UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

RETRO ENVIRONMENTAL, INC. &
RATH ENTERPRISES, INC. (Alter Egos)
& D&H DEMOLITION, LLC

Joint Employers

and Case 05-RC-183442

CONSTRUCTION AND MASTER
LABORERS', LOCAL 11, A/W
LABORERS' INTERNATIONAL
UNION OF AMERICA

Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner,[1] Construction and Master Laborers' Local 11, affiliated with Laborers' International Union of North America ("Petitioner" or "the Union") seeks to represent the following unit:

> All full-time and regular part-time laborers, including demolition and asbestos removal workers jointly employed by the Joint Employer, Retro Environmental, Inc. ("Retro") and Rath Enterprises, Inc. ("Rath"), alter egos, and D&H Demolition, LLC ("D&H"), but excluding all office clerical employees, managerial employees, professional employees, guards, and supervisors as defined by the Act.

Rath and Retro maintain that they are not a single employer or alter egos. Further, Rath, Retro and D&H, collectively, contend that they are not joint employers of the employees in the petitioned-for unit.

[1] The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act. See Board Ex. 2, ¶ 3.

A hearing was held in this matter on September 12, 15, and 23, 2016. D&H orally argued its position prior to the close of the hearing. Petitioner, Retro, and Rath submitted post-hearing briefs, which I have carefully considered. Based on the entirety of the record, the parties' positions and briefs, and relevant Board law, I find that Rath and Retro are alter egos, and D&H and Rath/Retro are joint employers of the employees in the petitioned-for unit. Accordingly, I am directing an election, the details of which are set forth below in Section IV.

I. Facts

A. D&H Demolition's Operations

D&H provides demolition and environmental remediation services, as well as supplying temporary labor to construction firms performing demolition and environmental remediation services, including asbestos abatement.[2] Over the course of the last two to three years, D&H has provided temporary laborers to both Rath and Retro. Rath hires the employees, and, as more fully explained below, assigns these employees as temporary laborers to Rath and/or Retro.

B. Retro Environmental's Operations

Retro is a construction company providing demolition and asbestos abatement services to private and governmental entities in Maryland, Virginia, and the District of Columbia.[3] Retro has an office and place of business in Sykesville, Maryland. Robert Gurecki is the president and sole owner of Retro, which was created 25 years ago. Retro employs a workforce of approximately 120 individuals, though it is unclear how many laborers Retro employs directly.

When necessary, Retro contracts with other companies for supplemental temporary laborers, including from D&H, among other firms. Generally, Retro field superintendents request the temporary labor directly from labor supply companies, and Gurecki is not involved in

[2] The parties stipulated, and I find, that D&H, a limited liability company with an office and a place of business in New Carrolton, Maryland, is engaged in the business of providing demolition and environmental remediation, including asbestos remediation. In conducting its operations during the 12-month period ending August 31, 2016, Retro performed services valued in excess of $50,000 in states other than the State of Maryland. The parties further stipulated, and I find, that D&H is engaged in commerce within the meaning of Sections 2(6) and 2(7) of the Act. See Board Ex. 2, ¶ 9.

[3] The parties stipulated, and I find, that Retro, a corporation with an office and a place of business in Sykesville, Maryland, is engaged in the business of providing demolition and environmental services to private and governmental entities, including at sites in Washington, D.C. In conducting its operations during the 12-month period ending August 31, 2016, Rath performed services valued in excess of $50,000 in states other than the State of Maryland. The parties further stipulated, and I find, that Retro is engaged in commerce within the meaning of Sections 2(6) and 2(7) of the Act. See Board Ex. 2, ¶ 7.

those requests. He testified that he has not approved such requests. Moreover, Gurecki is uncertain about who at Retro would approve such a request to contract for supplemental labor, if anyone.

In addition to contracting for supplementary temporary labor, Retro leases out supervisors, including to Rath. Gurecki testified, however, that he is uncertain whether Retro leases supervisors to entities other than Rath.

C. Rath Enterprises' Operations

Rath is a construction company providing demolition and asbestos abatement services to private and governmental entities in Maryland, Virginia, and the District of Columbia.[4] Rath's office is located in Washington, D.C. Michael Brown, Gurecki's son-in-law, is Rath's president and lone supervisor. In addition to serving as president of Retro, Gurecki is Rath's vice president. Immediately prior to forming Rath in 2013, Brown was employed by Retro as a project coordinator.

Rath is a certified business entity under District of Columbia law. As such, Rath receives preference points based: 1) on its status as a locally-owned business in Washington, D.C.; 2) on its status as owned by a racial minority, i.e., a disadvantaged business; 3) on its status as a small business; and, 4) finally, on its status as owned by a veteran of the United States Armed Forces. See Pet. Ex. 5. Retro derives none of the delineated preferences.

Brown owns a 60% stake in Rath, while Gurecki owns the remaining 40%. Gurecki acquired his stake in the business in consideration for providing financial capital to Rath approximately one year after its inception. Though he initially denied having done so, Gurecki conceded that he signed in on Rath's behalf at a pre-bid conference organized by the District of Columbia Department of General Services.

Rath directly employs 10-20 laborers, depending on its workload.[5] Like Retro, though, Rath periodically contracts for supplemental temporary labor, including from Retro and D&H.

[4] The parties stipulated, and I find, that Rath, a corporation with an office and a place of business in Washington, D.C., is engaged in the business of providing construction, demolition, and environmental services to private and governmental entities, including at sites in Washington, D.C. In conducting its operations during the 12-month period ending August 31, 2016, Rath performed services valued in excess of $50,000 in states other than the District of Columbia. The parties further stipulated, and I find, that Rath is engaged in commerce within the meaning of Sections 2(6) and 2(7) of the Act. See Board Ex. 2, ¶ 8.

[5] Applicants for employment with Rath must complete a Form I-9 as part of the Rath employment application. This form lists Maria Gurecki as Rath's office manager. See Pet. Ex. 4. It is undisputed that Maria Gurecki is Retro's office manager.

Brown testified concerning the informal nature of Rath's request for temporary labor. Specifically, Brown will simply e-mail, text message, or call a D&H representative, state the number of laborers required, as well as the date, time, and location where the laborers are needed.[6] Thereafter, D&H assigns the requested number of employees to the location requested by Brown.

In his capacity as Rath's lone supervisor, Brown stated that there is no difference in how he supervises D&H employees as opposed to Rath employees. Brown testified that he retains discretion to remove any employee under his supervision for any reasons he would like. Further, Brown testified that supervisors—himself or those leased from Retro—determine the length of employee breaks based on workload. Brown also testified that he directs employees regarding work tasks, and generally instructs employees throughout the workday

D. Relationship Between Retro and Rath

Retro leases both employee laborers and supervisors to Rath. The companies do not have a written agreement setting forth the terms pursuant to which Rath leases laborers from Retro. Rath and Retro are, however, parties to a written agreement setting forth the wage rates to be paid by Rath to Retro for use of Retro's supervisors. This agreement, an hourly rate sheet, is effective through December 31, 2016. See Pet. Ex. 3. The parties stipulated that Rath leases Retro supervisors absent any markup—i.e., the Retro supervisors are leased at cost.[7]

Retro sends invoices to Rath for the cost of leasing Retro supervisors on a calendar-month basis. See Pet. Ex. 6. The Retro invoice sets forth a payment due date of 30 days. Based on date stamps, however—which the parties stipulate represent the dates on which the invoices were paid—Rath frequently submits payment well after the due date. Of the 23 invoices submitted, eight were paid more than 90 days late, and an additional three invoices had not been paid as of the final hearing date. There is no evidence in the record that Rath incurs late fees for untimely payment to Retro.

When Retro supervisors or laborers are requisitioned by Rath, Retro provides equipment for use by employees on the Rath project. Brown testified that Rath is charged for consumable products, but not for use of Retro's equipment (e.g., Sawzall, compression hammer, etc.). Indeed, the employers do not have a written agreement concerning the terms of Rath's use of Retro's equipment.

[6] No evidence of such text messages and/or e-mails was placed into the record.
[7] Tr. 239.

Gurecki and Brown testified that Retro and Rath have never shared office space. Nor do the employers share payroll operations or commingle funds. Gurecki testified that the employers do not share assets (besides tools), and both maintain separate bank accounts. Rath and Retro have separate employee handbooks, personnel policies, and job applications.

E. D&H's Supply of Supplementary Temporary Labor to Retro and Rath

1. The Agreements

Since 2013, D&H has provided Retro with supplemental temporary labor. See Pet. Ex. 1. During 2013 and 2014, D&H and Retro were parties to a written agreement setting the terms under which D&H would supply temporary labor to Retro. See Pet. Ex. 2. Retro and D&H have not executed a written extension of the agreements set forth in Petitioner Exhibits 1 and 2. Nonetheless, Gurecki testified that the parties continue to adhere to the rates specified in those agreements.

D&H has also provided Rath with supplemental temporary labor for approximately two years. Unlike D&H's written arrangement with Retro, however, Brown testified that Rath and D&H have never been parties to a written agreement. Rather, the parties' relationship is governed by an oral agreement establishing the terms under which D&H will supply labor. Brown, however, could not recall the terms of the oral agreement at the hearing. Brown further testified that this oral agreement is the only agreement in place between Rath and D&H.

The record reveals the following process when Rath and Retro, the user employers, seek to contract for labor from D&H, the supplier employer. The user employers request from D&H a specified number of temporary laborers. The number of employees to be assigned is determined by the user employers. The user employers set forth the location, date, and time the D&H employee should report. D&H determines which employees are assigned to the Rath or Retro projects, though both Rath and Retro require that referred employees possess current certifications for work to be performed by Rath or Retro—e.g., asbestos abatement. D&H generally ensures that its employees maintain required certifications. D&H subsequently bills the user employers at the agreed-upon rate. Brown testified that Rath tracks D&H employee hours, and retains copies of D&H employee sign-in sheets for Rath's own records and to compare with received invoices. Brown further testified that he may authorize D&H employee overtime. Ultimately, D&H is responsible for compensating the employees it assigns to the user employers.

Once D&H employees report to the jobsite, they are supervised by Retro, Rath, or Rath-leased supervisors. D&H does not send its own supervisors to jobsites for its employees working

for the user employers.[8] Rather, at least with respect to Rath jobs, referred D&H employees are supervised by Brown or supervisors leased by Rath, including those leased from Retro. Brown testified that he may provide D&H employees with Tyvek suits or protective equipment (e.g., respirators) if the employee arrives at the jobsite without such equipment or, alternatively, Brown may send the employee home.

2. Jobsites

Testimony was provided regarding four jobsites where the petitioned-for employees were working prior to the filing of the petition. The four jobsites are: (1) 2201 Colston Drive, Silver Spring, Maryland ("the Silver Spring Project"); (2) 100 Peabody Street, NW, Washington, D.C. ("the Peabody Project"); (3) Watkins Elementary School, located in Washington, D.C. ("Watkins School"); and (4) Herbert C. Hoover Building, located in Washington, D.C. ("Hoover Building"). A majority of the testimony pertained to the Silver Spring and Peabody Projects.

D&H employee Jose Alvarez testified regarding experiences at the Silver Spring Project and Peabody Project. Alvarez was supervised by Jose Perez, a Retro supervisor, and worked alongside approximately 15 Retro employees and 9 D&H employees.[9] D&H and Retro maintained separate timesheets, but Perez would provide Retro supervisor Jose Guerrero with the timesheets for the D&H employees. Perez informed employees that they were working for Rath on the project—a statement that confused Alvarez because all employees obtained tools from the Retro gang box.[10] Alvarez received direction from Perez. Specifically, Perez instructed employees on which walls to demolish and the tools to be used to perform job tasks (e.g., the Sawzall to cut metal, or the power drill to remove nails). At the Peabody Project, Alvarez was supervised by Retro supervisor Manuel Alvizures.[11] Like Perez, Alvizures informed the laborers that they were Rath employees at this job. Once again, Retro employees and D&H employees worked side-by-side, and worked identical hours. Alvizures directed employees concerning the areas in which they would work, the walls that were to be demolished, and the tools to be used. Further, Alvizures determined start and end times for breaks, and tracked employee work hours to ensure that employees worked 40 hours per week.

Retro employee Elmer Monje corroborated much of Alvarez's testimony. At the Silver Spring Project, Perez directed Monje about which rooms to demolish and the tools to be used to complete his tasks. Monje also testified that all employees working at these projects—including

[8] Tr. 175.
[9] Alvarez's testimony is unclear as to whether Rath employees worked at this jobsite.
[10] Generally, a gang box is a tool box accessed by multiple workers.
[11] Alvarez testified there were approximately 12 D&H employees and 10 Retro employees at the Peabody Project. To Alvarez's knowledge, no laborers directly employed by Rath were at this job. Tr. 38.

those who he believed to be Rath employees—used tools from Retro's gang box. Monje confirmed that Alvizures informed employees that the Peabody Project was a Rath job and Retro employees were being "borrowed" by Rath.

II. Analysis

A. Retro and Rath are Alter Egos

The burden of establishing an alter ego relationship rests with the party asserting the relationship. See *A.D. Conner, Inc.*, 357 NLRB 1770, 1785 (2011). While the determination of whether two entities are alter egos is an analysis most often undertaken in unfair labor practice cases, the Board has considered the issue in representation proceedings. *Elec-Comm, Inc.*, 298 NLRB 705 (1990); *All County Electric Co.*, 332 NLRB 863 (2000). To determine whether two employers are alter egos, the Board considers several factors, including whether they have substantially identical ownership, business purpose, operations, management, supervision, premises, equipment, and customers. *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73, slip op. at 4 (2016). No single factor is determinative, and not all are necessary to establish alter ego status. *Fugazy Continental Corp.*, 265 NLRB 1301, 1301-02 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984). While the Board will consider whether the purpose behind the creation of the suspected alter ego was to evade another employer's responsibilities under the Act, unlawful motivation is not a necessary element of an alter-ego finding. *Id.* at 1302. Further, the Board will examine the degree to which the nominally separate employers maintain an arm's-length relationship in dealings with each other. *Hebert Industrial Insulation Corp.*, 319 NLRB 510, 522 (1995); *Advance Electric*, 268 NLRB 1001, 1002 (1984).

Based on the totality of the record, and in consideration of the above factors, I find that Retro and Rath are alter egos.

1. Common Ownership

Typically, the factor of common ownership is accorded significant weight in the alter ego analysis. *Cofab, Inc.*, 322 NLRB 162, 163 (1988). The Board will find substantially identical ownership where the original and newly-formed companies are owned by members of the same family. See *Kenmore Contracting Co.*, 289 NLRB 336, 337 (1988) (parents and children); *Rogers Cleaning Contractors*, 277 NLRB 482, 488 (1985) (parent and child, and child worked for initial company).

Here, the record reveals significant evidence of substantially identical ownership. Gurecki is the president and sole owner of Retro. He also owns 40% of Rath. Brown, Gurecki's son-in-law—and a former project coordinator for Retro until Rath's inception—owns the remaining 60% of Rath. Thus, Gurecki has a significant ownership stake in both Rath and Retro, and the entities are owned within the same family.

2. Substantially Identical Business Purpose and Operations

Rath and Retro operate identical businesses and work closely together. Both entities are construction companies engaged in the business of demolition and asbestos abatement. Indeed, it appears both entities perform the same work, so much so that employees of each entity are able to work side-by-side performing the same tasks using the same equipment. Moreover, both entities are licensed to provide asbestos remediation, and operate in the same geographic market: Maryland, D.C., and Virginia. See *Island Architectural Woodwork, Inc.*, 364 NLRB slip op. at 4-5 (employees of both companies performed same work using the same equipment that employees of original employer used prior to creation of the second entity).

3. Substantially Identical Management and Supervision

Gurecki contemporaneously serves as Retro's president and Rath's vice president. Additionally, Maria Gurecki—the wife of Robert Gurecki, and Brown's mother-in-law—is listed as Rath's office manager on the Rath employment application.[12] Maria Gurecki currently serves as Retro's office manager, as well.

The record further reveals that Rath and Retro have substantially identical supervision. When Rath requires additional supervision for its own employees or leased employees, Brown customarily utilizes Retro's supervisors. As stated above, Rath receives the services of Retro supervisors at cost, paying only the supervisors' wage rates. Because Rath does not have a benefit plan, this arrangement allows Rath to effectively employ additional supervisors while Retro pays the supervisors' benefits. Monje, a Retro employee, testified that Retro, Rath, and D&H employees were supervised at the Silver Spring and Peabody Projects by Retro supervisors Perez and Alvizures, respectively. Additionally, both Perez and Alvizures informed non-Rath employees that they were working on behalf of Rath at the Silver Spring and Peabody Projects, yet were being supervised by Retro supervision.

[12] Brown testified that his wife mistakenly listed Maria Gurecki as Rath's office manager on the Form I-9 included in the Rath application. This form was correct in all other material respects as it pertains to Rath, including Rath's legal name and mailing address. On balance, I find that the record contains sufficient evidence to conclude that Maria Gurecki is Rath's office manager as well as Retro's office manager.

4. Equipment

It is clear from the record that Retro power tools (e.g., Sawzall, compression hammer, etc.) are utilized on Rath projects. Indeed, both Monje and Alvarez testified that they retrieved work tools from the Retro gang box being used on Rath's Silver Spring and Peabody Projects. However, it is not clear from the record that Rath similarly provided work tools for its own employees, or employees leased from Retro or D&H. Moreover, Brown conceded that Retro provides equipment on projects for which its personnel are being leased, and there is no written agreement between the parties setting forth the terms of Rath's lease or use of Retro's equipment.

5. Customers

The record does not establish whether Rath and Retro share customers, and, if so, to what extent.

6. Premises

There is no record evidence establishing that Retro and Rath share, or have shared, a common office or premises.

7. Motivation in Forming Rath

There is insufficient evidence to conclude that Rath was created to evade any obligations imposed upon Retro by the Act. Rather, Petitioner seemingly argues that Rath was created so that Gurecki and Retro could procure additional projects by virtue of Rath's status as a Certified Business Entity, which provides Rath with a competitive advantage on projects bid by the District of Columbia government. Although Petitioner's argument is a possibility, it is not established in the record. Thus, I do not find there was an evasive motivation in Rath's creation.

8. Retro's Financial Control Over Rath

The Board also examines the amount of control the original employer asserts over the purported alter ego employer. In determining whether the original employer maintains substantial control over the purported alter ego employer, the Board focuses on the financial relationship between the employers. *Island Architectural Woodwork*, 364 NLRB slip op. at 5, citing *First Class Maintenance Service, Inc.*, 289 NLRB 484, 485 (1988). The Board has found the requisite substantial control in cases where the financial dealings demonstrate "a significant

lack of an arms-length relationship." *SRC Painting, LLC*, 346 NLRB 707, 721 (2006); *Vallery Electric, Inc.*, 336 NLRB 1272, 1275 (2001), enfd. 337 F.3d 446 (5th Cir. 2003).

Here, the record includes convincing evidence that Retro exerts substantial financial control over Rath because Retro and Rath do not maintain an arm's-length business relationship. One year after Rath was created, Retro, through Gurecki, provided Rath and Brown with financial capital in an amount sufficient to warrant Brown surrendering a 40% stake in Rath to Gurecki.[13] See *El Vocero De Puerto Rico, Inc.*, 357 NLRB 1585, 1605 (2011) (original company's provision of financial capital to new company is evidence of financial control). While Retro sends invoices to Rath for use of Retro personnel, these invoices are suggestive of a façade of arm's-length dealing, rather than legitimate transactions between independent entities. Rath utilizes Retro's supervisors with no markup to Rath. Thus, Retro derives no economic benefit from its leasing, at cost, of its supervisors to Rath.[14] Moreover, Rath and Rath-leased employees use Retro power equipment free of charge when Retro supervisors are overseeing Rath employees.[15] Finally, Retro has permitted Rath to repeatedly submit untimely payments—often in excess of 90 days—for Rath's leasing of Retro personnel, with no financial consequence to Rath. I find that this evidence sufficiently establishes that Rath and Retro are not operating at arm's length.

Based on the foregoing, I find that the record establishes that the entities have substantially identical ownership, business purposes, operations, management, supervision, and equipment.[16] While I do not find that Retro formed Rath to evade its obligations under the Act, this is not dispositive. Moreover, in light of the evidence establishing that Rath and Retro do not maintain an arm's-length business relationship, I find that the record establishes that Retro maintains substantial financial control over Rath. Accordingly, I find that the totality of the evidence shows that Retro and Rath (hereinafter "Rath/Retro," collectively) are alter egos.

[13] Though Brown stated that this was a loan, and is still in repayment, neither Brown nor Gurecki testified to the amount of this loan nor did either produce a written document setting forth the repayment terms.
[14] Not only does this leasing arrangement not result in an economic benefit to Retro, it arguably would be to Retro's detriment—if its supervisors are working under a lease arrangement with Rath, then Retro does not have the advantage of its own supervisors' services at that time.
[15] Indeed, the parties have no agreement setting forth the terms of Rath's use of such power equipment.
[16] I also note that, on the first hearing date, Rath and Retro were to be represented by the same law firm, which is a factor weighing in favor of a finding that two entities are alter egos. *Sobeck Corp. & Roof Pro, Inc.*, 321 NLRB 259, 267 (1996). Indeed, the same law firm attempted to file a Statement of Position on behalf of both Rath and Retro. This Statement of Position was rejected as untimely, and, thus, is not a part of the hearing record. See Tr. 79-80.

B. Rath/Retro are Joint Employers of the Petitioned-for Unit with D&H

Two or more entities will be found to be joint employers of a single workforce "if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 15 (2015). A joint employer relationship may be established by showing that the putative joint employer has authority over essential terms such as "hiring, firing, discipline, supervision, [or] direction," as well as "wages and hours." *Id.* Other examples of control over mandatory terms and conditions of employment found probative by the Board include dictating the number of workers to be supplied; controlling scheduling and overtime; and assigning work and determining the manner and method of work performance. *Id.* (internal footnotes omitted).

The employers admit that each of them is an "employer" within the meaning of Section 2(2) the Act, and I find that each is an employer within the meaning of the common law. Additionally, for the reasons set forth below, I find that Rath/Retro and D&H share and co-determine essential terms and conditions of employment for the employees in the petitioned-for unit. Accordingly, Petitioner has established that Rath/Retro and D&H are joint employers of the petitioned-for unit.

Recently, the Board, applying *BFI Newby Island Recyclery*, held that Retro and Green JobWorks, another of Retro's temporary labor suppliers were joint employers. *Retro Environmental, Inc./Green JobWorks, LLC*, 364 NLRB No. 70, slip op. at 3-4 (2016). There, Green JobWorks, the supplier employer, hired, trained, certified, assigned, and compensated employees working on projects for Retro, the user employer. For its part, Retro alone determined the number of employees to be assigned to one of its jobs. Retro determined employee work schedules, and length of breaks. Further, Retro supervised and directed the Green JobWorks employees' day-to-day activities at the jobsite. Finally, though it had not frequently done so, Retro retained the unqualified right to discontinue use of employees supplied by Green JobWorks.

The facts underlying the Board's decision in *Retro/Green JobWorks* are closely analogous to the facts of this case. D&H hires, trains, certifies, assigns, and compensates employees it supplies, upon request, to Rath/Retro. Rath/Retro requires that D&H-referred employees possess and maintain required certifications needed to perform asbestos abatement tasks. Rath/Retro exclusively determines the number of employees to be assigned by D&H, as well as the dates, locations, and hours of the assignment. At the project sites, the Rath/Retro supervisors exclusively determine the nature and sequence of work, oversee the work, and direct the day-to-day activities of the D&H employees; indeed, D&H stipulated that its supervisors play

no role in the supervision of D&H-supplied employees working at Rath/Retro jobsites. The Rath/Retro supervisors determine the start and end time for breaks, and are responsible for tracking employee hours. Though Brown does not recall having disciplined a D&H employee, he testified that he would be able to send home a D&H employee for any reason. Further, I find that much of the job equipment necessary to perform the assigned work to be performed by D&H employees is provided by Rath/Retro, and used by Rath/Retro and D&H employees alike.

The totality of the record demonstrates that both Rath/Retro and D&H are charged with oversight of different areas of responsibility in their joint relationship. In conjunction with one another, Rath/Retro and D&H control all of the employees' terms and conditions of employment. Thus, Rath/Retro and D&H "share or codetermine the employees' terms and conditions of employment," and, thus, I find that Rath/Retro and D&H are joint employers of the employees in the petitioned-for unit.

III. Conclusions

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act. The Petitioner claims to represent certain employees of the Joint Employer, and the Joint Employer declines to recognize the Petitioner.

3. Retro Environmental, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

4. Rath Enterprises, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. D&H Demolition, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

6. Retro Environmental, Inc. and Rath Enterprises, Inc. are alter egos.

7. Retro Environmental, Inc. and Rath Enterprises, Inc., alter egos, and D&H Demolition, LLC are joint employers within the meaning of the Act of the employees in the petitioned-for unit.

8. A question affecting commerce exists concerning the representation of certain employees of the Joint Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

9. The following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time laborers, including demolition and asbestos workers, jointly employed by Retro Environmental, Inc. and Rath Enterprises, Inc., alter egos, and D&H Demolition, LLC, excluding office clericals, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

IV. Direction of Election

The National Labor Relations Board will conduct a secret ballot election by mail among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Construction and Master Laborers' Local 11, a/w Laborers' International Union of North America (LIUNA).

A. Election Details

Based on the parties' stipulation, and my own determination, the election will be held by mail. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 5, Bank of America Center, Tower II, 100 S. Charles Street, Ste. 600, Baltimore, MD 21201, on December 5, 2016 at 3:00 p.m. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will automatically be void.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the National Labor Relations Board by calling the Baltimore Regional Office collect at (410) 962-2219 by no later than 4:45 p.m. on December 12, 2016 in order to arrange for another mail ballot kit to be sent to that employee.

The mail ballots will be counted at the Baltimore Regional Office of the National Labor Relations Board, Region 5 at 3:00 p.m. on December 27, 2016. In order to be valid and counted,

the returned ballots must be received in the Baltimore Regional Office of the National Labor Relations Board, Region 5 prior to the counting of the ballots.

B. Voting Eligibility

I also find that, for eligibility purposes, it is most appropriate to use the *Daniel/Steiny* formula for employees working in the construction industry. The employers do not dispute that they operate in the construction industry. D&H provides temporary labor to various construction companies, providing demolition and asbestos abatement laborers to client construction companies, including Retro and Rath. For their parts, Retro and Rath are construction companies engaged in the business of providing demolition and asbestos abatement services to private and government entities. The construction industry eligibility formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961), and *Steiny & Co.*, 308 NLRB 1323 (1992) applies to all employees in the construction industry. In *Steiny*, the Board held that the construction industry eligibility formula applies to all construction industry elections unless the parties stipulate not to use it. *Steiny*, supra at 1327-28 and fn. 16. Accordingly, I find, and the parties agree, that the *Daniel/Steiny* formula is applicable to this case.

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date, or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the

election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Joint Employer must provide the Region and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Region and the parties by **TWO business days after the date of issuance**. The list must be accompanied by a certificate of service showing service on all parties. **The Regional office will no longer serve the voter list.**

Unless the Joint Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-April-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties name in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Joint Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Joint Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Joint Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Joint Employer must also distribute the Notice of Election electronically to those employees. The Joint Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the non-distribution of notices if it is responsible for the non-distribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

Finally, I find, consistent with the position of the parties at the hearing, that Notices shall be posted in both English and Spanish.

V. Right to Request Review

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: November 18, 2016

(SEAL)

/s/ Charles L. Posner

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