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Positive Electrical Enterprises, Inc. *and* International Brotherhood of Electrical Workers, Local 43. Case 3–CA–25037

September 23, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 17, 2005, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The 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 as modified and to adopt the recommended Order.

Dated, Washington, D.C. September 23, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The Respondent has 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.

We correct an inadvertent error in fn. 2 of the judge's decision concerning the appropriateness of a bargaining unit. Although the Act requires a unit for bargaining to be *an* appropriate unit, it does not require that the unit be the *most* appropriate unit. *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991); *Overnite Transportation Co.*, 322 NLRB 723 (1996).

Chari-Lynn Koppel, Esq., for the General Counsel.
Joseph A. DeTraglia, Esq., for the Respondent.
Stephanie A. Miner, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Syracuse, New York, on March 15 and 16, 2005. The charge was filed by the International Brotherhood of Electrical Workers, Local 43 (the Union), on September 2, 2004,[1] and a complaint and notice of hearing issued on November 10, 2004. On January 19, 2005, the Regional Director for Region 3 of the National Labor Relations Board (the Board) issued an amended complaint and order designating hearing. The amended complaint alleges that on August 20, 2002, Positive Electrical Enterprises, Inc. (the Respondent) signed letters of assent with the Union. The amended complaint alleges that by doing so, Respondent bound itself to the terms and conditions of employment of the 2002–2003 residential wiring agreement and inside wiring agreement negotiated by the Union and the Finger Lakes New York Chapter National Electrical Contractors Association (NECA). The amended complaint further alleges that since on or about August 20, 2002, Respondent has repudiated and failed and refused to follow the terms of the 2002–2003 collective-bargaining agreements, as well as those subsequently negotiated by the Union and NECA in violation of Section 8(a)(5) and (1) of the Act. Respondent filed timely answers to the complaint and amended complaint denying the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel, the Union, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with a facility in Mattydale, New York, is engaged as an electrical contractor in the building and construction industry. Annually, Respondent in conducting its business operations provided services valued in excess of $50,000 to an enterprise within the State of New York that is directly engaged in interstate commerce. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 2004, unless otherwise indicated.

I also find that the following employees of Respondent constitute a unit appropriate for the purposes of collective bargain within the meaning of Section 9(b) of the Act:[2]

> All employees performing electrical work, as described in "Type of Work covered by this Agreement" set forth on page one of the 2004–2007 "residential wiring agreement" and in Section 2.07 of the 2003–2007 "inside construction agreement" within the geographic jurisdiction set forth in Article 4.08 of the same agreements between the Union and the Finger Lakes, New York Chapter of the National Electrical Contractors Association.

II. ALLEGED UNFAIR LABOR PRACTICES

William Towsley has been a member of the International Brotherhood of Electrical Workers since 1970 and has held various offices with the Union since 1989. He has served as business manager for Local 43 of the Union since 1997. There are 75 employers who are currently signatory contractors with Local 43. Of those 75 signatory contractors, 10 are owner-operators. Towsley explained that even though an individual owner-operator may sign a letter of assent with the Union, the individual may perform work on his own and does not necessarily hire members of the Union. The Finger Lakes New York Chapter NECA is the management association that negotiates collective-bargaining agreements with the Union on behalf of the signatory employers.

A. Cirrincione's First Contact with the Union

Towsley recalled that he first met Anthony Cirrincione in the summer of 2000 after union organizer Bernie Coffey asked Towsley to meet with Cirrincione and to help Cirrincione find employment with a union contractor. Towsley met with Cirrincione and arranged an interview for him with Burns Electric, a union signatory contractor. Following Towsley's referral, Burns Electric hired Cirrincione as project manager estimator. Cirrincione testified that prior to meeting with Towsley he had been employed by a non-union contractor for approximately 2 years. He had become bored with the job and had also determined that he needed the Union's assistance in finding a company that could afford to pay him what he wanted.

B. Cirrincione's 2002 Contact with the Union

Cirrincione obtained his Utica, New York, Master Electrician's License in June or July 2002. Just prior to taking the test, he was terminated by Burns Electric. At the time that he applied for the Utica License, he also applied for the Syracuse, New York Master Electrician's License. Cirrincione explained that after his termination, he became concerned about passing the test for the Syracuse license. Because the owner of Burns Electric was also a member of the licensing board, Cirrincione believed that Burns might prevent his obtaining the Syracuse license. Because of his concerns, Cirrincione contacted Towsley who was also a member of the licensing board. Cirrincione recalled that the told Towsley that he needed his license and that he was worried that Burns would do something to hurt him. Cirrincione testified:

> I thought Mr. Towsley could see that I was a decent person and that he could maybe try to keep this guy from hurting me in any way because I was worried about again feeding my family and the license was important for that and because of what I had heard I was worried about it. I was sincerely worried about it.

C. Towsley's Recollection of the August 20, 2002 Meeting

Towsley testified that after his initial meeting with Cirrincione in 2000, he didn't recall any further conversations with Cirrincione until 2002. Towsley recalled that a short time prior to August 20, 2002, Cirrincione telephoned him and discussed the Master Electrician's Examination for the city of Syracuse. Towsley recalled that he discussed with Cirrincione the procedures of the examination and also what Cirrincione should study in advance of the examination. Towsley testified that he did not anything to influence the scoring of Cirrincione's examination. He explained that he could not have done so because of the scoring procedure. An applicant's answer sheet is graded by one licensing board member and verified by a different licensing board member. Under the Syracuse city ordinance, an applicant also has the right to review the examination scoring upon request.

Towsley testified that on August 20, 2002, Cirrincione came to the Union's office and met with him. Cirrincione told him that "it was not working out with Burns Electric" and he wanted to open his own business. Cirrincione also stated that he would be working alone "for awhile." Towsley testified that he explained to Cirrincione that he would have to sign a letter of assent in order to become a signatory contractor. Towsley testified that Cirrincione acknowledged that he knew about the letters of assent, as well as about the need for his filing a bond and the requirement for making contributions to the Union's trust fund. Towsley explained the requirement that Cirrincione use the Union's hiring hall. Towsley testified that he told Cirrincione that in the future, any employees that he hired would have to be referred by the Union. Cirrincione told Towsley that he planned to begin the business by performing all the work himself. Later, he anticipated that he would add additional employees when he was financially able to do so. Towsley testified that during the meeting Cirrincione did not have any questions about the procedures in signing the agreements and did not ask for the opportunity to submit the letters of assent to an attorney before signing the documents.

Respondent does not dispute that on August 20, 2002, Cirrincione signed two letter of assent authorizing the Finger Lakes New York Chapter of the NECA, or otherwise referred to in this decision as NECA, as its collective-bargaining representative for all matters contained in or pertaining to the current and any subsequent residential and inside labor agreements

[2] In its answer, Respondent denies knowledge or information sufficient to form a belief as to the truth of the alleged unit. It is well settled that the Act does not require a unit for bargaining to be an appropriate unit or even the most appropriate unit. *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991); *Overnight Transportation Co.*, 322 NLRB 723 (1996). The evidence reflects that the described unit has been designated by the Union and NECA in successive collective-bargaining agreements. There being no evidence to the contrary, I find the described unit appropriate for purposes of collective bargaining.

between the NECA and the Union. The letters of assent further provide that by signing the agreement, the employer is bound by all the provisions contained in the current and subsequent labor agreements between the Union and the NECA. By its terms, the agreement remains in effect until terminated by the employer giving written notice to the NECA and to the Union at least 150 days prior to the current anniversary date of the applicable labor agreement. Towsley testified that the information concerning the name, address, and Federal employer identification number for Respondent, as well as Cirrincione's name and title, were provided by Cirrincione and typed onto the form by Towsley's secretary, Janice Lincoln. Towsley testified that he told Cirrincione on August 20 that copies of the agreement would not be available until after approved by the International. Towsley did, however, give Cirrincione copies of the existing Inside Construction Agreement between the NECA and the Union as well as the Residential Wiring Agreement between the NECA and the Union. On August 28, 2002, the Union sent Respondent copies of the executed letters of assent that had been approved on August 26, 2002.

Towsley explained that under the terms of the collective-bargaining agreement with NECA, the Union requires verification of liability insurance, compensation insurance, and workers' compensation insurance. The insurance coverage must be in effect as soon as possible after an employer signs a Letter of Assent. No employees can be referred to the employer without verification of the insurance coverage. On August 21, 2002, the Union received a Certificate of Liability showing that Respondent had the requisite commercial general liability insurance as required by a signatory employer and as discussed with Cirrincione on August 20, 2002. Cirrincione acknowledged that after he met with Towsley on August 20, he contacted his accountant and asked for information concerning his getting a bond as requested by the Union. He recalled that his accountant explained to him that the bond was like getting insurance. If he were unable to pay the wages or benefits to employees, the bond would "step in and take over and protect the Union." He admitted that he secured the bond shortly after his signing the letters of assent.

D. Cirrincione's Testimony Concerning his August 20, 2002 Meeting with Towsley

Cirrincione testified that after his passed his examination for the Syracuse Master Electrician's License, Towsley telephoned him to congratulate him on the results. He recalled that Towsley also asked him to visit him at his office. Cirrincione acknowledged that while in Towsley's office he signed the letters of assent. Cirrincione maintained that he did so because he felt obligated to Towsley. Cirrincione testified that Towsley never explained to him that by signing the documents, he could not use nonunion labor. He also testified that he told Towsley that he could not afford to pay union labor because he was just starting his business. Cirrincione asserted that Towsley told him that he could build up his business and when he was ready Towsley would help him "to get people on board." Cirrincione testified that Towsley did not ask him if he understood what he was signing or ask him to have an attorney look over the documents. Cirrincione acknowledged, "I just have to say I was stupid." He also asserted that he signed the documents because he didn't want enemies starting out in his new business. He testified: "I didn't want any enemies, especially someone as connected and known as Mr. Towsley. I didn't want to make an enemy of him. I felt obligated and so I signed it."

E. The Union's Contacts with Respondent in 2003 and Early 2004

On January 21, 2003, Towsley sent a written memorandum to all signatory contractors and included a copy of a new form that was to be used for requesting manpower from the Union. On April 29, 2003, Towsley sent a letter to Respondent advising of the new wage rates and fringe benefit contributions that were effective through May 31, 2004. Respondent does not deny receipt of either correspondence. There is no evidence that Cirrincione responded to either correspondence or at any time notified the Union that such correspondence was not applicable to his business.

Union organizer Thomas Kurak testified that he first met Cirrincione during late 2003 or early 2004. He explained that part of his job as an organizer is to periodically check with new contractors to inquire as to whether they need any help with their business. He went on to add that the Union has found that while it is good to organize contractors, it is also important to pay attention to them and try to help them or they may otherwise revert to nonunion contractors. Kurak described his visit to Cirrincione as simply a courtesy call. Other than Cirrincione, Kurak observed only one other individual at Respondent's facility. The young man that he observed was wearing a sweatshirt and sneakers and displayed neither tools nor anything else that would distinguish him as an electrician. During Kurak's visit, Cirrincione spoke about his former work in New York City and described his current work as residential. He did not indicate that he was employing any employees.

Approximately 6 to 8 weeks later, Kurak returned for a second visit to Cirrincione's office, accompanied by union organizer Bernie Coffey. Kurak saw the same young man as he had seen on his previous visit. Again, the young man was not wearing a tool belt or carrying any tools. After the visit, Coffey told Kurak that the young man had previously been employed as a truck driver for an electrical company in Utica, New York. Kurak testified that during this second visit to Cirrincione's office, there was nothing said to indicate that Cirrincione had hired employees or planned to hire employees in the future.

F. The Union Learns that Respondent has not Followed the Agreement

Towsley testified that all written notices of contract termination are forwarded to him for response. It is undisputed that as of the date of the hearing, Respondent has never submitted a written notice of its intent to terminate the collective-bargaining agreements. It is also undisputed that since signing the agreements on August 20, 2002, Respondent has neither requested referrals for employees through the Union's hiring hall nor submitted any reporting forms to the Union. The reporting forms provide information to the Union concerning the names of employees, classifications of employees, rates of pay, hours worked, and the working assessment deductions for employees

during the month. Respondent does not dispute that it has failed to make any "fringe benefits" contributions to the Union or to remit any union dues to the Union.

On June 14, 2004, Towsley received a letter notifying the Union of Respondent's request to cancel the bond providing indemnity to the Union. Towsley testified that the bond is the security that ensures that if fringe benefits are not paid to employees by the employer, there is a resource for payment to the employees. Towsley explained that such a notification raises a "red flag" that an employer is having financial problems, going out of business, or otherwise violating the collective-bargaining agreement. In response, Towsley instructed Kurak to investigate Respondent's current jobs and their locations.

Kurak testified that in August or September 2004, he visited the Syracuse construction site for the Christmas Tree Store. When he arrived, he noticed a construction trailer that was "hooked up" for temporary electrical service. He observed Cirrincione directing three men on the installation of the service. The men were wearing lime green shirts bearing Respondent's name. Kurak did not recognize any of the men who were working for Cirrincione. He explained that at the time he did not believe that they were union members because their members would be reluctant to wear such shirts and to work without hardhats.

Three or four days after seeing Cirrincione at the construction site, Kurak visited Cirrincione's offices in Mattydale. When Kurak mentioned that he had seen Cirrincione on the job, Cirrincione acknowledged that he was the electrical general contractor for the job and that he had bid the job for between $230,000 and $250,000. After Kurak reported this information to Towsley, Kurak contacted the head inspector for the city of Syracuse to inquire if Cirrincione had requested any other permits during the previous year. Kurak obtained copies of approximately a dozen permits requested by Cirrincione during the specified time period. Kurak acknowledged, however, that the majority of the jobs were service-oriented jobs, requiring minimal work. One of the jobs, however, involved work on a medical building. Kurak estimated that based upon the amount of work involved, the job would probably have paid between $20,000 to $30,000.

Cirrincione acknowledged that for the period of time between July 1, 2002, and January 6, 2005, he performed approximately 400 jobs within the geographical jurisdiction of the Union and the majority of the jobs involved electrical work. Respondent's quarterly State Report of Wages for the quarter ending September 30, 2002, reflects that Respondent paid David Quigg $300 in wages. Cirrincione recalled that he paid Quigg approximately $7 or $8 an hour for his work as an electrician's helper. Cirrincione further acknowledged that he also paid wages to Quigg for electrical work for the period of time between September 30 and November 24, 2002. Geoffrey Grow received wages for electrical work for the period between October 21 and November 24, 2002. Cirrincione further confirmed that he also employed individuals to perform electrical work during the first, second, and fourth quarters of 2003.[3] Admittedly, Cirrincione paid 20 individuals to perform electrical work during 2004. Cirrincione determined their individual rates of pay by their interview and the amount of time worked on the job. Cirrincione did not deny that he failed to request employees through the hiring hall. He also admitted that he neither filed any reporting forms to the Union nor made any union trust fund contributions. There is no dispute that union dues were never remitted to the Union.

III. FACTUAL AND LEGAL CONCLUSIONS

There is no factual dispute that on August 20, 2002, Respondent signed letters of assent authorizing NECA as its collective-bargaining representative for all matters contained in or pertaining to the current and nay subsequent approved residential or inside labor agreements between NECA and the Union. The signed agreements provide that Respondent agrees to comply with, and be bound by, all of the provisions contained in the current and subsequent approved labor agreements and such authorization remains in effect until Respondent provides written notice to NECA and the Union at least 150 days prior to the current anniversary date of the applicable labor agreement. While Respondent does not deny that subsequent to signing these agreements, it has not followed the terms of these agreements, Respondent has not attempted to withdraw from its bargaining obligation under the terms of the agreement. The Board has determined that employers who voluntarily enter into an 8(f) relationship with a union by executing a letter of assent, are bound to current and successive collective-bargaining agreements between the Union and a multiemployer group or association, in the absence of a timely withdrawal from the association. *P & C Lighting Center*, 301 NLRB 828, 832 (1991); *Riley Electric*, 290 NLRB 374, 375 (1988); and *City Electric*, 288 NLRB 443, 445 (1988). Despite its execution of the letters of assent, however, Respondent maintains that it has not violated the Act. As set forth below, I do not find merit to Respondent's arguments.

A. Respondent's Argument of Section 10(b) of the Act, Waiver, and/or Estoppel

Respondent argues that by virtue of the letters of assent, it promised to pay union scale wages and benefits as well as promised to remit union dues and to obtain employees through the Union's exclusive hiring hall. Respondent asserts, however, that because of the Union's misrepresentations, it had no intention of abiding by the terms of the letters of assent. Respondent contends that the Union had actual or constructive notice prior to March 2, 2004, that it had repudiated the letters of assent.

Section 10(b) of the Act provides that a complaint may not issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board. See 29 U.S.C. § 160(b). The Board has found, however, that this limitations period does not begin to run until the charging party has "clear and unequivocal notice," either actual or construc-

[3] GC Exh. 19 reflects that both Douglas Morey and David Quigg were employed during the second quarter of 2003. GC Exh. 20 reflects that Respondent employed David Quigg and David Gaiser during the second quarter of 2003. GC Exh. 21 reflects that Respondent employed David Gaiser, Douglas Morey, David Quigg, and Mathew Wilcox to do electrical work during the fourth quarter of 2003.

tive, of a violation of the Act. *Leach Corp*., 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). The Board has also looked to whether the charging party should have become aware of a violation in the exercise of reasonable diligence. *Moeller Bros. Body Shop*, 306 NLRB 191, 192–193 (1992). The burden of showing such clear and unequivocal notice rests with the party raising the affirmative defense of Section 10(b). *California Portland Cement Co*., 330 NLRB 144 (1999); *Chinese American Planning Council*, 307 NLRB 410, 410 (1992).

Respondent takes the position that because it clearly repudiated the contract outside the 10(b) period, the Union is barred from recovery. In its decision in *St. Barnabas Medical Center*, 343 NLRB No. 119, slip op. at 4 (2004), the Board noted that when an alleged unfair labor practice may be characterized as a contract repudiation, the unfair labor practice occurs at the moment of the repudiation, and the 10(b) period begins to run at the moment the union has clear and unequivocal notice of that act. All subsequent failures of the respondent to honor the terms of the agreement are considered to be consequences of the initial repudiation. The Board went on to explain that by contrast, cases are not barred by 10(b) where the respondent has not given clear notice of total contract repudiation outside the 10(b) period, but has simply breached provisions of the collective-bargaining agreement. As discussed more completely below, I do not find that the Union had clear and unequivocal notice of Respondent's contract repudiation outside the 10(b) period.

Respondent argues that when Cirrincione met with Towsley on August 20, 2002, he told Towsley that he was not able to pay union labor because he was just starting his company. Cirrincione testified that despite the fact that he signed the letters of assent, he "made it perfectly clear" to Towsley that he had no intention of hiring union employees. Notwithstanding Cirrincione's assertions, he also admits that after meeting with Towsley, he secured the bond and certificate of insurance as requested by Towsley and designated the Union Trust Funds as the beneficiary. Thus, while Cirrincione may have told Towsley that he was not financially ready to begin hiring at that time, his actions otherwise communicated that he was complying with the terms of the agreement.

Respondent also relies upon the testimony of David Gaiser to demonstrate that the Union had knowledge that Respondent was not using union labor. Gaiser testified that he first interviewed with Cirrincione in late June or early July 2000. Although Cirrincione kept his telephone number and resume, he told Gaiser that his business was still too small to hire him at that time. In 2001, Gaiser applied for the Union's apprenticeship program that was scheduled to begin in 2002. At the time of his application, Gaiser was working as a truckdriver for Engler Electric, a union contractor in Utica, New York. Gaiser testified that in late October 2002, he ran into a friend who told him that he was working for Respondent at the Dollar Tree worksite in New Hartford, New York. Although he went to see Cirrincione the next day, Cirrincione told him that he was not hiring at that time. Gaiser recalled that union organizer Bernie Coffey usually visited Engler Electric about twice a month. Approximately a week or 2 weeks after talking with Cirrincione, Gaiser saw Coffey when he visited Engler Electric and he told Coffey that Cirrincione had hired his friend on the Dollar Tree job but had not hired him. Gaiser acknowledged, however, that at the time that he made these comments to Coffey, Coffey was preoccupied and simply turned away and walked up the stairs to the office without responding.

Gaiser was later hired to work for Respondent as an electrician on April 21, 2003. Gaiser recalled that Bernie Coffey and another individual visited Respondent's office around late June or early July 2003. At the time they arrived, he was unloading a truck and simply spoke to them as they walked by him.

Having considered the testimony in its entirety, I do not find that Gaiser's testimony demonstrates that the Union was given clear and unequivocal notice of Respondent's repudiation of the contract. Even though Gaiser asserts that he told Coffey about Respondent's hiring his friend, Gaiser admits that Coffey was preoccupied and walked away from him without responding. Additionally, I note that even if Coffey heard Gaiser's comment, the alleged comment as described by Gaiser did not indicate whether Respondent was using union or nonunion labor. When asked how he began the conversation Gaiser testified:

> Yeah, I mean general conversation, like, "Hi, how you doing?" and "How's everything going?" And then I brought that fact up that Anthony was doing the Dollar Tree job in New Hartford and he had hired my friend and I had gone and he didn't have any work for me.

Based upon Gaiser's alleged comments, there would have been no basis for Coffey to assume that Respondent was using nonunion labor or doing anything contrary to the terms of the existing labor agreements. There would have been no reason for Coffey to report this comment to Towsley or to make any independent search or inquiry as to whether Respondent was paying union wages or making trust fund contributions. Additionally, I don't find Gaiser's presence at Respondent's offices in June or July 2003 as clear and unequivocal notice of Respondent's repudiation of the agreement. Admittedly, Gaiser did nothing more than simply speak to Coffey and Kurak as they walked by him on the way into Cirrincione's office. At the time the union representatives saw Gaiser, he was unloading a truck. Inasmuch as Coffey had only known Gaiser in his capacity as a truckdriver for another union contractor, Gaiser's unloading a truck would not have indicated that he was performing electrical work within the terms of the existing collective-bargaining agreement. I credit Kurak's testimony that Coffey simply identified Gaiser as a truckdriver for a contractor in Utica.[4] Neither Gaiser nor Cirrincione testified that they informed Coffey or Kurak that Gaiser was working as an electrician for Respondent. Thus, neither Gaiser's alleged comments to Coffey at Engler Electric nor his presence at Respondent's facility in 2003 constituted sufficient evidence of clear and unequivocal repudiation of the agreement.

[4] Kurak testified that when he had previously visited Cirrincione's office, he had also seen Gaiser. At that time, Gaiser was wearing a sweatshirt and sneakers. He was not wearing a tool belt or doing anything that would indicate that he was involved in performing electrical work.

Respondent also asserts that Kurak and Coffey's conversations with Cirrincione at his office provided sufficient notice of contract repudiation. The credible record evidence, however, does not support such a finding. Firstly, Cirrincione testified that during Kurak's visit to his office in April 2003, he told Kurak that he was not hiring union labor. Cirrincione also maintained that he told Kurak that all of the jobs that he had bid had been nonunion and that he would have lost money if he had paid union labor. Cirrincione did not indicate Kurak's response to his alleged statement. By contrast, Kurak testified that during this conversation, Cirrincione told him that he had only been involved in residential work and he did not indicate using any employees for that work. Kurak also testified that if he had known that a signatory contractor hired employees independent of the referral procedure, he would have notified Towsley. He explained that he would have lost his job if he had not done so. In considering the overall testimony, I credit Kurak's recall of the conversation. It is implausible that Kurak would have made no response if Cirrincione had told him that he was using nonunion labor. The overall evidence reflects that Cirrincione declined any assistance from Kurak and represented his work as small enough to not require a referral for additional electricians.

Cirrincione testified that when Coffey and Kurak visited his office in June or July 2003, he had been working on a bank job in Liverpool, New York. He recalled that they asked him if he needed any workers on the job. Admittedly, Cirrincione told them that only he and Gaiser were working on the job and that he did not need any additional workers. As discussed above, there is no evidence that Cirrincione or Gaiser said anything to indicate that Gaiser was working as an electrician. Because Coffey knew that Gaiser had worked as a truckdriver for another union contractor, there was no reason for Kurak or Coffey to conclude that Cirrincione was using nonunion electricians on this or any other job.

Respondent also asserts that the Union was put on notice of its failure to abide by the contract by Respondent's advertisements for electricians. Respondent contends that it placed ads in the Syracuse newspaper in January, April, and December 2003, and again in 2004. The ad, however, did not include Respondent's name. The ad simply included:

> ELECTRICIANS. must have own tools & experience good pay. Please call 455–0146 or fax resume 455–7416

Cirrincione testified that sometime after the first article appeared in the paper, he received a telephone call from Kurak. Cirrincione asserted that when Kurak asked if he needed any employees, Cirrincione replied that he was "not hiring any union workers at this time." Cirrincione did not testify, however, that Kurak said anything in the conversation to indicate that he had seen the newspaper ad or that he was in any way aware that Cirrincione had placed an ad for electricians. Kurak denied that he ever saw Respondent's newspaper ad seeking electricians. Kurak testified that had he been aware of such an ad, he would have notified Towsley. Respondent also submitted into evidence Respondent's ad in the classified index from the telephone directory. While the ad indicates that Respondent is a licensed electrical contractor, there is nothing in the ad to demonstrate that Respondent was functioning as a union or nonunion contractor. Respondent also asserts that during the relevant time period, it utilized the Internet to advertise its business. There is no indication, however, that such advertisement indicated that Respondent was using nonunion labor or otherwise functioning as a nonunion contractor.

In its argument that the Union had notice of the contract repudiation, Respondent also relies upon Respondent's having secured certain work permits and upon Respondent's having performed work that was categorized as "public work." Cirrincione testified that he applied for, and received, approximately 14 permits from the city of Syracuse in 2003. As an example of having bid on and having performed work that was considered to be a "public work," Respondent submitted invoices for work performed on the Utica Public Library in March 2003 in the amount of $9250 and in September 2003 in the amount of $1075.[5] Respondent asserts that both jobs were publicly bid. On further examination, however, Cirrincione conceded that he had been the only electrician performing work on both of these jobs.

In *Baker, Inc*., 317 NLRB 335, 340 (1995), the Board dealt with the issue of whether an 8(f) prehire letter of assent and benefit fund agreement were enforceable after the employer failed to honor them for a substantial number of years and hired employees without calling the union for referrals as required. Specifically, although the sole proprietor employer signed the letter of assent in October 1976, the employer never asked the union for referrals, never made contributions to the benefit funds, and never paid the union wages or applied the other terms of the NECA-union agreement. When the union contacted the employer in 1976 and 1977 to determine whether he needed referrals from the union's hiring hall, the employer declined and promised that he would use the hiring hall when and if he needed electricians. The first time that the union became aware that the employer was hiring employees was in September 1993, The Board affirmed the administrative law judge in finding that the 8(f) agreement was enforceable despite the passage of time. The administrative law judge noted that there was no reason for the union to suspect that the employer was reneging on the agreement or that he was operating a nonunion shop. The administrative law judge also found that the employer's appearance on the Dodge report did not provide sufficient notice under the circumstances of the case. In *Neshoba Construction Co*., 305 NLRB 100, 101 (1991), the employer failed for 14 years to abide by its 8(f) agreement before the union observed employees on the job. In *Neshoba*, supra, the Board affirmed the administrative law judge's finding that there was insufficient notice under Section 10(b), even though the employer had 20 jobs as a prime contractor or subcontractor during the 14-year period. The work was covered by the col-

[5] Respondent contends that it is significant that Respondent performed "public work" jobs in excess of $2500 because all public work jobs in excess of $2500 are listed in a publication known as the "Dodge" service. Towsley testified that he receives and reads copies of the Dodge report. He credibly testified, however, that he did not recall having ever seen Cirrincione or Respondent listed in the report. Towsley explained that had he seen any reference to Cirrincione or Respondent, he would not have thought anything about it because he considered Respondent as a signatory contractor.

lective-bargaining agreement with projects ranging from $100,000 to $2,328,000 within the union's geographical jurisdiction.

Despite its assertions, Respondent did not put the Union on notice of its repudiation of the agreement. Respondent was a small operation and one of 75 signatory contractors. Towsley testified that the number of projects and mobility of the construction force makes it impossible for the Union to monitor each of the contractor's activities. He testified that on any given day, he would not know where all 1250 members were working. Cirrincione acknowledges that when he signed the letters of assent, he told the Union that he would initially work on his own and he would not need any other electricians. Although Kurak checked with Cirrincione on a number of occasions, Cirrincione continued to tell him that he did not need a referral for employees. Just as in *Baker Electric*, supra at 345, the Union had no reason to assume that Respondent was using nonunion labor. It was not until Respondent canceled its bond in June 2004, that the Union realized that additional investigation was necessary. When the Union determined that Respondent was involved in more substantial work than had been represented and that Respondent was employing nonunion employees, a timely charge was filed.

Respondent cites two specific Board decisions in arguing that a union is required to exercise reasonable diligence in monitoring an employer and that the employer will be charged with constructive knowledge of what it would have learned had it exercised such diligence. In its decision in *Moeller Bros. Body Shop*, 306 NLRB 191 (1992), the Board found the union chargeable with constructive knowledge because of its failure to exercise reasonable diligence by which it would have learned much earlier of the employer's contractual noncompliance. In that case, the Board found that mere observation would have put the union on notice of the employer's noncompliance.[6] In *Mathews-Carlsen Body Works, Inc*., 325 NLRB 661 (1998), the Board found evidence that the union knew that the employer had hired employees but had not reported them to the union or to the benefit trust funds. Not only did the union representative admit that he had known that the employer hired "sleepers," but there was additional evidence that the representative observed these employees at the employer's facility and solicited their membership in the union. I find the facts of these cases distinguishable from the circumstances in issue. The credible evidence in this case demonstrates that the Union had no basis to conclude that Respondent was hiring employees who would have been covered by the collective-bargaining agreement. While Gaiser was observed at the Respondent's facility, he was not known by the Union to be a member of the bargaining unit and there is no evidence that he did anything to indicate that he was working as an electrician. Thus, even though the Union had contact with Respondent, there was no indication that Cirrincione was doing anything other than working alone as he initially represented to the Union. Accordingly, I do not find that the Union had either actual or constructive notice of Respondent's noncompliance or repudiation of the agreement outside the 10(b) period and thus the charge is not barred by 10(b) of the Act.

B. Respondent's Argument of Duress, Undue Influence, Misrepresentation, and Fraud

In posthearing brief, counsel for Respondent argues that Respondent cannot be bound by the letters of assent, citing a number of contract defenses discussed in various court decisions. Respondent includes a number of court cases dealing with the issue of "undue influence" with respect to the enforceability of contracts in various matters unrelated to labor agreements. Citing the court's decision in *Hellenic Lines, Limited v. Louis Drefus Corp*., 372 F.2d 753 (2d Cir. 1967),[7] Respondent argues that pressure must be improper and excessive in going beyond what is reasonable in the circumstances in order to constitute either duress or undue influence. Respondent also cites a Fifth Circuit Court of Appeals decision in *Lee v. Hunt*, 631 F.2d 1171 (5th Cir. 1980),[8] wherein the court noted "In order to prove undue influence, one must demonstrate that persuasion, entreaty, importunity, argument, intercession, and solicitation were so strong as to subvert and overthrow the will of the person to whom they are directed."

The total record evidence does not establish that Cirrincione signed the letters of assent because of duress. Cirrincione admits that at the time that he signed the letters, he had already passed his test for the city of Syracuse license. Admittedly, he had already sought Towsley's help twice and there is no evidence that Towsley required anything in return for his assistance. Cirrincione acknowledged that in response to his request for assistance, Towsley assisted him in obtaining the job with Burns Electric. There is no evidence that Towsley required any reward or recompense for doing so. Interestingly, Cirrincione had been working for a nonunion contractor and there is no evidence that Cirrincione had any past affiliation with the Union. When Cirrincione again requested Towsley's counsel with respect to the licensing examination, there is no evidence that Towsley asked for any compensation from Cirrincione. Cirrincione, in fact, testified that he trusted Towsley and considered him to be his friend. Cirrincione testified that Towsley kept his promise to help him because Burns was then unable to stop him from obtaining his license. Cirrincione explained: "I felt kind of obligated." It is undisputed that Cirrincione continued to ask for assistance from the Union and yet there is no evidence of a prior affiliation or a relationship. It is certainly reasonable that

[6] The union official testified that he had assumed that the employer was a small shop because it never reported more than four employees on its fringe benefit reporting forms. The administrative law judge, whose decision was affirmed by the Board, found that the union had tended to ignore the employees during its period of representation. The union did not appoint a steward even though the contract gave it the right to do so and the union representatives did not visit the shop to determine the needs of the employees. The Board found that if the union had exercised reasonable diligence, it would have learned that the employer was not paying fringe benefit fund payments for certain employees and was not paying contractually required wages for other employees.

[7] The case came before Circuit Court of Appeals as an appeal from the District Court granting a petition to compel arbitration of a commercial dispute involving a bill of lading.

[8] This case involved a lawsuit brought against an estate executor by a decedent's alleged putative wife.

Cirrincione would have felt indebted to Towsley for his continuing assistance. A sense of indebtedness or even obligation certainly does not rise to the level of coercion that would constitute duress.

In explaining the circumstances of having signed the letters of assent, Cirrincione asserted that while he had been "hesitant," he had felt obligated and had not wanted to make an enemy of Towsley. Cirrincione did not, however, testify that Towsley asked him to sign the letters of assent because of Towsley's assistance to him in passing the Master Electrician's examination. Moreover, while Cirrincione implied that he signed the letters of assent at Towsley's request, he does not actually explain how the letters of assent came to be discussed during his visit with Towsley.

Respondent cites court cases for the proposition that "fraud in the inducement" renders a contract voidable and capable of rescission. Respondent argues that by contrast, "fraud in the execution" induces a party to believe that the nature of his act is something entirely different than it actually is, thus, rendering the contract void from its inception. Citing *Iron Workers Local 25 Pension Fund v. Allied Fence & Security Systems,* 922 F. Supp. 1250, 1259 (E.D. Mich. 1996), Respondent acknowledges: "This defense, however, arises only where a party neither knows, nor has reasonable opportunity to know of the character or essential terms of the proposed contract." The case upon which Respondent relies involved a trust fund action against an employer who had failed to make fringe benefit contributions to funds pursuant to a collective-bargaining agreement. The employer alleged that it signed the collective-bargaining agreement, believing that it was a temporary permit that would allow the employer to perform a "union" job. The Court found that the employer's ample opportunity to review the collective-bargaining agreement before signing it defeated the employer's attempt to rely on a "fraud in the execution" defense. The court noted that any alleged misrepresentation by the union did not significantly undermine the employer's ability to ascertain the true nature of the document provided and that the employer's failure to read the 26-page document did not constitute excusable negligence. I find that in the instant case there is even less evidence that would support a "fraud in the execution" defense. The two letters of assent signed by Cirrincione were one-page documents. The following language was printed double spaced and contained on the first nine lines of each letter:

> In signing this letter of assent, the undersigned firm does hereby authorize Finger Lakes New York Chapter NECA as its collective bargaining representative for all matters contained in or pertaining to the current and any subsequent approved residential (or inside) labor agreement between the Finger Lakes New York Chapter NECA and Local Union 43, IBEW. In doing so, the undersigned firm agrees to comply with, and be bound by, all of the provisions contained in said current and subsequent approved labor agreements. This authorization, in compliance with the current approved labor agreement, shall become effective on the 20 day of August 2002. It shall remain in effect until terminated by the undersigned employer giving written notice to the Finger Lakes New York Chapter NECA and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the applicable approved labor agreements.[9]

Cirrincione admitted that he read the letters of assent. When asked by his attorney what he thought the above language meant, he only replied: "I'm smart when it comes to electrical but when it comes to legal stuff I'm not very smart." He did not, however, recall whether he asked Towsley if he could have an attorney review it. He admitted that after signing the documents, he never consulted an attorney concerning the legal consequences. While Cirrincione testified that he did not understand what the papers were that he was signing, he did not assert that he asked any questions or requested any explanation. There is no dispute that Cirrincione provided his name, address, title, and Federal employer identification number to the Union for the Union's secretary to type the information on the letters of assent. I find it totally incredible that he provided the information to the Union, read the letters, and then signed the letters of assent, and yet had no understanding of what he was signing. Such alleged conduct is totally inconsistent with that of a businessman operating a commercial business enterprise. Accordingly, I find no credible evidence of any fraud in the execution of the contract.

Cirrincione contended that Towsley never told him about the "four-year contract" or that by signing the letters, he could not use nonunion labor. He went on to acknowledge, however, that when he told Towsley that he was just starting his business, Towsley told him that whenever he was ready to hire men, Towsley would help him. Clearly, despite Cirrincione's claim that there was no discussion about hiring procedures pursuant to the letters of assent, his own testimony reflects otherwise.

Overall, I do not find Cirrincione's testimony to be credible. As both counsel for the General Counsel and counsel for the Union point out in their posthearing briefs, Respondent's claim of duress and fraud is suspect when it is first alleged after the Union filed charges and more than 2 years after the alleged intimidation. See *Service Employees Local 32-B-32J (Austin Gardens),* 326 NLRB 1256 (1998). Respondent's untimely assertions appear to be more of an after-thought offered to justify Cirrincione's undisputed actions.

Accordingly, based upon the total record evidence, I find that Cirrincione, on behalf of Respondent, voluntarily and knowingly signed the letters of assent, binding Respondent to the terms of the collective-bargaining agreements. Respondent, thereafter, failed and refused to abide by any of the terms of the agreements in violation of Section 8(a)(5) and (1) of the Union.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. By failing and refusing since August 20, 2002, to adhere to the terms of the June 1, 2002, through May 31, 2003 NECA-Union "residential wiring agreement" and the June 1, 2000,

[9] The underlined wording was typed into the document identified at the bottom as IBEW form 302.

through May 31, 2003 NECA-Union "inside construction agreement" and all successive labor agreements between NECA and the Union, Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In order to remedy the 8(a)(5) and (1) violations, Respondent must comply with the exclusive hiring hall provisions and other terms and conditions of employment in the current NECA residential and inside wiring agreements, and to offer full and immediate employment to those individuals on the Union's out-of-work list who, on and since August 20, 2002, were denied an opportunity to work for Respondent because of its failure and refusal to comply with the hiring hall provisions in *J. E. Brown Electric*, 315 NLRB 620 (1994). Additionally, for the period beginning August 20, 2002, Respondent should make whole employees in the bargaining unit, as well as those employees who were denied the opportunity to work, for any losses suffered as a result of its failure to abide by the applicable NECA inside or residential agreements as provided for in *R. L. Resinger Co*., 312 NLRB 915 (1993), and *Williams Pipeline Co*., 315 NLRB 630 (1994). Respondent should also be ordered to make whole these employees and individuals by making all required fringe benefit contributions that have not been made since August 20, 2002, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979), and by reimbursing the employees and individuals for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1979), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to employees should be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Positive Electrical Enterprises, Inc., Mattydale, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to comply with the hiring hall provisions and the terms and conditions of employment in the current NECA-Union "inside construction agreement" and "residential wiring agreement."

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

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

(a) Comply with the terms and conditions of the current "residential wiring agreement" and "inside construction agreement" between the Union and the Finger Lakes, New York Chapter, National Electrical Contractors Association.

(b) For the period beginning August 20, 2002, make whole its employees in the bargaining unit, as well as those individuals who were denied an opportunity to work, for losses suffered as a result of its failure to adhere to the "residential wiring agreement" and the "inside construction agreement" since August 20, 2002; reimburse them for any expenses ensuing from its failure to make required contributions to the benefits funds; and make whole the benefit trust funds for losses suffered, in the manner set forth in the remedy section of the decision.

(c) Offer full and immediate employment to those hiring hall applicants who were denied the opportunity to work for Respondent since August 20, 2002, because of Respondent's failure to comply with the hiring hall provisions in the "resident wiring agreement" and with Union and the "inside construction agreement" with the Union.

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

(e) Within 14 days after service by the Region, post at its facility in Mattydale, New York, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 20, 2002.

(f) 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 Respondent has taken to comply.

Dated, Washington, D.C. May 17, 2005

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] 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."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT, during the terms of the 2003–2007 inside construction and 2004–2007 residential wiring agreements, repudiate the agreement between the Finger Lakes, New York Chapter of the National Electrical Contractors Association and the International Brotherhood of Electrical Workers, Local Union 43, the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All employees performing electrical work, as described in 'Type of Work Covered by this Agreement' set forth on page one of the 2004–2007 'residential wiring agreement' and in Section 2.07 of the 2003–2007 'inside construction agreement' within the geographic jurisdiction set forth in Article 4.08 of the same agreements between the Union and the Finger Lakes, New York Chapter of the National Electrical Contractors Association.

WE WILL NOT refuse to comply with the hiring hall and other terms and conditions of employment in the "residential wiring" and "inside construction" collective-bargaining agreements with the International Brotherhood of Electrical Workers, Local Union 43.

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

WE WILL comply with all of the provisions of the 2004–2007 "residential wiring agreement" and the 2003–2007 "inside construction agreement" between the Finger Lakes, New York Chapter of the National Electrical Contractors Association and the International Brotherhood of Electrical Workers, Local Union 43, including the wage, fringe benefit, and hiring hall provisions of the agreements.

WE WILL offer full and immediate to any individual who would have been hired through the Union's hiring hall since August 20, 2002 and WE WILL make them whole for any loss of earnings and other benefits they may have suffered by reason of our failure to hire them, with interest.

WE WILL make whole our employees, any individuals who would have been hired through the Union's hiring hall since August 20, 2002, and the appropriate contractual benefit funds for any losses they may have suffered as a result of our failure to adhere to the collective-bargaining agreements in effect between the Finger Lakes, New York Chapter of the National Electrical Contractors Association and the International Brotherhood of Electrical Workers, Local Union 43 since August 20, 2002.

POSITIVE ELECTRICAL ENTERPRISES, INC.