreement because he was trying to accommodate the Company's needs, and the wages were similar for hauling commodities from mill to mill in both agreements. Parks testified that he did not take any notes during the meeting. When asked on cross-examination if Anderson took notes, Parks testified, "I, I don't, I have no awareness of that." When asked on rebuttal whether he saw Anderson taking notes during the meeting on March 8, 2005, Parks testified, "No."

Parks testified Anderson did not bargain any provisions in the contract he signed. Rather, Parks just gave him a choice of two contracts. Parks testified that he described each of the contracts, but he did not steer Anderson to either one of them.

Further discussions of the witnesses' testimony and credibility are set forth throughout this decision.

[3] I found Parks to be a credible witness considering his demeanor, recall, and the content of his testimony.

[4] The meeting took place prior to Mittal's eventual takeover of both steel operations.

[5] Parks testified he did not recall Anderson specifying 100,000 tons in describing ESC's hauling contract.

Parks testified that he told Anderson that if he signed the construction contract he could compete for construction work and that if he signed the commodity contract with the construction addendum, he could also compete for construction work. Parks testified that under either contract it was anticipated that ESC might do construction work to keep the drivers busy. Parks testified that, after the deal was completed, Anderson and Surdell asked that now that they had the agreement if they could get some highway work on I-94 as work was going to begin soon on the interstate. Parks responded they would have to talk to the contractors doing the work, and that they should contact them. Parks testified there was no discussion about the contract being an 8(f) contract prior to Anderson signing it. Parks denied telling Anderson that one of the benefits of the construction contract was that he could walk away at the end of the agreement. Parks denied telling Anderson that when he sold his 100,000 tons he could terminate the collective-bargaining agreement. Parks, a business agent with Local 142 for 8 years at the time of his testimony, testified, "I'd be foolish to say something like that."

Parks testified that he did not remember either Anderson or Surdell telling him that ESC had previously used union commodity haulers from P&C and Jack Gray Trucking to deliver their product. Parks testified Jack Gray is a 50/50 company with 15 trucks in Gary, Indiana, which are union and the other 200 trucks out of Detroit which are nonunion. Parks testified he did not know ESC was in existence before Anderson contacted him. Parks testified he was given the impression at the meeting that ESC was just starting with Local 142 drivers.

Parks testified that, during the March 8, 2005 meeting, either Anderson or Surdell informed him that Surdell would be Parks' contact person for ESC hiring drivers, as well as for union matters. Parks testified that to his knowledge ESC did not have any employees at the time Anderson signed the contract. He testified it was his understanding that, subsequent to the meeting, Parks referred ESC their initial employees through the Union. Parks testified that, after the drivers were hired, Parks had little if any contact with Anderson. Rather, Parks' contact was with Surdell about ESC's need for drivers. Parks testified he received calls when ESC needed a fill-in driver for someone taking off, or if they were in need of another driver. Parks testified there was one occasion when the Union placed nine drivers for ESC for work at U.S. Steel on an around the clock shift. Parks testified he dealt with Surdell on all of these calls. Parks testified the Union's construction agreement does not contain an exclusive hiring hall provision. Parks testified that, prior to 2006, Parks had one or two contacts with ESC on behalf of employees with a work-related problem. On one of the occasions, one of drivers did not get his check in a timely fashion. Parks called Surdell and Surdell corrected the situation. Parks testified that during the fall of 2005 and early winter 2006, ESC employed three Local 142 members who were doing commodity hauling.

Steve Wagner worked for ESC from March 2005 to February 2006 as a truckdriver. Parks told Wagner about ESC and Wagner was the first driver hired there. Marc Roop was the second driver to be hired.[6] Parks made arrangements for Wagner's interview with ESC officials to be conducted at Local 142's hall. Wagner was interviewed by Anderson and Surdell. Wagner testified it was his understanding that Surdell was part of management. Surdell told Wagner that he was hired either the day of the interview or the next morning.[7] Wagner has been a member of Local 142 on and off since 1977. He testified there was a collective-bargaining agreement between Local 142 and ESC and that his hourly rate at ESC was the contractual rate equal to 80 percent of the rate for semitruckdrivers. He testified that he was correctly receiving the 80-percent rate under the Union's contract because they were performing stockpile work. Wagner testified his health and welfare and insurance were also paid.[8]

Wagner testified that he hauled different products from one steel mill to the other for ESC. Wagner drove a semitruck and the products he hauled were loaded in a dump trailer. He testified the drivers get it loaded, take it, and dump it off. They would usually pick up the materials from MultiServ, a steel processing plant that processes slag and other products for the steel mill. MultiServ is located inside the ISG plant (Mittal West). From MultiServ the drivers took the material to the Inland Steel plant 2 (Mittal East). As set forth above, at the time of the hearing both plants had been taken over by Mittal. While working for ESC, Wagner performed hauling for MultiServ on a daily basis. Wagner drove a red and black Volvo truck for ESC. Wagner's truck number was 311 which appeared on the side of the truck. There were also Engineered Steel Concepts magnetic signs on the doors of the cabs of the ESC trucks, of which there were three of the same make, model, and color. The other two ESC trucks were numbered 301 and 221.

Wagner testified that: On a typical day, the ESC drivers picked up their trucks and trailers at the MultiServ yard inside of ISG. Upon arriving at the yard, most of the time drivers were issued an all day pass by Surdell giving them permission to go in and out of the plant, or else Surdell issued them any alternative assignment. Most of the time the drivers hauled c-fines on a 5-mile route between the two steel plants. Wagner testified Surdell told him what to do on a daily basis, and Anderson only gave him a daily gate pass when Surdell was not present, which was around 2 or 3 percent of the time. Wagner testified he did other work at ESC besides hauling c-fines. He testified they hauled scrap, iron ore pellets, and slag. He testified they worked once at U.S. Steel hauling iron ore pellets inside the plant. He testified there was there was an occasion

[6] Both Roop and Wagner testified on behalf of the General Counsel. I found each, considering their demeanor, to be credible witnesses and to have testified in a consistent fashion concerning the content of the testimony, which I have credited.

[7] Roop testified he filled out a job application for ESC given to him by Surdell. Roop testified he thought Surdell was their boss. Roop testified Surdell interviewed Roop to work for ESC, by phone, and no one else was on the call. Surdell told him that he was hired during the same conversation as the interview.

[8] Roop testified his benefits included health and welfare, health insurance, life, eye, dental, and pension. The employees paid their union dues on their own.

when they hauled some dirt for another company.[9] On a typical day, Wagner made about seven or eight round trips between the steel plants loading and dumping the materials there. The other ESC drivers performed the same work as Wagner. At the end of the day, Wagner parked his truck in the MultiServ yard. Wagner left all the scale tickets in the truck, or Surdell would pick them up. Wagner called off work once or twice and spoke to Surdell. Surdell approved the time off during the call.[10]

Wagner testified that, prior to November or December 2005, the ESC drivers usually worked 5 days a week, at least 40 hours. Beginning in November or December 2005, the work slowed down, and they went down to about 3 or 4 days a week. Wagner testified that during this time period neither Anderson nor Surdell said anything about closing ESC, laying off the drivers, or having no more work for them.

Wagner credibly testified that on February 8, Surdell called him at home after work. Surdell told Wagner ESC had no more work for the drivers as Inland was complaining about the price of the material and they were going to try to get authorization to buy the material and then the drivers could go back to work.[11] On February 9, Surdell came to Wagner's home to drop off his paycheck. Surdell told Wagner that he hoped it would not take too long, that they had nothing the drivers could do until they got authorization. Wagner testified that after this conversation he never worked for ESC again. Roop testified that on February 8, Surdell called Roop at home. Surdell told Roop that there was no work the rest of the week and possibly the following week. Surdell said they had some contracts coming up they were hoping to close and Surdell would call Roop if there was any work.

Roop credibly testified Surdell called Roop at home on March 6. Surdell told Roop that they were reorganizing ESC and were going to start it over under another name, nonunion. Surdell told Roop the name of the company, but Roop could not recall it. Surdell told Roop they hired someone out of a temp agency, and Surdell offered Roop a job as a truckdriver for $18 an hour, nonunion, no benefits. Roop declined the offer. Roop testified he called Wagner and Parks notifying them of Surdell's call.

Wagner credibly testified he called Surdell in the morning on March 13, and asked him what was going on. Surdell replied they had filed for bankruptcy, opened up under a new company called Engineered Group Limited, and that they could not afford to pay union benefits any more. Surdell said they had work for Wagner if he was willing to work nonunion at $18 an hour, but that was all they could offer him. Surdell said he wanted Wagner to come to work for the new company. Wagner said that he could not do that because he worked too hard to get his benefits and retirement from the Union. Surdell said they had hired a new driver from a temp agency and they had 90 days to keep him or get rid of him.

Wagner went to the union hall on March 13, where he spoke to Parks. Parks testified that Wagner informed him of the content of Wagner's call with Surdell. Parks credibly testified that: Parks called Surdell from the speaker phone in Parks' office, in Wagner's presence. Parks asked Surdell why he laid off Parks' drivers. Surdell said the Company was going out of business, they were bankrupt, and they no longer were going to be a union company. Parks asked what Surdell meant, and Surdell said there was a new company called Engineered Group Limited. Parks said thank you and that now he knew what to put on the picket signs. Parks told Surdell that he never notified the Union of the closing, gave the Union an opportunity to bargain, or for recognition with the new company. Surdell said he had one employee working that day for the new company, who was from a temporary service. Parks told Surdell there would be grievances and probably Labor Board charges filed immediately.[12] Parks testified that following the phone call, Wagner filed a grievance against ESC, which Parks faxed to ESC on March 13. The cover letter was addressed to Anderson's attention. The grievance, signed by Wagner, stated, "Non union drivers doing my job."

After sending the grievance on March 13, Wagner and Parks drove to Mittal West, to the MultiServ parking lot. Parks testified they saw two ESC red Volvo truck cabs and about five trailers parked in the yard. Parks testified he saw truck cabs 221 and 301 there. He testified the truck cabs had ESC signs on them. Parks testified they also saw ESC truck 311 driving past the scales at MultiServ loaded with c-fines. Parks testified that both he and Wagner identified the product. Parks testified the cab on truck 311 was red, with ESC signs on the doors. Parks did not recognize the driver. Parks took four pictures of truck 311, with a trailer attached thereto on March 13. Parks took notes on the pictures to identify the date and location of the truck confirming truck 311's operation and route.[13] Parks testified they observed truck 311 exit the gate at Mittal West. They followed the truck out of the plant through public streets to the Inland plant (Mittal East), where the truck proceeded to dump the product. They followed the empty truck back to ISG, or Mittal West. After taking the pictures and following the truck, Parks and Wagner returned to the union hall, where

[9] Similarly, Roop testified Surdell usually obtained the passes for the drivers. When Surdell was not present to give Roop the passes then Anderson gave them to him, which was not too often. Roop confirmed that most of his work for ESC was hauling c-fines for MultiServ from Mittal West to East. He testified he drove an older Volvo truck with a red cab which had an ESC sign and truck 301.

[10] Roop described a similar route and procedure for hauling c-fines as the one described by Wagner. When Roop called off work at ESC, he called Surdell. Surdell approved the leave request while they were on the phone. Roop testified he saw Surdell almost every day.

[11] Wagner knew ESC had a contract to haul about 100,000 tons of c-fines from one place to another. Wagner did not have an understanding that when the contract was over that he would be terminated. Wagner testified he was told that when this contract was done ESC would get another one, that there would be other things to do. Roop testified he heard there was a contract for ESC to deliver 100,000 tons of c-fines. Roop testified he asked Surdell if he was out of a job after they hit the 100,000 ton mark and Surdell said no they would find work for him.

[12] Wagner corroborated Parks' testimony concerning Parks' call with Surdell.

[13] One of the pictures was inside ISG or Mittal Steel West; the next was of the truck leaving ISG to go to Inland (Mittal East); another picture was of the truck going into Inland or Mittal East to empty the c-fines; and the last was the truck on the road traveling between the steel plants.

Parks wrote and faxed the initial charge against the Respondents to the NLRB.[14]

The Union received a fax from ESC later on in the afternoon on March 13. The fax was sent from Surdell, stating ESC Trucking has gone out of business and the following drivers are laid off: Wagner, Roop, and Anthony Miletich. On March 14, Parks met with Roop at the union hall at which time Roop filed a grievance stating, "nonunion workers in trucks." Parks faxed the grievance on that date to ESC to Anderson's attention. On March 15, Parks saw two ESC trucks in the morning loaded with what appeared to be c-fines on a public road in East Chicago. The trucks were red and had ESC Steel signs on them. Parks did not recognize either of the drivers. On March 17, Wagner and Roop filed separate grievances alleging "unjust termination." The grievances were faxed on March 17, to ESC to Anderson's attention. Parks received no response from ESC to any of the grievances that were filed. On March 17, Parks faxed a letter to ESC and Group to Anderson's attention. Parks stated it was the Union's position that Group is an alter ego of ESC, and was covered by the current labor agreement. Parks stated the Union was requesting recognition by Group, and that the Union's members be returned to work immediately. Parks received no response.

By letter to the Union, dated March 28, sent by overnight mail, Paul Cummings of Blankenship Associates, stated, "I have been authorized and instructed" by ESC to serve notice that it was terminating the collective-argaining agreement with the Union, "as of its termination on May 31, 2006," pursuant to aticle 30 of the agreement. The letter was copied to Anderson and the FMCS. Cummings asked in the letter that the Union notify the Health & Welfare and Pension Fund. Parks testified that since the uion members were laid off, ESC did not apply the collective-argaining agreement, and he has received no contact from Group. By letter dated September 12, ESC informed the Union's pension plan that it had no hours to report since February 2006. Parks identified checks to the pension plan from ESC dated March 13. He testified those checks would have been for February hours, and that it was his understanding those were the last checks the pension plan received.

On April 5, 2006, Parks was at Mittal East (Inland). Parks saw two of ESC's trucks, 301 and 311, operating there as he saw ESC signs on the trucks red cabs. Parks took pictures of the trucks. Roop, while working for another trucking company, saw trucks containing signs listing ESC's new name performing hauling work at Mittal West in November and December 2006. Roop saw, depending on the day, one to two ESC trucks loading red dust. The trucks had ESC Group on them, but were using the same truck numbers they had with ESC. One of the trucks had the same 301 number that Roop had driven for ESC. Roop did not recognize any of the drivers. The Group drivers were hauling red dust from Mittal West to the Newton County Landfill.

Harland Ronk works for MultiServ at the Mittal West facility. Aside from the various name changes at Mittal West, Ronk has worked at that location for over 33 years as a loader operator. Ronk testified ESC trucks are parked at the mill across from MultiServ's office. Ronk started loading ESC trucks in the latter part of 2005. During the November 2005 to early 2006 timeframe the trucks said ESC on the cab. Ronk thought trucks 301 and 311 were also on the side of two of the trucks. He testified that ESC had three red trucks during that time period. Ronk testified that, after February 2006, the ESC trucks had different drivers. Ronk testified that, at the time of the hearing in February 2007, two of the red trucks were still operating at the mill. He testified the third red truck remained parked at the mill with a tarp over it. Ronk testified that in addition to the two red trucks, the Company had a couple of white trucks in operation at the mill. Ronk testified all the trucks now have Group's name on them rather than ESC. The yard where the ESC then Group trucks and trailers are kept parked is close to MultiServ's office. Ronk testified that, at the time of the hearing, there were four trucks being used by Group off and on, depending on the amount of material to be loaded. Ronk testified that the Group trucks were hauling case iron loaded by cranes, and B scrap which Ronk loads. Ronk thought they were hauling to Mittal East. Ronk testified that, prior to February 2006, the ESC trucks were hauling c-fines the majority of the time. Ronk testified that after February 2006, he did load c-fines in ESC or Group trucks and that this occurred during the summer of 2006. He testified the last time he loaded c-fines in the ESC or ESC Group trucks was around a month prior to the hearing.

Ed Teffeau works for Mittal as the transportation sourcing manager for three steel plants, two of which are Mittal East, formerly Inland, and Mittal West, formerly LTV and ISG. Teffeau negotiates freight rates and executes contracts with motor carriers for various transportation services. Teffeau testified Mittal purchased ISG in April 2005. As part of his job, Teffeau contacts a transportation company to solicit a rate by email, phone, in person, or in writing. A quote from a carrier is generally faxed to Teffeau. He is the only person for the three Mittal facilities who negotiates freight rates with carriers.

Teffeau testified that ESC had a contract for hauling with the ISG plant prior to Mittal taking over the plant. Teffeau learned of ESC around the middle of 2005 when an invoice for freight services arrived at his office. Upon Mittal's receipt of ESC's invoice, ESC was contacted and the process began of obtaining a Mittal vendor code for ESC so ESC could get paid for its services. Teffeau testified a new carrier for Mittal has to fill out a supplier application form in order to receive a vendor code. Anderson signed this form as the general manager and contact person for ESC on May 19, 2005, and Teffeau signed on behalf of Mittal on May 20, 2005. ESC was provided separate Mittal vendor codes for the Mittal East and West facilities because each Mittal facility has its own computer system. Teffeau testified that Mittal does not permit one company to use the vendor codes of another company.

[14] Similarly, Wagner testified that ESC trucks 221 and 301 were sitting in the MultiServ lot, and 311 was working. The trucks had ESC signs on their doors. There was a driver in the 311 truck hauling material that looked like c-fines. The 311 truck was the same truck Wagner had driven. The driver was not one of the Teamster drivers who had previously worked with Wagner. Parks and Wagner followed the truck to Inland Steel where it dumped its load and back to MultiServ.

Teffeau testified Anderson is his primary contact for ESC when Teffeau wants to use ESC's services. At the time of the hearing, Teffeau last called Anderson in January 2007 pertaining to work for Mittal. Teffeau testified that when he called Anderson in January 2007, he understood Anderson was working for ESC stating, "In my mind, there had been no change." Teffeau testified he was never informed of a change of ESC to Group, although Teffeau testified that "[w]e did receive some different stationary later on in our relationship, around January of 2007." Teffeau testified that he was never informed there was a new company replacing ESC or asked for a new vendor code for Group from Mittal. Teffeau testified Group is still using the same supplier number as that given to ESC.

Teffeau received a price quote from ESC, dated January 5, 2006, for some hauling requested by Mittal. Surdell signed the quote of behalf of ESC. Teffeau testified he signed off on and accepted ESC's quote for this work. Teffeau testified Surdell is "another one of the contacts that I am familiar with at Engineered Steel Concepts." Teffeau testified Surdell was Teffeau's secondary contact for ESC. He testified he would call Surdell if he could not reach Anderson. Teffeau testified that the work in question was to be hauled between different sections of Mittal. Teffeau received another quote from ESC under Surdell's signature dated February 24, 2006, for the hauling of c-fines for MultiServ Mittal West to Mittal East. Surdell's letter was in response to a verbal request for a quote that Teffeau made to Anderson. Teffeau approved ESC's quote and they received the work. Surdell also signed off on quotes to Teffeau on documents dated April 24 and November 1, 2006.

Teffeau testified he met Ron Callihan once when Callihan came to Teffeau's office to obtain a drive-in pass allowing his entrance into the plant. Callihan was accompanied during the visit by Anderson and Surdell. Teffeau was told during the meeting, "This is Ron Callihan, he works for Engineered Steel Concepts." Teffeau testified that they did not say anything about a company called ESC Group, LLC. Teffeau identified Callihan's application for a driving pass with Mittal, dated June 28, 2006, the company identified on the application was "Engineered Steel Concepts, Inc."

By letter dated December 12, 2006, under company name of Group, Teffeau received and approved a quote for work under the signature of Callihan. Teffeau testified he was not familiar with a separate company called Group. He testified Mittal has never received a supplier application from a company with that name. Teffeau testified that aside from issuing the June 28, driving pass, he never had any contact with Callihan prior to Teffeau's receipt of the December 12 letter. Teffeau testified that, prior to December 12, he primarily spoke to Anderson, and occasionally Surdell when Teffeau solicited a bid for work. Teffeau testified that when he spoke to Anderson in December 2006 to solicit the bid, Anderson did not say anything about ESC going out of the hauling business or about the existence of a company called Group. Teffeau initially testified he never had contact with Callihan after he received the December 12, 2006 letter. However, he admitted to receiving another response to a request for a quote, dated January 31, 2007, under Callihan's signature, under the company name Group. Teffeau testified he talked to Anderson to solicit the price quote, and that Teffeau did not speak to Callihan.[15] Teffeau testified that when he saw Group on the company letter head, he did not require the company to obtain a new Mittal invoice number because, "In my eyes, I was still dealing with Engineered Steel Concepts." Teffeau explained, "I'd never been notified to the contrary."

Teffeau had prepared an invoice summary of the work performed by Respondents for Mittal from June 2005 to January 23, 2007. He testified that each vendor has its own unique vendor identification for motor carriers which he called the SCAC code, which Teffeau thought was issued by the National Trucking Association. He testified that one company cannot use another's SCAC code. Teffeau testified the SCAC code for ESC was the same from 2005 to 2007, and that Group continued to use ESC's SCAC code. He also testified that Group continued to use ESC's vendor codes issued by Mittal throughout the time period.

ESC sent an invoice, dated March 15, to Mittal for work performed from March 9 to 13, 2006. The invoice lists ESC as the employer with ESC's SCAC code on the invoice, as well as ESC vendor number issued by Mittal. The product moved was c-fines. Jack Gray is the trucking company shown on most of the gate passes attached to the invoice, meaning that although ESC billed for the work Jack Gray actually performed the hauling for the dates it is listed on the gate passes. The gate passes show that ESC driver Dion Thomas hauled several of the loads in truck 311 on Marc 13. Teffeau testified that it was Mittal's assumption that the work was subcontracted to Jack Gray by ESC on the dates that Jack Gray's name appeared on the gate passes. Since the bill was submitted on ESC's invoices, ESC was paid by Mittal for all of the work.

Respondents continued to submit payment invoices to Mittal with ESC letterheads through May 2006. In June 2006, the letterhead on the invoices changed to ESC Group, LLC and that letterhead was used through December 2006. However, the Group invoices contained the same SCAC code and Mittal vendor identification number that had been used by ESC. The Group invoices contained the same post office box, phone, and fax numbers previously used on the ESC invoices. Teffeau testified that Group was never issued a new vendor code by Mittal, nor did Mittal ever receive a new remit address for Group. He testified that ESC was paid for all the work billed Mittal by Group.

A. Respondents' Witnesses

Anderson testified that when ESC was operating in 2005 and early 2006, the primary material ESC hauled was c-fines. Anderson testified that the majority of the work performed by ESC drivers in 2005 was hauling material from one steel facility to another. Anderson testified he contacted Local 142 and set up a meeting with Parks to obtain drivers. Parks, Surdell,

[15] Teffeau testified that he did not recall having conversations with Callihan concerning hauling lime from Milwaukee, or about the hauling of heavy melt. However, he did not deny those conversations occurred. He testified that he had very few conversations with Callihan, and that the only one he could recall was the day in Teffeau's office.

and Anderson attended the March 8, 2005 meeting.[16] Anderson testified to the following: During the March 8, 2005 meeting Anderson explained to Parks that he had a contract to deliver 100,000 tons of material. Anderson told Parks that Anderson had been using subcontractors, but Anderson felt he could be more reliable in meeting the customer's needs if Anderson delivered the material himself. Anderson told Parks the delivery schedule was somewhat erratic that the customer may need 5000 tons in a few days and then a couple days they would not take anything. Anderson asked Parks what contracts were available. The response was the Union had a commodity agreement and a construction agreement. Parks told Anderson the commodity agreement paid on a weekly basis the same amount of pay regardless of the number of hours worked. Parks told Anderson the construction agreement would cover the type of material Anderson was moving and that, with the 80-94 highway construction going on, there would be some work opportunities possible to keep the trucks and drivers busy. Parks told Anderson that Parks knew some of the companies working the construction job and if necessary, Parks could give Anderson some phone numbers. Parks told Anderson that section 7 of the construction agreement covered stockpile to stockpile movement, which was ESC's hauling contract. Parks told Anderson that, under the construction contract, the pay was 80 percent of the construction hourly rate for commodities hauling, which would have been $21.72 per hour and the benefits were a 100 percent per hours worked. Anderson testified that Parks, "said the construction agreement was—could be ended at any time. Contract completion, equipment sold, business shut down, et cetera. He said the contract ends May 31st of '06. No wait he said that or I picked it out of the agreement that he had in front of me." Anderson testified Parks told him that the construction agreement might be the most economical for the work ESC was doing. Anderson testified Parks told him there was there was no seniority for drivers. Anderson testified Parks told them that if they wanted to replace drivers just tell them there was no more work, and call Parks for a replacement, or if Parks was not available call the union president. Anderson testified Parks said he would arrange for interviews with the drivers for March 9, and that ESC would pick which ones to employ. Anderson testified he returned to the union hall on March 9, 2005, to interview drivers. Anderson testified that ESC primarily relied on Parks for drivers during the time ESC had a relationship with the Union.

Anderson testified it was important to him at the conclusion of the sale of the 100,000 tons of c-fines to be able to terminate the agreement with the Teamsters. He testified he did not anticipate the need for Teamsters drivers once the sale of the 100,000 tons was completed. Anderson testified, in response to a leading question, that Parks told him the construction agreement was an 8(f) agreement that could be ended at any time. Anderson testified he selected the construction agreement.[17]

I did not find Anderson's testimony concerning the content of the March 8, 2005 meeting to be credible. He testified it was his practice, due to his accident, to take notes of meetings. He testified he took notes during the March 8, meeting, and he identified detailed notes, and claimed that due to his accident he could not testify about the substance of the meeting without reliance on the notes. Yet, Anderson admittedly failed to mention that he had notes of the meeting when he gave his prehearing affidavit to the Board agent on October 23, 2006, wherein he also testified about the March 8, 2005 meeting. I find his contention that he made notes during the meeting to be highly unlikely given his failure to apprise the Board agent that the notes even existed, when he gave prior sworn testimony about the meeting. Considering the witnesses' demeanor, I have credited Parks' testimony that Anderson did not take notes during the March 8, 2005 meeting over Anderson's claim to the contrary. Despite having 8(f) referenced in his notes, Anderson testified, only in response to a leading question, that Parks said the construction agreement was an 8(f) agreement that could be ended at any time. In fact, Anderson admitted he was aware at the meeting that the contract had a May 31, 2006 termination date. I find by Anderson's admission that he was informed by Parks or noticed on his own that the construction contract had a May 31, 2006 termination date and this serves to undercut his incredible claim that Parks told him the contract could end at any time. Anderson's claim that he was told by Parks that Anderson could terminate the contract at any time is further undermined by ESC's March 28, 2006 letter to the Union through ESC's then representative seeking to end the contract as of its May 31, 2006 termination date referenced in article 30 of the collective-bargaining agreement. Thus, no claim was made in the letter that ESC had a right to terminate the contract other than by the means and date set forth in the agreement.[18]

[16] Respondents did not call Surdell as a witness at the hearing. Anderson testified Surdell had back surgery in December. Anderson testified since Surdell's surgery, "He can't walk. Has weakness in the knee and now he can't lift more than eight pounds. He just started driving I believe in, recently. Last couple weeks or so."

[17] Anderson testified ESC did do some construction type work by hauling clay for the Calumet drainage dredging facility. Anderson testified it was construction work because they were building a dam. Respondent submitted five invoices into evidence pertaining the hauling of the clay showing the material was to be delivered from July 1 through August 25, 2005, with deliveries also taking place on September 7, 2005.

[18] In assessing Anderson's credibility, I am not insensitive to the fact that he was in an accident which did impact on certain aspects of his functioning including the pace of his testimony. On the other hand, he was functioning at a high level, in that he contracted with both Mittal and it predecessor steel companies in the negotiation of numerous contracts for large sums of money for hauling of steel by products, provided technology to the steel industry through ESC, purchased trucks and trailers, hired subcontractors to haul steel by products, and contacted the Union and clearly picked the collective-bargaining agreement that he felt was most advantageous to his operation in terms of pay and benefits. Thus, I reject Respondents' contention in its brief that "Anderson had no capacity to contract" with the Union. In fact, by Anderson's testimony he was still running ESC which was supplying technology to the steel industry. It is clear, that Anderson has and continues to enter into a multitude of contracts within and outside the trucking industry, including the purchase agreement for Group and subsequent lease agreement with Callihan. Apparently, it is Respon-

Accordingly, I have credited Parks' testimony that he never discussed Section 8(f) of the Act or informed Anderson that Anderson could terminate the agreement at any time prior to Anderson's signing the contract. I also credit Parks' testimony that Anderson elected to sign the Union's construction contract over the commodity contract solely because of the pay and benefit structure of that agreement, as opposed any 8(f) considerations that Anderson has subsequently claimed.

Anderson testified he began taking delivery of the 100,000 tons of c-fines around November or December 2004. Anderson testified that, after the 100,000 thousand tons of c-fines had been delivered, ESC had no other contracts, "so we told the drivers that there was no more work until we could find something else." Anderson testified that he instructed Surdell to tell the Teamster drivers that ESC had no more work at the time and that this was Surdell's only instruction. However, Anderson also testified that Surdell did not act independently and that Anderson gave Surdell instructions when to talk to people and he told Surdell what to say. Given the fact that I found Roop and Wagner to be credible witnesses, and considering the timing of Surdell's conversations with the employees, and the witnesses' demeanor, I do not credit Anderson's claims that he was not aware of and did not authorize the content of Surdell's conversations with Roop and Wagner. Particularly, since Surdell made offers of employment to the two individuals if they would shed their union status and work without the benefit of a union contract, wages, and fringe benefits. In this regard, Surdell gave Wagner and Parks the name of the new company, and then sent a fax to the Union on March 13 stating that ESC was going out of business, and that the three employees referred by the Union were laid off. Given the nature of Surdell's actions, I have concluded that Anderson told Surdell more than Anderson was willing to admit at the hearing, and that Anderson authorized Surdell to make the remarks to Roop and Wagner that they testified to. I also find that he had been apprised of the content of Surdell's phone call with Parks shortly after the conversation took place, and that he authorized Surdell's March 13 fax to the Union announcing that ESC had gone out of business and that the three employees were laid off.

Anderson testified that, after the completion of the delivery of the 100,000 tons of c-fines, he wanted to sell the equipment and get out of the trucking business. Anderson testified ESC owned the trucks. He testified they were used trucks, and that there were three of them. Anderson identified a one-page typewritten documented entitled "Purchase Agreement of ESC Group LLC," dated March 6, 2006, and signed by Anderson and Callihan. Anderson testified he drafted the agreement and Callihan reviewed it. In the agreement, ESC is referred to as the Seller and Callihan is the buyer. The agreement states in consideration of $5000 paid by the buyer to the seller, the receipt of which is acknowledged the seller grants the buyer the right to acquire ESC Group LLC located at 3001 Dickey Road East Chicago, Indiana. It is stated the buyer will acquire all stock in ESC Group, equipment, good will and other assets. It states equipment shall include three white GMC trucks, and three dump trailers with the VIN numbers of each listed. The agreement states that the sales price shall be $60,000, with the balance due on or before June 30, 2006. The agreement provides that the buyer shall carry on the business in the usual manner to and including the closing date of the sale, and that the agreement could only be amended in writing signed by both parties.

Despite the fact that purchase agreement stated it could only be amended in writing, Anderson testified that, "in transferring the assets to ESC Group, Engineered Steel retained 55 percent of the stock and gave the rest away to Mr. Callihan." Anderson testified that in his mind he owned 55 percent until Callihan paid for the equipment. Anderson was not precise on the split testifying at one point that he owned 50 to 55 percent of Group. Respondents' counsel stipulated that there was no written documentation of a percentage split of ownership between Anderson and Callihan. Anderson claimed that Callihan manages Group. He testified that neither Anderson nor Callihan were taking a salary from Group as expenses were very high due to attorney's fees, litigation costs, and maintenance costs.

Anderson testified that the purchase by Callihan of Group was never completed in that it was put on hold when Anderson received the NLRB charge on March 13. He testified that whether Callihan elects to go ahead with the purchase of Group is dependent upon the outcome of the NLRB litigation. When asked what consideration Callihan had given for the 45 percent of the business, Anderson testified, "I think he paid $5,000 for consideration." Anderson testified that, at the time they entered into the agreement, Callihan owed him $60,000 for the trucks and the name of the business. Anderson testified he was not receiving payments at the time of the hearing. When asked if Callihan opts out if Anderson had to give him the $5000 back, Anderson replied, "We haven't gotten that far." Anderson could not recall if Callihan gave him the $5000 by check or cash. Anderson testified that Group owns the trucks now, although Anderson had received no additional payments beyond the $5000. Anderson testified he still owned 55 percent of Group at the time of the hearing in February 2007. He testified that as result of the Board charge, they did not change the company stationary from ESC to Group, and they did not change ESC's trucking codes for the new company, and as well as a number of issues because they did not know the status of the company. Anderson testified rather than selling the trucks, he now leased the trucks to Callihan until the charge was resolved.

Anderson identified a document entitled "Indiana Agreement to Lease Equipment (with Limited Warranty) dated March 31, 2006, as the agreement he and Callihan used to replace the purchase agreement due to the filing of the unfair labor practice charge. The Lease Agreement, states it is an agreement to lease equipment between ESC the lessor and Group, the lessee. Yet, a subsequent provision of the agreement states that the equipment is and shall at all times be and remain the sole and exclusive property of Group. The term of the lease was from March 6 to December 31, 2006, or as agreed by the parties. The rate of the lease was $20 per truck per day. Anderson signed the agreement on behalf of ESC and Callihan signed on behalf of Group. Anderson testified that the $20-a-day rental fee was not

dents' contention that Anderson only lacks capacity to contract when it is convenient to raise that argument in defense of Respondents' unfair labor practices. Therefore, I reject Respondent's contention.

actually being paid. Rather, credits for the use of the trucks were being accrued, and Callihan was going to pay the lease rate credits if he ended up purchasing the company for the time that Group used the trucks. Anderson testified that if Callihan did not purchase Group, the $20-a-day accumulation rate would remain with Group, and it would go back to whoever buys it or becomes the new owner. Anderson testified they had not reached the point of deciding whether Callihan would owe the rental money if he decided not to purchase Group.

Anderson testified he created Group, but that previously it had performed no work, and was just a corporate shell.[19] Anderson testified he sold Group to Callihan when he sold the three trucks and trailers to Callihan. While Anderson testified the management or control of Group was under Callihan, he admitted that Teffeau had contacted Anderson concerning business since Anderson sold Group to Callihan. Anderson testified Teffeau called and asked if Anderson knew of any trucks available to move some material because he needed a quote. Anderson testified that he would call Callihan and tell him they were looking for a quote on some material. Anderson testified that, depending if he was busy, sometimes Callihan would say could you send it for me.

Anderson testified that Anderson has the exclusive authority to sign checks for ESC. He testified that both he and Callihan can sign checks for Group. Anderson testified that ESC did not have a location, but that they parked the trucks primarily wherever the work was located to minimize travel time. ESC and Group share a post office box, and Anderson thought they share the cost of the box. Anderson testified that the trucks were purchased by ESC and that the title for the trucks transferred to Group in February or March 2006. Respondent entered into evidence five State of Indiana vehicle registrations for trucks. One was addressed to ESC, with a purchase date of March 2, 2005, with a transaction date of February 28, 2006. While addressed to ESC, it was signed by Group. Two of the other registrations were addressed to Group, with a purchase date of February 27, 2006, and a transaction date of February 28, 2006. The last two registrations were addressed to Group with a purchase date of May 3, 2006, and a transaction date of May 4. Anderson could not explain why the VIN numbers in the State registrations did not match any of the VIN numbers in the March 6 purchase agreement.

Callihan testified he is retired from LTV Steel and that he has known Anderson since 1998, through their employment at LTV. Callihan testified that he and Anderson are friends and that their business arrangements are informal.[20] Callihan testified Anderson told him that he had a contract that was expiring in his trucking business. Callihan testified they reached an agreement that Callihan would buy the trucking part of the business. Callihan testified, "I bought ESC Group which primarily consisted of three trucks, three semi tractors and three trailers." Callihan testified the $5000 referenced in the purchase agreement was paid in cash by Callihan to Anderson, and that Callihan was unsure but did not think he had a receipt for the payment. Callihan testified he did not think they had an agreement as to the ownership split during the pendency of the purchase agreement. He testified, "It was just going to go from zero to a hundred percent when the purchase was complete." Callihan testified they worked out a 55- and 45-percent split when they put the purchase agreement on hold, and they worked out a lease agreement. The lease agreement was to allow them to mark time until the NLRB case was resolved. He testified he did not consummate the purchase agreement because he learned the NLRB issues may be more financially significant than originally thought.

Callihan testified the most notable difference between ESC and Group is that Group hauls material for a customer and delivers it. While ESC's primary contract was to haul material that ESC owned. Callihan testified the title to the three trucks may have been transferred from ESC to Group. He testified he thought the documents would show the transfer. In terms of registrations, Callihan testified, "The intention was to have the three trucks and the three trailers transferred to ESC Group, LLC. And I think that's been done. I'm not absolutely certain." He testified, "The insurance should be in the name, I think it is in the name of ESC Group, LLC." Despite his uncertainty about Group's holding and it operations, Callihan claimed he manages Group by himself. Yet, Callihan testified that Surdell continued to help with Group while claiming Surdell's role was greatly diminished since Callihan took over. Callihan testified he never gave Surdell authority to act as his agent. Callihan testified that he handles labor relations for Group. Callihan testified that they have added some customers since he has been involved with Group including: Allied Waste, Scoria Iron, and have off and on dealings with Indian Trucking.

Callihan testified that Group purchased three trucks from ESC, with two being operational, and the third being used for parts. Callihan testified Group has purchased two additional trucks. Callihan testified the trucks are currently located in the area adjacent to MultiServ's office at the Mittal West. Callihan testified that Group does not have an office. He testified there is a common post office box between Group and ESC. Callihan testified he did not think there was a common phone number. Callihan claimed calls for Group usually go to his cell phone. However, Callihan signed off on a price quote to Teffeau with a Group letter head, dated December 12, 2006, using the same phone, fax, cell phone numbers, post office box, and email address as those on an ESC letter head signed off on by Surdell to Teffeau in April 2006. The phone numbers on the ESC and Group's letterheads were Anderson's number, not Callihan's. Callihan testified that Anderson was the recipient of the phone call for the December 12 price quote Callihan signed, and that Anderson prepared the letter. Callihan testified he did not think there was ever a separate Group letterhead with his phone number on it. Callihan testified Group never applied for a supplier application with Mittal Steel, and it never received its own vendor number from Mittal. He testified Group is using ESC's vendor number.

[19] Anderson testified ESC still exists and continues to supply parts and technology to customers in the steel industry. At the time of the hearing, customers included: U.S. Steel, Service Stall Steel, Republic Technology, WCI Steel, and Mittal Steel. Anderson testified that ESC has no employees.

[20] Callihan testified since Anderson's car accident in 2003, Callihan has noticed a difference in Anderson's sharpness and memory.

Callihan testified he had met Teffeau once and that Teffeau called Callihan on a couple of occasions. He testified that Teffeau called him soliciting a bid on hauling limestone from a Milwaukee supplier to Mittal East. Callihan testified Group received that job. Callihan testified another occasion Teffeau called about hauling heavy melt from Mittal West to Mittal East. Callihan testified they also got that job. Callihan testified that while they provided Teffeau with a new letterhead for Group, they never gave him a verbal explanation of the change in the companies. Callihan testified that since they put the purchase of Group on hold they thought changing the name and representatives to Teffeau would create confusion especially if the sale did not go through. Callihan testified they did not try to explain to Teffeau or their other customers that there was a new company due to the uncertainty created by the unfair labor practice charge. Callihan testified he was, at the time of the hearing, still not sure of whether he was going to consummate the deal to purchase Group. Callihan testified he became involved with Group and started his activity with the business around March 2006, and Callihan was the sole manager and supervisor since that time. Yet, Surdell was still signing off on an ESC bid dated April 24, 2006, to Teffeau. Callihan testified this was work for Group although the bid contained an ESC letterhead. Surdell also signed off on a quote to Teffeau dated November 1, 2006. Callihan testified it was a quote for Group. Callihan claimed that ESC ceased its hauling operations some time prior to Callihan's involvement in March 2006.

Callihan testified the March 6 purchase agreement was placed on hold and replaced by the March 31, lease agreement. The March 31 lease agreement states at page three that the trucks at all times and remain in the sole and exclusive property of Group. However, on the first page of the lease agreement it states that Group is leasing the trucks. Callihan admitted that there was confusion in the document. Callihan testified that what was intended was that Group lease the trucks from ESC. Yet, Callihan testified that Group owned the trucks at some point in time as evidenced by the truck registrations, and that the trucks were transferred to Group, at which point Group was leasing the trucks from itself. Callihan testified there was supposed to be a payment of $20 a truck used per day. However, the money was not actually being paid, and was just an accounting notation in that its accrual was dependent on resolution of the unfair labor practice charge when the purchase and lease agreement would be concluded. Callihan testified that he is a 45-percent owner and Anderson is a 55-percent owner of Group for the duration of the lease agreement. Callihan testified that when the lease agreement ends, he has the option of purchasing all of Group, and that if he decides not to go through with the purchase he would not own any of it. Callihan testified that to purchase Group, "I'd have to pay the balance of the $60,000 purchase agreement and significant additional monies offset by the expense itself. The dollar amount is definitely not certain in my mind at this point." Callihan testified he would have to make the truck rental payments to consummate the purchase. He testified that the only thing that he has paid is the $5000. Callihan testified that since he was brought aboard with Group in March 2006, he did not think there were any documents filed with the Indiana Secretary of State's office for that company.

I do not credit either Anderson or Callihan's claims that Callihan ran Group following the March 6 purchase agreement. First, minimal if any funds changed hands between Anderson and Callihan for Callihan's alleged acquisition of Group. Anderson testified he received $5000, from Callihan, but could not recall if it was by cash or check, and Callihan claimed it was by cash for which he did not believe he had a receipt. Admittedly no other purchase funds were paid, and any truck rental fees also were not being paid and in all probability will never be paid. Thus, Anderson for all intents and purposes is the owner of all the trucks and trailers operated by Group, as he was for ESC.

Moreover, Teffeau, the chief contracting officer for Mittal, which was both ESC and Group's primary customer, testified Anderson remains his primary contact for soliciting work, and that Teffeau considered ESC and Group to be the same operation. At the time of the hearing, Teffeau last called Anderson in January 2007 pertaining to work for Mittal. Teffeau testified that when he called Anderson in January 2007, he understood Anderson was working for ESC stating, "In my mind, there had been no change." Teffeau testified he was never informed of a change of ESC to Group. Teffeau testified that Surdell was his secondary contact, and that he would call Surdell when he could not reach Anderson. Teffeau met Callihan on only one occasion, when Callihan applied for a driving pass with Mittal on June 28. He testified that Anderson and Surdell introduced Callihan to him, and told him that Callihan works for ESC, which was the company identified on Callihan's driving pass. Teffeau testified that he had minimal contact with Callihan. While Mittal had over 80 invoices with Respondents from March 6, 2006, to the time of the hearing. Callihan, himself, only claimed to have spoken to Teffeau on three occasions, one of which was when he received his driving permit. Thus, I do not credit either Anderson or Callihan's testimony that Callihan ran Group beginning in March 2006. Rather, I find that Anderson remained the owner of Group, and was the principle contact in terms of soliciting bids, and formulating invoices as Teffeau testified. Anderson's phone, fax number, and address remained as the sole listing on Group's invoices. I also do not credit Callihan's claim that he was involved in the labor relations of Group. He gave no specifics in support of this testimony, and it was Surdell who offered Wagner and Roop jobs for Group, as Surdell had previously done for ESC.

B. Legal Analysis

1. Surdell's supervisory and agency status

A "supervisor" is defined in Section 2(11) of the Act as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The enumerated powers listed in Section 2(11) of the Act are to be read in the disjunctive. *NLRB v. McEver Engineering, Inc.,* 784 F.2d 634, 642 (5th Cir. 1986). Thus, if an individual possesses any one of the 13 kinds of authority set out in Section 2(11), they are a "supervisor" for purposes of the Act assuming that such authority is not routine or clerical in nature.

I conclude that Surdell is a supervisor within the meaning of Section 2(11) of the Act in that he has the authority to exercise independent judgment in the hiring of employees, and that he responsibly directs employees. While no evidence was presented that Surdell received compensation for his services, he was given a business card for ESC with the title of national sales manager. Surdell attended the March 8, 2005 meeting with Parks, along with Anderson, where Anderson executed the collective-bargaining agreement for ESC with the Union. Parks' credited and uncontradicted testimony reveals that during the meeting Surdell presented Parks with Surdell's business card, and it was explained to Parks by Anderson and Surdell that Surdell would be taking care of the day-to-day operations of ESC. During the meeting, either Anderson or Surdell informed Parks that Surdell would be Parks' contact person for ESC's hiring drivers, as well as for union matters. Parks testified that, after ESC hired its drivers, Parks had little if any contact with Anderson. Rather, Parks' contact was with Surdell about ESC's need for drivers. Surdell called Parks when ESC needed a fill-in driver for someone taking off, or if they were in need of another driver. There was one occasion when the Union placed nine drivers for ESC for work at U.S. Steel on an around the clock shift. Parks testified he dealt with Surdell on the call for those drivers. Parks testified that, prior to 2006, Parks had one or two contacts with ESC on behalf of employees with a work-related problem. On one of the occasions, one of drivers did not get his check in a timely fashion. Parks called Surdell and Surdell corrected the situation.

Wagner and Roop were the first two drivers hired by ESC. Wagner was interviewed by Anderson and Surdell at the union hall on March 9. Wagner testified it was his understanding that Surdell was part of management. Surdell told Wagner that he was hired either the day of the interview or the next morning. Roop testified he filled out a job application for ESC given to him by Surdell. Roop testified he thought Surdell was their boss. Roop testified Surdell interviewed Roop to work for ESC, by phone, and no one else was on the call. Surdell told him that he was hired during the same conversation as the interview. Anderson testified that Parks told him during the March 8, meeting that, although the Union would arrange for interviews with the drivers that ESC could pick which ones they wanted to employ. Thus, Wagner and Roop's testimony reveals that Surdell participated in ESC's hiring process as a member of management, and that Surdell exercised independent judgment in hiring Roop, who was hired by Surdell, without consulting Anderson, during the course of Roop's job interview with Surdell.

The vast majority of work the Union referred drivers performed for ESC was picking up materials from MultiServ located at the Mittal West plant, and driving it to the Mittal East plant. Respondent's trucks were parked at the Mittal West facility. Wagner testified that during his first week of employment with ESC, he went with Surdell and obtained the three trucks the Company used, and dropped them off for repair. Wagner and Roop's testimony revealed that on most days they met with Surdell each morning before starting work, and he either obtained an all day pass for them to drive trucks from one Mittal facility to the other, or Surdell issued them alternative assignments. Wagner testified Surdell told him what to do on a daily basis, and that Anderson gave him a daily gate pass when Surdell was not present, which was around 2 or 3 percent of the time. Similarly, Roop testified Surdell usually obtained the passes for the drivers. Wagner called off work once or twice and spoke to Surdell. Surdell approved the time off during the call. Similarly, when Roop called off work he called Surdell and Surdell approved the leave request while they were on the phone.

Wagner's credited testimony reveals that on February 8, Surdell called Wagner at home after work and told Wagner ESC had no more driving work for the drivers as Inland was complaining about the price of the material and they were going to try to get authorization to buy the material and then the drivers could go back to work. On February 9, Surdell came to Wagner's home to drop off his paycheck. Surdell told Wagner that he hoped it would not take too long, that they had nothing the drivers could do until they got authorization. Roop credibly testified that on February 8, Surdell called Roop at home on the phone. Surdell told Roop that there was no work the rest of the week and possibly the following week. Surdell said they had some contracts coming up that they were hoping to close and Surdell would be in touch with Roop if there was any work. Surdell later made arrangements for Roop to pick up his paycheck. In early March 2006, Surdell offered Wagner and Roop jobs on behalf of Group. On March 13, ESC faxed a letter to the Union under Surdell's signature. The letter stated that ESC Trucking has gone out of business and the following drivers are laid off: Wagner, Roop, and Miletich.

Teffeau testified Anderson was the primary contact for business with ESC and Surdell was Teffeau's secondary contact. Teffeau testified he would call Surdell concerning ESC, if he could not reach Anderson. Teffeau received a price quote from ESC, dated January 5, under Surdell's signature and signed off on and accepted ESC's quote for this work. Teffeau received other quotes from ESC under Surdell's signature dated February 24, April 24, and November 1, 2006. Surdell also attended a meeting with Teffeau, Anderson, and Callihan on June 28, when Callihan was introduced to Teffeau. Clearly, Surdell was a member of management for ESC and Group.

I therefore conclude that Surdell was a supervisor within the meaning of Section 2(11) of the Act in that Surdell used independent judgment to both hire and responsibly direct employees on behalf of the Respondents and that as a supervisor Surdell was acting as an agent on behalf of the Respondents. In this regard, Surdell was involved in the hiring process with Wagner and told him he was hired. Surdell was the only one to interview Roop, and told Roop he was hired during the interview. Surdell was at the jobsite most every morning where he gave employees their gate passes, and their assignments. He approved leave for employees, and adjusted a grievance with the Union concerning an employee's paycheck. Parks was told

Surdell was running the day-to-day operations of ESC, that he was ESC's contact for the Union, and the employees considered Surdell to be their boss. Surdell contacted the Union when ESC needed more drivers, he wrote the Union stating that the employees were laid off and ESC had gone out of business, and he offered Roop and Wagner positions on behalf of Group. He acted on behalf of both companies in terms of business dealings with Teffeau at Mittal, which was their principle customer. See *Grinnel Corp.,* 320 NLRB 817, 826 (1996) (Carter); and *Essbar Equipment Co.,* 315 NLRB 461 (1994) (Detweiler).

Even if contrary to my findings above, it could be determined that Surdell was not a supervisor, I find that he was an agent of the Respondent under settled principles. In *Zimmerman Plumbing Co.,* 325 NLRB 106 (1997), enfd. mem. in pertinent part 188 F.3d 508 (6th Cir. 1999), the Board set for the following standard for assessing agency:

> It is well established that apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for that party to believe that the principal has authorized the alleged agent to perform the acts in question. See generally *Dentech Corp.,* 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay),* 291 NLRB 82 (1988). Thus, in determining whether statements made by individuals to employees are attributable to the employer, the test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management." *Waterbed World,* 286 NLRB 425, 426–427 (1987).

At a minimum, Surdell was responsible for relaying and enforcing the Respondents' policies, views, and objectives at the worksite. In this regard, Surdell told Roop and Wagner they were hired, gave them their assignments on a daily basis, told them they were laid off, made arrangements for them to collect their paychecks, approved their leave requests, and signed the letter to the Union stating they were laid off and ESC had gone out of business. Therefore, independent of any finding with respect to his supervisory status, I find that Surdell had apparent authority to act for management, and he served as an agent for the Respondents within the meaning of Section 2(13) of the Act.

2. Respondents ESC and Group are not construction industry employers

In *Oklahoma Fixture Co.,* 333 NLRB 804, 807 (2001), it was stated:

> Under Section 8(f) of the Act, employers and unions in the construction industry are permitted to enter into collective-bargaining agreements before the union has established its majority status. Either party is free to repudiate the collective-bargaining relationship once an 8(f) contract expires by its terms. *John Deklewa & Sons,* 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). However, an automatic renewal clause in an 8(f) agreement will be given effect and operates to bind the parties to a continuation of the agreement. *Cedar Valley Corp.,* 302 NLRB 823 (1991), enfd. 977 F.2d 1211 (8th Cir. 1992), cert. denied 508 U.S. 907 (1993); *Fortney & Weygandt,* 298 NLRB 863 (1990). When an employer repudiates a collective-bargaining agreement during its term, it violates Section 8(a)(5) and (1) of the Act. See *John Deklewa,* supra, 282 NLRB at 1385.

The determination of whether a collective bargaining agreement is a 9(a) or an 8(f) agreement impacts the future obligations of the parties upon the contract's expiration. Unlike an 8(f) agreement, under a 9(a) agreement, an employer would have to demonstrate actual loss of majority status in order to withdraw recognition from a union. *Levitz Furniture Co.,* 333 NLRB 717 (2001).

The plain reading of Section 8(f) of the Act reveals that it is applicable only to "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. . . ." See *Techno Construction Corp.,* 333 NLRB 75, 83–84 (2001). The burden of proof in determining whether an employer is engaged primarily in the building and construction industry lies with the party seeking to avail itself with the 8(f) statutory exception. See *Bell Energy Management Corp.,* 291 NLRB 168, 169 (1988); and *Painters Local 1247 (Indio Paint & Rug Center)*, 156 NLRB 951 fn. 1 (1966). In a nonconstruction situation in the Section 9(a) of the Act context, Section 10(b) of the Act precludes inquiry as to the lawfulness of recognition granted outside the 10(b) period that was not challenged within the 10(b) period. See *Strand Threatre of Shreveport Corp,* 346 NLRB 523, 536–537 (2006); *Alpha Assoc.,* 344 NLRB 782, 782–784 (2005); *Expo Group,* 327 NLRB 413, 431 (1999); *Royal Components, Inc.,* 317 NLRB 971, 972–973 (1995); *Gibbs & Cox, Inc.,* 280 NLRB 953, 967 fn. 21 (1986); *International Hod Carriers (Roman Stone Constructions),* 153 NLRB 659 (1965); and *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB,* 362 U.S. 411 (1960).

In *Teamsters Local 83,* 243 NLRB 328, 331 (1979), the Board stated the following in terms of the definition of the building and construction industry:

> The Act does not define the term "building and construction industry." However, the Board has dealt with the term in a number of cases involving the question of whether an employer is qualified for an exemption under Section 8(f). In *Carpet, Linoleum [&] Soft Tile Local No. 1247,* (156 NLRB 951, 959 (1966)) the Administrative Law Judge (then Trial Examiner) defined the industry, with Board approval in the following manner:
>
> > Within these various definitions, whether technical, common, or legal, substantial consensus seems clear. Each formulation with respect to the so-called building and construction concept subsumes *the provision of labor whereby materials and constituent parts may be combined on the building site* to form, make, or build a structure. The various factors, therefore, define the statutory "building and construction industry" with which we are concerned.

The Board in *Teamsters Local 83,* supra at 333, found that certain employers were not engaged primarily in the building and construction industry, and therefore certain hiring hall provisions in their collective-bargaining agreements were not protected by Section 8(f)(4) of the Act. The Board did not strike down the collective-bargaining agreements, but merely found the maintenance, enforcement, and giving effect to the hiring hall provisions of the collective-bargaining agreements was violative of Section 8(b)(1)(A) and (2) of the Act. More specifically, in *Flying Dutchman Park, Inc.,* 329 NLRB 414, 416 (1999), the Board held that a contract containing an unlawful union-security clause did not so permeate the remainder of the contract as to render the contract unenforceable. The Board stated:

> For in cases where the Board has found a union-security provision unlawful because it did not provide newly hired employees the legally established grace period in which to become union members, the Board has not found that such a provision so permeated a contract as to render the contract unenforceable. See *Royal Components, Inc.,* 317 NLRB 971, 972 (1995). We likewise decline to make such a finding here where the clause in question is "not basic to the whole scheme of the contract, and there is no provision that the contract is 'integrated' or that its respective sections are 'interdependent.'" *NLRB v. Tulsa Sheet Metal Works,* 367 F.2d [55] at 59.

In *Royal Components, Inc.,* supra at 972–973, an employer that was not a construction industry employer entered into a collective-bargaining agreement with a 7-day membership grace period, allowed in the construction industry, but not for employers outside that industry. The Board found the maintenance of the union-security provision to be unlawful, but refused to entertain the respondent's contention that the union lacked majority status at the time the contract was executed since the asserted lack of majority status was not challenged within the since month period from the time the contract was executed. Thus, the respondent was barred from challenging the union's presumed majority status; although the contract provision was found to be unlawful it was not held to vitiate the remainder of the contract.

The Board has addressed the issue in detail with respect to the construction industry status of employers who employ drivers whose function it is to deliver materials to construction sites. In *J. P. Sturrus Corp.,* 288 NLRB 668 (1988), the employer operated a quarry, batch plant, and delivery service for ready-mixed concrete. The employer argued it was engaged in the construction industry and therefore was free to withdraw recognition from the union under *Deklewa & Sons,* supra. The ALJ noted that the employer supplied companies, some of which may have been within the provisions of Section 8(f) of the Act, "but that does not mean that Respondent is in the building and construction industry." Id. at 671. The administrative law judge further stated, "The Board has held that redi-mix concrete delivery companies are not engaged in the building and construction industry within the meaning of either Section 8(e) and (f) of the Act, and those cases are controlling here. *Inland Concrete Enterprise,* 225 NLRB 209 (1976); *Island Dock Lumber Co.,* 145 NLRB 484 (1983)." Id at 671.[21] The Board in *J. P. Sturrus Corp.,* supra at 668, in affirming the employer was not a building and construction industry employer, stated that although the employer's drivers occasionally assisted contractors at the construction site with the spreading of concrete after they poured it, or hosed down the contractor's tools, they were engaged in incidental tasks which did not bring the employer within the building and construction industry as contemplated by Section 8(f). See also *Mastronardi Mason Materials Co.,* 336 NLRB 1296, 1306 (2001), enfd. mem. 174 LRRM 2927 (2d Cir. 2003); and *St. John Trucking,* 303 NLRB 723, 730 (1991).

The evidence in the instant case reveals that on March 8, 2005, Anderson and Surdell met Parks at the Union's office, and that following a discussion concerning the provisions of the Union's standard commodity and construction agreements, Anderson elected to sign the construction agreement. I have credited Parks' testimony of the content and nature of the discussion in that meeting over Anderson's.[22] Parks' credited testimony reveals that Anderson elected to sign the construction industry agreement over the commodity agreement because, unlike the commodity agreement, the construction agreement provided the employees were to be paid by the hour, and their fringe benefits were also based on their hours of work. The construction industry agreement also did not provide for vacations and seniority. During the discussion, Parks told Anderson he would prefer to have him sign the commodity agreement because Anderson had told Parks that the drivers would be hauling product between steel mills, and Parks informed Anderson this was not really construction work. However, Parks agreed to Anderson's election to sign the construction agreement as an accommodation to Anderson, and because the wages were similar in the commodity and construction agreements.[23] Thus, on March 8, 2005, Anderson, on behalf of ESC,

---

[21] See also *Techno Construction Corp.,* 333 NLRB 75, (2001), and the cases cited at p. 82 of that decision and in particular at fn. 7, involving the interpretation of the construction industry proviso to Sec. 8(e) of the Act, standing for the proposition that "the mere transportation of goods or materials to or from a construction site is not onsite work and therefore not covered by the construction industry proviso."

[22] Surdell did not testify at the hearing, although he attended the meeting. I have found Surdell to be an agent and supervisor for Respondents and the General Counsel asks for an adverse inference concerning Surdell's failure to appear. The hearing was in mid-February 2007, and Anderson testified Surdell, who was in his late 70s, had back surgery in December 2006. Yet, he also testified that Surdell had begun to drive a couple of weeks prior to the hearing. No medical evidence was proffered by Respondents for their failure to call Surdell. However, I do not need to decide this case premised on an adverse inference. In this regard, the General Counsel's witnesses testified in a clear and credible fashion, while the testimony of Respondents' witnesses was vague, inconsistent, and simply not credible considering the record as a whole.

[23] The work jurisdiction described in art. 1, sec. 4 of the Union's construction industry agreement states that work under the agreement was "not limited to" the work described in that section. Moreover, Anderson's testimony reveals that they discussed that the reduced wage rates set forth in art. 11, sec. 7 of the agreement would be applying to

signed the Union's, "General Construction of Building, Heavy & Highway Projects" contract. The contract's effective dates were June 1, 2003, to May 31, 2006. Parks credibly denied that Anderson took notes during the meeting. Parks also credibly denied telling Anderson that he could terminate the agreement at the end of the collective-bargaining agreement or when ESC's then current contract for hauling c-fines ended. Parks credibly denied that Section 8(f) of the Act was discussed prior to Anderson's signing of the Union's contract.

I find that neither ESC nor Group are employers in the construction industry. ESC purchased 100,000 tons of c-fines on October 7, 2004, from ISG. C-fines are finely granulated steel refuse that can be recycled by steel mills. ISG was eventually sold to Inland, another steel company. Anderson testified that when ESC was operating in 2005 and early 2006, the primary material ESC hauled was c-fines. Anderson testified the majority of the work performed by ESC drivers in 2005 was hauling material from one steel facility to another. Similarly, Parks testified that, during the March 8, 2005 meeting, Anderson and Surdell explained they were going to be hauling commodities from one steel mill to the other, which at the time was between ISG and Inland Steel. The meeting took place prior to Mittal's eventual take over of both steel operations. Anderson testified ESC did do some construction type work by hauling clay for the building of a dam. Respondent submitted into evidence four ESC invoices for Austgen Equipment Inc., showing deliveries from July 1 to August 24, 2005, with a fifth invoice showing deliveries on September 7, 2005, pertaining to the hauling of clay. The total billing for the invoices was $20,020, which was a small fraction of Respondent's billing during 2005 and 2006, for its work at the steel mills, as revealed by Teffeau's invoice summary of the work Respondents performed for Mittal from June 2005 through January 2007.[24] Teffeau's summary and his testimony is confirmed by the testimony of ESC drivers Wagner and Roop, who credibly testified that the vast majority of their work from March 2005 to February 2006 was hauling of steel by products between steel plants. It is also confirmed by Parks and Wagner's testimony that they saw and followed an ESC truck on March 13, hauling c-fines between Mittal West and East; and Roop's testimony that he saw two Group trucks in November and December at Mittal West loading red dust. Ronk, a loader operator, working at the Mittal West facility confirmed that ESC and then Group trucks remained parked at Mittal West and were hauling steel by products away from the facility throughout the whole time period up until the hearing in 2007.

In sum, the vast majority of work performed by ESC and Group from 2005 to 2007 was the hauling of steel byproducts between, and to and from steel mills. ESC and Groups trucks were stored at Mittal West in 2005 through 2007, because they were obtaining most of their work from that facility. While ESC hauled clay to a dam construction site for a 7-week period in 2005, this clearly was not the majority of ESC's work. Moreover, there was no showing that the ESC drivers did anything at the dam site, other than dump the clay there. The Board has consistently held that the nature of the work performed by ESC, Group, and its drivers is not work in the construction industry. See *Mastronardi Mason Materials Co.,* 336 NLRB 1296, 1306 (2001), enfd. 174 LRRM 2927 (2d Cir. 2003); *Techno Construction Corp.,* 333 NLRB 75, 82–84 (2001); *St. John Trucking,* 303 NLRB 723, 730 (1991); *J. P. Sturrus Corp.,* 288 NLRB 668, 671 (1988); *Inland Concrete Enterprise,* 225 NLRB 209 (1976); and *Island Dock Lumber Co.,* 145 NLRB 484 (1983). Accordingly, neither ESC nor Group are employers engaged primarily in the building and construction industry.

Thus, the contract in the instant case was based on a 9(a) relationship since Respondent was not a construction industry employer it could not have entered into an 8(f) relationship.[25] Thus, Section 10(b) of the Act prevents an inquiry into whether the Union had majority status at the time the contract was entered into since no unfair labor practice charge was filed within since months of the parties entering into the contract. See *Strand Threatre of Shreveport Corp,* 346 NLRB 523, 536–537 (2006); *Alpha Assoc.,* 344 NLRB 782, 782–784 (2005); *Techno Construction Corp.,* supra; *Expo Group,* 327 NLRB 413, 431 (1999); *Royal Components, Inc.,* 317 NLRB 971, 972 (1995); *Gibbs & Cox, Inc.,* 280 NLRB 953, 967 fn. 21 (1986); *International Hod Carriers (Roman Stone Constructions,* 153 NLRB 659 (1965); and *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB,* 362 U.S. 411 (1960). Moreover, all three of ESC's employees at the time of their February 2006 termination had been referred by the Union. The evidence reveals that Surdell offered at least two of the three employees continued employment with Group in March 2006 without the benefit of union representation and benefits. Both the employees declined and contacted the Union to file grievances against the Respondent. Thus, Respondents' own unfair labor practices revealed that a majority of its employees wanted the Union to represent them at the time it formally terminated the three employees on March 13, and incorrectly declared to the Union that it had gone out of business.[26]

his employees indicating that he was aware that his employees were not performing work otherwise typified by the construction industry agreement.

[24] Teffeau's summary of ESC and Group invoices for steel mill hauling shows work performed from June 22, 2005, to January 23, 2007. The summary shows there were about 42 invoices between the period of June 22, 2005, and February 14, 2006. There were about 93 invoices from the period of February 24, 2006, to January 23, 2007.

[25] That the agreement contains a 7-day union-security clause which is not applicable in a non construction industry setting does not nullify the otherwise valid provisions of the agreement. This is particularly so since the agreement has a savings clause at art. 15. See *Flying Dutchman Park, Inc.,* 329 NLRB 414, 416 (1999); *Royal Components, Inc.,* 317 NLRB 971, 972 (1995); and *Teamsters Local 83,* 243 NLRB 328, 333 (1979).

[26] The case, *NOVA Plumbing, Inc. v. NLRB,* 330 F.3d 531 (DC Cir. 2003), cited by Respondents is inapposite to the facts presented herein. There a construction industry employer claimed it entered into an 8(f) rather than a 9(a) agreement, and therefore lawfully withdrew recognition from a union. The court, in reversing the Board, looked to the facts behind the agreement to determine whether the union had ever achieved majority status. The court stated at 539, "The fundamental

3. Group is an alter ego and disguised continuance of ESC

In *Diverse Steel, Inc.,* 349 NLRB 946 (2007), the Board stated:

> The Board generally will find alter ego status where two entities have substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership.[4] Not all of these indicia need be present, and no one of them is a prerequisite to an alter ego finding.[5] Although unlawful motivation is not a necessary element of an alter ego finding, the Board also considers whether the purpose behind the creation of the alleged alter ego was to evade responsibilities under the Act.[6] Where there is evidence that the second company was formed to take over the business of the first in order to reduce its labor costs by repudiating the union's collective-bargaining agreement the Board has found that the second company was formed with the unlawful motive of avoiding the first company's responsibilities under the Act. *Midwest Precision Heating & Cooling, Inc.,* supra, 341 NLRB [435] at 439. [Footnotes omitted.]

Wagner's credited testimony reveals that on February 8, Surdell called him and told Wagner ESC had no more driving work for the drivers as Inland was complaining about the price of the material and they were going to try to get authorization to buy the material and then the drivers could go back to work. On February 9, Surdell dropped off Wagner's paycheck. Surdell told Wagner that he hoped it would not take too long, that they had nothing the drivers could do until they got authorization. Wagner testified that after this conversation he never worked for ESC again. Similarly Roop credibly testified that on February 8, Surdell called Roop at home and told Roop there was no work the rest of the week and possibly the following week. Surdell said they had some contracts coming up that they were hoping to close and Surdell would be in touch with Roop if there was any work.

Roop credibly testified Surdell called Roop on March 6 and told Roop they were reorganizing ESC and were going to start it over under another name, nonunion. Surdell told Roop they hired someone out of a temp agency, and Surdell offered Roop a job as a truck driver for $18 an hour, nonunion, no benefits. Roop declined the offer. Wagner testified he called Surdell on March 13. Wagner asked Surdell what was going on, and Surdell said they had filed for bankruptcy, opened up under a new company called Engineered Group Limited, and that they could not afford to pay the union benefits. Surdell said they had work for Wagner if he willing to work nonunion at $18 an hour, but that was all they had to offer him. Surdell said he wanted Wagner to come to work for the new company. Wagner said he could not do that because he worked too hard to get his benefits and retirement from the Union. Surdell said they had hired a new driver from a temp agency and they had 90 days to keep him or get rid of him. As set for above, I have found that Surdell was a statutory supervisor and agent of Respondents. Accordingly, I find that his calling and conditioning continued employment to Roop and Wagner on their working nonunion and relinquishing union pay and benefits was coercive and violative of Section 8(a)(1) of the Act. See *Mastronardi Mason Materials Co.,* 336 NLRB 1296, 1296 (2001), enfd. 174 LRRM 2927 (2d Cir. 2003). See also *Colden Hills, Inc.,* 337 NLRB 560 (2002), where a statement that a union organizer's application was not taken seriously because of his union status was found violative of Section 8(a)(1) of the Act; and *J. S. Alberici Construction Co.,* 231 NLRB 1038, 1042 (1977), enfd. 591 F.2d 463 (8th Cir. 1979).

Parks called Surdell on March 13, from the speaker phone in Parks' office, in Wagner's presence. Parks asked Surdell why he laid off Parks' drivers. Surdell said the Company was going out of business, they were bankrupt, and they no longer were going to be a union company. Parks asked what Surdell meant, and Surdell said there was a new company called Engineered Group Limited. Parks said thank you and that now he knew what to put on the picket signs. Parks told Surdell that he never notified the Union of the closing, gave the union an opportunity to bargain, or for recognition with the new company. Surdell said he had one employee working that day for the new company, who was from a temporary service. Parks told Surdell there would be grievances and probably Labor Board charges filed immediately.[27] Parks testified that following the phone call, Wagner filed a grievance against ESC, which Parks faxed to ESC on March 13. The cover letter was addressed to Anderson's attention. The grievance, signed by Wagner, stated, "Non union drivers doing my job."

After sending the grievance on March 13, Wagner and Parks drove to Mittal West, to the MultiServ parking lot where they saw two ESC red Volvo truck cabs and about five trailers parked in the yard. In addition to the two ESC parked trucks, they saw ESC truck 311 driving past the scales at MultiServ loaded with c-fines. All three trucks had ESC signs on them.

---

issue at the heart of this case is whether the 1995 contract was subject to section 8(f) or 9(a); only if the parties formed a section 9(a) relationship in 1995 did Nova commit an unfair labor practice in 1997 and thereby trigger the six-month time limit." The court was referencing the union's argument that under Sec. 10(b) of the Act the employer could not dispute that the contract, by its terms, created a 9(a) relationship some 2 years after the contract was entered into. The court specifically declined to address the 10(b) question stating, "the Board did not rely on section 10(b) and '(w)e cannot sustain agency action on grounds other than those adopted by the agency in the administrative proceedings.'" The court also looked to evidence therein that certain employees were opposed to having the union at Nova, and stated, "[T]he record contains no evidence of independent verification of employee support." Id. at 537. Unlike in *NOVA* where there was evidence that a majority of employees there did not want union representation, in the instant case two of the three bargaining unit employees refused Respondents' offer of continued employment on condition that they work nonunion, and in fact contacted the Union to grieve Respondents' actions.

[27] Wagner confirmed Parks' version of the call testifying that Surdell said the Company opened up under new name, Engineered Group Limited, and that they could not afford to pay union benefits so they filed bankruptcy. Surdell said they hired a new driver from a temporary service. Parks thanked Surdell for stating the name of the new company because he knew what he had to put on the picket signs. Parks asked Surdell if he did not think he had an obligation to the Union, and Surdell did not have much of an answer for that.

Parks did not recognize the driver. They observed truck 311 exit the gate at Mittal West and followed it to Mittal East, where the truck dumped its load, and then returned to Mittal West. After taking the pictures of and following the truck, Parks and Wagner returned to the union hall, where Parks wrote and faxed the initial charge against the Respondents to the NLRB. Despite ESC's continuing to operate in plain view at the Mittal plants, on March 13, Surdell faxed the Union a letter stating ESC Trucking has gone out of business and the following drivers are laid off: Wagner, Roop, and Miletich.[28]

On March 14, Parks met with Roop at the union hall at which time Roop filed a grievance stating, "[N]onunion workers in trucks." Parks faxed the grievance on that date to ESC to Anderson's attention. On March 15, Parks saw two ESC trucks in the morning loaded with what appeared to be c-fines on a public road in East Chicago. Parks did not recognize either of the drivers. On March 17, Wagner and Roop filed separate grievances alleging "unjust termination." The grievances were faxed on that date to ESC to Anderson's attention. Parks testified that he received no response from ESC to any of the grievances that were filed. On March 17, Parks faxed a letter addressed to ESC and Group to Anderson's attention. In the letter, Parks stated it was the Union's position that Group is an alter ego of ESC, and was covered by the current labor agreement. Parks stated the Union was requesting recognition by Group, and the Union's members be returned to work immediately. Parks received no response.

By letter to the Union, dated March 28, sent by overnight mail, Paul Cummings of Blankenship Associates, stated, "I have been authorized and instructed" by ESC to serve notice that it was terminating the collective-bargaining agreement with the Union, "as of its termination on May 31, 2006," pursuant to article 30 of the agreement. By letter dated September 12, ESC informed the Union's pension plan that it had no hours to report since February 2006. Parks identified checks to the pension plan from ESC dated March 13. He testified those checks would have been for February hours, and that it was his understanding those were the last checks the pension plan received.

I find that Group is an alter ego and disguised continuance of ESC, and that Group was specifically made into an active entity in order to void ESC's contract with the Union. Roop's testimony reveals that, on the day the March 6 purchase agreement was entered into between Callihan and Anderson, that Surdell called Roop and offered him a job. Surdell told Roop they were reorganizing ESC and were going to start it over under another name, nonunion without union benefits. Roop declined the offer. Wagner received a similar call from Surdell on the morning of March 13, where Surdell said they had filed for bankruptcy, opened up under a new company called Engineered Group Limited, and that they could not afford to pay the union benefits. Wagner also declined Surdell's offer to work for Group nonunion.

I find that the March 6 purchase agreement entered into between Callihan and Anderson for Callihan's acquisition of Group was a sham transaction. Anderson and Callihan were longtime friends. The purchase agreement called for the immediate payment of $5000 from Callihan to Anderson. However, I am not convinced that payment was ever made. Anderson could not recall whether it was made by cash or check, while Callihan testified it was made by cash, for which he did not believe he received a receipt. The agreement called for the payment of $60,000, with the balance due on or before June 30, 2006. There is no contention that this money was ever paid. In fact, at the time of hearing, Callihan was still testifying that he had not made up his mind as to whether to purchase the company. The VIN numbers for the trucks listed in the purchase agreement are also suspect in that they do not match any of the VIN numbers on the records submitted by Respondent of any of the trucks that were eventually transferred to Group, or ever owned by ESC. Both Anderson and Callihan testified that by verbal agreement, Anderson owned 55 percent of Group and that Callihan owned 45 percent. However, the purchase agreement specifically stated it could only be altered by a written agreement.

The March 31 lease agreement entered into between Anderson and Callihan was similarly flawed. The lease agreement, states it is an agreement to lease equipment between ESC the lessor and Group, the lessee. Yet, a subsequent provision of the agreement states that the equipment is and shall at all times be and remain the sole and exclusive property of Group. Thus, in essence Group was leasing the trucks from itself. The rate of the lease was $20 per truck per day, but it was not actually paid. Rather, it was just kept for accounting purposes should Callihan ever decide to purchase. While in fact no consideration was given for the transfer of trucks between Group and ESC, State vehicle registration documents showed that two vehicles were registered to Group as purchased on February 27, 2006, a date preceding the March 6 purchase agreement between Anderson and Callihan. Two more vehicles were registered as purchased by Group on May 3, 2006. There is no showing that Callihan ever paid anything for the purchase of the two additional vehicles. I have concluded that Anderson purchased and owned all the vehicles that were eventually transferred from ESC to Group, or were directly purchased by Group. I have concluded that he was and is the sole owner of Group, and that he received no payments from Callihan for the company.

This conclusion is buttressed by documentary evidence and Teffeau's credible testimony. In this regard, while Surdell wrote to the Union on March 13, that ESC Trucking had gone out of business and that Wagner, Roop and Anthony Miletich, were laid off, ESC invoices submitted to Teffeau at Mittal revealed that ESC continued to operate and was making substantial deliveries for Mittal on March 13, and thereafter. In fact,

[28] While ESC sent a fax to the Union on March 13, stating it had gone out of business, ESC submitted invoices to Teffeau at Mittal, dated: March 13, for the hauling of c-fines from March 9 to 13; March 17, for the hauling of skimmer iron material from March 15 to 17; March 17, for the hauling of c-fines from March 14 to 17; March 26, for the hauling of c-fines from March 21 to 23; and March 26, for the hauling of skimmer iron material from March 20 to 23. All of the invoices were on ESC letterheads. Additional invoices were submitted dated March 29, April 12, and May 18 on ESC letterheads. Respondents did not change to a Group letterhead for their invoices until June 22, 2006. Moreover, the Group letter head used the same address, phone and fax number as the ESC letter head. An ESC letterhead was again used for an invoice dated June 29, 2006.

ESC in combination with Group tendered over 80 invoices to Mittal from March 2006 to the time of the hearing in February 2007. Mittal remained ESC and Group's principal customer, as ESC's trucks and trailers remained parked at Mittal West throughout the period both before and after the alleged purchase by Group, and Anderson testified they parked the trucks where the work was. Moreover, ESC did not change its invoice letterhead to show Group until June 2006, even after the switch to the Group name it retained ESC's mailing address, phone and fax numbers on the letterhead, which testimony revealed were in fact Anderson's numbers. Teffeau also testified that Group continued to use ESC billing numbers with Mittal, and that he considered them to be one in the same operation because any new company would have had to apply for its own billing number.

I have not credited Anderson's or Callihan's testimony that Callihan ran Group. Teffeau testified that Anderson was his prime contact for ESC and Group, and that he would phone or otherwise contact Anderson when he wanted the company to solicit a bid. He testified that Surdell was his secondary contact, and the evidence showed that Surdell continued to submit bids to Teffeau even after the operation allegedly switched to Group. Teffeau testified he had minimal contact with Callihan. When Callihan was introduced to Teffeau in a June meeting for Callihan to obtain a drivers permit for entrance into the Mittal facility, he was introduced as an employee of ESC, and such was reflected on the permit. Callihan himself only claimed two phone calls with Teffeau concerning Group's business during a period of time when over 80 invoices were submitted by ESC/Group to Mittal. I have concluded that Anderson drafted the invoices. Thus, I have concluded, as Teffeau credibly testified, that Callihan had very little to do with the operation of Group, which continued to be run by Anderson, and secondarily by Surdell.

In sum, I have concluded that ESC and Group had the same ownership and management, and that both companies engaged in the same business of transporting steel byproducts to and from steel companies. I find that ESC's trucks and trailers were transferred to Group for no consideration, and that ESC and Group's business actually increased allowing them to increase from operating three trucks to four, and that all additional trucks were paid for by Anderson the owner of both ESC and Group. I find that ESC and Groups' principal customer was Mittal, and that ESC and Group's trucks remained stored at Mittal's facility as they had before Group came into operation. Both operations used the same phone and fax numbers and same mailing address. They used the same billing codes to bill Mittal, and the same truck codes in general. I do not credit Callihan's testimony that he played a significant role in the labor relations in Group. No specifics were given supporting this testimony as opposed to Callihan's signing a few paychecks. It was Surdell who offered Roop and Wagner jobs on behalf of Group, and told those employees that another individual had been hired from a temporary agency. Surdell played that same role for ESC, and continued to sign job bids to Mittal on behalf of ESC after that company had allegedly gone out of the trucking business. Thus, I have concluded that ESC and Group are alter egos in that they have substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership. I also find that, as evidenced by Surdell's statements to Roop and Wagner, the purpose of the sham transfer of operations from ESC to Group was to evade ESC's responsibilities under the Act in an effort to reduce its labor costs by repudiating the Union's collective-bargaining agreement. This becomes abundantly clear when Surdell falsely informed the Union that ESC had gone out of business when at the same time ESC was continuing to contract and perform work for Mittal. Thus, I find that the sham transfer of operations to Group was done with the unlawful motive of avoiding the ESC's responsibilities under the Act. See *Diverse Steel, Inc.,* supra.[29]

It is undisputed that ESC ceased honoring its collective-bargaining agreement with the Union with the layoff of the Union referred drivers in February 2006.[30] Both Wagner and Roop testified that Surdell told them they were being laid off on February 8, 2006.[31] I find that ESC and Group, alter egos, abrogated the collective-bargaining agreement with the Union and terminated drivers Wagner, Roop, and Miletich in order to avoid their collective-bargaining obligations with the Union and that by such conduct the violated Section 8(a)(1), (3), and (5) of the Act. See *Mastronardi Mason Materials Co.,* 336 NLRB 1296 (2001); and *Diverse Steel, Inc.,* supra.[32] Respondents officially notified the Union of the termination of all three

[29] I do not find persuasive claims that Group's business was different than ESC because ESC owned the c-fines it was transporting, while Group was hauling product owned by others. First, ESC transported products other than c-fines, which were owned by other companies. Moreover, I do not find controlling as to whether Group or ESC owned the product as the work was essentially the same for the drivers of hauling steel by products to and from steel mills. In fact, Wagner and Roop were offered to continue on in the same capacity if they were willing to work nonunion. I also do not find persuasive in distinguishing the companies that ESC remained in existence after the transfer to Group, in that ESC continued to perform other steel industry related functions. The trucking aspect of ESC was a significant operation, and the use of the Group name was in my view a sham transaction to void the Union's contract. Therefore, I have found ESC and Group to be one of the same and that Group was bound by the Union's contract as well as by ESC's continuing collective bargaining obligation with the Union.

[30] Teffeau's invoice summary for ESC reveals that ESC tendered invoices to Mittal dated February 14 and 24, although the date the work was performed for these invoices is unclear on the record.

[31] Miletich did not testify so his last day of work for Respondents is unclear. However, he was listed, along with Roop and Wagner, in Surdell's March 13, termination notice to the Union.

[32] To the extent a *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), analysis is required to support the 8(a)(1) and (3) findings for Wagner, Roop, and Miletich's termination, I note that Surdell's statements to Roop and Wagner revealed that ESC was transferring its operations to Group for the expressed purpose of going non union and not paying union contract rates and fringes. Respondent continued its operations as ESC, and only later on attempted to superficially make it appear as if Group in fact existed. Respondents offered no business justification for their failure to continue to employ the Union referred drivers save for their desire to void the Union's contract, as they in fact offered at least two of the three drivers continued employment without the benefit of union representation.

drivers on March 13, and that ESC was going out of business, while at the same time ESC continued to perform work for Mittal. Respondent's contract with the Union did not expire until May 31, thus, Respondents unlawfully terminated the contract during its term.[33] Since I have concluded that Respondents had a 9(a) relationship with the Union, they were obligated to keep certain terms and conditions of the contract in effect even after the contract's termination date until bargaining to impasse occurred or the contract was replaced by another agreement. See *University Moving & Storage Co.,* 350 NLRB 6 (2007).[34]

CONCLUSIONS OF LAW

1. Respondents Engineered Steel Concepts, Inc., (ESC) and ESC Group Limited (Group) are each engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and have engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Group is a disguised continuance and alter ego of ESC.

3. General Drivers, Warehousemen, and Helpers Union Local 142, International Brotherhood of Teamsters (the Union) is labor organization within the meaning of Section 2(5) of the Act.

4. The employees described in the collective-bargaining agreement between ESC and Group and the Union effective from March 8, 2005, to May 31, 2006, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

5. Since March 8, 2005, the Union has been the exclusive collective-bargaining representative of ESC and Group's employees in the bargaining unit described above in paragraph 4 within the meaning of Section 9(a) of the Act.

6. Martin Surdell is a supervisor and agent of ESC and Group within the meaning of Section 2(11) and (13) of the Act.

7. By conditioning job offers to employees upon their working for a nonunion company without union wages and benefits Respondents have violated Section 8(a)(1) of the Act.

8. Respondents ESC and Group have violated Section 8(a)(1) and (3) of the Act by:

(a) During February 2006, laying off employees Steve Wagner, Mark Roop, and Anthony Miletich.

(b) On March 13, 2006, terminating the employment of employees Steve Wagner, Mark Roop, and Anthony Miletich.

9. Respondents ESC and Group have violated Section 8(a)(1) and (5) of the Act by since February 2006:

(a) Failing and refusing to recognize and bargain collectively with the Union in an appropriate unit of truckdrivers, by refusing to apply the terms and conditions of their collective-bargaining agreement with the Union, including wage rates, fringe benefit fund contributions, hiring hall provisions to the employees and by abrogating the agreement including the subcontracting of bargaining unit work.

(b) Laying off and then terminating its employees Steve Wagner, Mark Roop, and Anthony Miletich.

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

REMEDY

Having found Respondents ESC and Group, ESC's alter ego and disguised continuance, have engaged in certain unfair labor practices, I find Respondents must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondents having unlawfully laid off and then terminated Steve Wagner, Mark Roop, and Anthony Miletich must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharges to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The collective-bargaining agreement between the Union and Respondents provides at article 3, section 1, "When the Employer needs additional employees he shall give the Local Union twenty-four (24) hours to provide suitable applicants, but shall not be required to hire those referred by the Union. . . . If the Union is unable to provide suitable applicants within twenty-four (24) hours, the Employer may employ applicants from any source." The record reveals that until Respondents abrogated the collective-bargaining agreement, they sought

[33] While I have found Respondents to have a 9(a) relationship with the Union, even if the contract were found to be 8(f) in nature, Respondents violated Sec. 8(a)(1) and (5) of the Act by terminating it during its term. See *Oklahoma Fixture Co.,* 333 NLRB 804, 807 (2001); and *John Deklewa & Sons,* 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3d Cir. 1988).

[34] It came up during the course of the hearing that following their termination of their relationship with the Union, Respondents subcontracted some of their work. Testimony was drawn from Parks that the collective bargaining agreement allowed Respondent to subcontract work as long as the contract employees received union wages and benefits as required by the parties' collective bargaining agreement. The collective bargaining agreement's Article 4 is entitled "Subcontracting." Respondent argued at the hearing that the subcontractor's employees may have been covered by the Union's contract. It was discussed that if that was the case, the facts pertaining to the employees' contract coverage could be established in compliance proceedings. However, the General Counsel argues that Respondents, having unlawfully abrogated the collective-bargaining agreement, should not be allowed to use its provisions as justification for subcontracting work that had in the past been given to drivers directly referred to Respondent by the Teamsters hall. I agree with the General Counsel's position. Roop and Wagner's testimony reveals that they had been given steady work through the course of their employment with ESC. There was certainly no history shown of Respondent subcontracting work, while they were in layoff status. I have concluded that despite any language in the collective bargaining agreement, Respondents have not shown that they would have subcontracted the work in dispute but for the unlawful termination of the Union drivers. Parks' testimony is undisputed that during the course of the contract all of Respondent's employees were supplied through the union, and that the Union was able to refer extra employees when Respondent needed them. Accordingly, I find that the laid off Teamster drivers were entitled to perform the work that Respondent contracted out, absent a showing that there was more work than they could have performed and that the Union would have been unable to directly provide any additional drivers needed.

from the Union, and the Union was able to supply qualified applicants through its referral system. Accordingly, I am recommending an instatement and make whole remedy to those applicants who would have been referred to the Respondents for employment through the Union's hiring hall were it not for the Respondents' unlawful conduct. See *Diverse Steel, Inc.,* 349 NLRB 946 (2007); and *Strand Theater of Shreveport Corp.,* 346 NLRB 523 (2006). As set forth above, while the collective-bargaining agreement between the parties expired on May 31, 2006, the terms and conditions of that agreement remain in effect at least until the parties' bargain in good faith to a lawful impasse. See *University Moving & Storage Co.,* 350 NLRB No. 2 (2007). These applicants should be made whole for any loss of earnings and other benefits they may have suffered by reason of the Respondents failure to hire them, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., supra, plus interest as computed in *New Horizons for the Retarded*, supra.

ORDER

The Respondents, Engineered Steel Concepts, Inc., (ESC) and ESC Group Limited (Group), located at in East Chicago, Indiana, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Conditioning job offers to employees upon their working for a nonunion company without union wages and benefits.

(b) Laying off and terminating employees because of their membership in and activities on behalf of the General Drivers, Warehousemen, and Helpers Union Local 142, International Brotherhood of Teamsters, or any other labor organization.

(c) Failing and refusing to recognize and bargain collectively with the General Drivers, Warehousemen, and Helpers Union Local 142, International Brotherhood of Teamsters, in an appropriate unit of truckdrivers, by refusing to apply the terms and conditions of their collective-bargaining agreement with the Union, including wage rates, fringe benefit fund contributions, hiring hall provisions to their employees, and by abrogating the agreement including the subcontracting of unit work.

(d) 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 actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employees Steve Wagner, Mark Roop, and Anthony Miletich full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging any employee, if necessary.

(b) Make Steve Wagner, Mark Roop, and Anthony Miletich whole for any loss of earnings and other benefits suffered as a result of the discrimination against them 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 any reference to the unlawful layoffs and terminations of Make Steve Wagner, Mark Roop, and Anthony Miletich and within 3 days thereafter notify them in writing that this has been done and that the layoffs and terminations will not be used against them in any way.

(d) Within 14 days of the date of this Order, offer full and immediate employment to those work applicants who would have been referred to the Respondents for employment though the Union's hiring hall were it not for the Respondent's unlawful conduct.

(e) Make whole those work applicants who would have been referred to the Respondents for employment through the Union's hiring hall for any loss of earnings and other benefits they may have suffered by reason of the Respondents' failure to hire them as set forth in the remedy section of this decision.

(f) Honor and abide by the terms and conditions of the their collective-bargaining agreement with the Union and make whole their employees represented by the Union, including those hired during the period in which Respondents failed to apply the collective-bargaining agreement, for any loss of pay and other benefits suffered as a result of Respondents' refusal to apply the collective-bargaining agreement to all unit employees. See *Expo Group,* 327 NLRB 413 (1999). Backpay shall be computed with interest as computed in *New Horizons for the Retarded,* supra.

(g) Pay all contractually-required fringe benefit fund contributions not previously paid, in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 (1979). In addition, make all unit employees whole for any expenses resulting from the failure to make such contributions, with interest, as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

(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 to be 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 back pay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at their place of business and at each of their jobsites of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent 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 its operations the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and

[35] 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."

former employees employed by the Respondent at any time since February 1, 2006.

(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.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT condition job offers to employees upon their working for a nonunion company without union wages and benefits.

WE WILL NOT lay off or terminate employees because of their membership in and activities on behalf of the General Drivers, Warehousemen, and Helpers Union Local 142, International Brotherhood of Teamsters, or any other labor organization.

WE WILL NOT fail and refuse to recognize and bargain collectively with the General Drivers, Warehousemen, and Helpers Union Local 142, International Brotherhood of Teamsters, in an appropriate unit of truckdrivers, by refusing to apply the terms and conditions of our collective-bargaining agreement with the Union, including wage rates, fringe benefit fund contributions, hiring hall provisions to our employees and by abrogating the agreement including the subcontracting of unit work.

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

WE WILL, within 14 days from the date of the Board's Order, offer employees Steve Wagner, Mark Roop, and Anthony Miletich full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Steve Wagner, Mark Roop, and Anthony Miletich whole for any loss of earnings and other benefits suffered as a result of their unlawful termination in the manner set forth in Board's decision.

WE WILL, within 14 days from the Board's Order, remove from our files any reference to the unlawful terminations of Steve Wagner, Mark Roop, and Anthony Miletich, and within 3 days thereafter notify them in writing that this has been done and that their terminations will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer full and immediate employment to those work applicants who would have been referred to us for employment though the Union's hiring hall were it not for our unlawful conduct.

WE WILL make whole those work applicants who would have been referred to us for employment through the Union's hiring hall for any loss of earnings and other benefits they may have suffered by reason of our failure to hire them in the manner set forth in Board's decision.

WE WILL honor and abide by the terms and conditions of our collective-bargaining agreement with the Union and make whole our employees represented by the Union for any loss of pay and other benefits suffered as a result of our refusal to apply the collective-bargaining agreement to all unit employees and to unit work, plus interest.

WE WILL pay all contractually-required fringe benefit fund contributions not previously paid and make whole unit employees for any for any expenses resulting from the failure to make such contributions, with interest.

ENGINEERED STEEL CONCEPTS, INC., AND ESC GROUP LIMITED, ALTER EGOS