UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re Construction Service Corporation, a/k/a CSC Electric,	Case No. 04-68847 Chapter 7 Hon. Marci B. McIvor
Debtor. _____/	

OPINION SUSTAINING IN PART AND OVERRULING IN PART TRUSTEE'S OBJECTIONS TO CLAIMS ONE AND TWO

This matter came before the Court on the Trustee's Objections to claim number one, filed by the International Brotherhood of Electrical Workers Local 58, in the amount of $304,740.50, and claim number two, filed by the International Brotherhood of Electrical Workers Local 58 Fringe Benefits Fund, in the amount of $10,000.00. The Trustee contends that the claims are, in part, duplicative, and if allowable at all, are not entitled to the priority status sought by Claimants. An evidentiary hearing was held on November 13, 2006. For the reasons set forth in this Opinion, claim one is allowed as a general unsecured claim, but is subordinated to other general unsecured claims. Claim two is allowed as a general unsecured claim for benefits owed on employees performing covered employment prior to July 15, 2004, and a priority claim for benefits owed for July 15, 2004 to October 13, 2004.

I. Statement of Facts

Debtor Construction Service Corporation, a Michigan corporation owned by Tod Shull, began operating as an electrical contractor in 1999. While it initially operated as a non-union employer, it became a party to a collective bargaining Agreement ("CBA") with the International Brotherhood of Electrical Workers Local Union 58 (hereinafter

"Local 58" or "Union") on January 6, 2002. (Trustee's Ex. 2).[1] The record indicates that Mr. Shull took Debtor into the Union reluctantly.[2]

The Union's Articles of Agreement and Working Rules (hereinafter "Agreement" or "working rules") placed specific obligations on both the Debtor and the Union. [3] Under Section XII of the working rules, the Union became "the sole and exclusive source of referral of applicants for employment." Debtor was thus required to obtain all of his employees from the union hall. Debtor was permitted to hire employees outside of the union hall, but only when the Union was "unable" to provide employees:

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[1]Specifically, in January 2002, Debtor signed a letter of assent approving a labor agreement authorizing Southeastern Michigan Chapter of the National Electrical Contractors Association, Inc. (NECA) as its collective bargaining representative for all matters concerning an inside labor agreement between the Southeastern Michigan Chapter of NECA, Inc. and the International Brotherhood of Electrical Workers, Local Union 58. By doing so, the debtor agreed to be bound to the articles of Agreement and Working Rules for Local Union No. 58 IBEW dated June 17, 2001 - June 26, 2004.

[2]With respect to Debtor's decision to sign the letter of assent, Mr. Shull testified that Debtor was picketed by the Union on several occasions and the Union made "improper accusations that we did not pay proper wages and fringes, which was untrue." In the winter of 2002, Debtor obtained a sizeable contract with the Goodrich School District, and the Union said it was "going to go to the general contractor and have that work pulled from us if we didn't sign their agreement." Because Debtor had more than 20 employees at that point, he testified that he "couldn't take that chance. . .". (Tr. at 91).

It appeared that Mr. Shull was not eager to testify. When asked if he was uncomfortable testifying, he replied, "[a] little bit, but it's the right thing to do[.]" (Tr. at 89-90). It should be noted that Mr. Shull testified at the hearing under subpoena. (Tr. at 89).

[3]The Articles of Agreement and Working Rules initially applicable to Debtor were effective from June 17, 2001 through June 26, 2004. (Trustee's Ex. 2). The work rules applicable after June 26, 2004 were effective from June 27, 2004 to June 27, 2007. (Creditor's Ex. A). Apart from changes in the wage and fringe benefits rates, the two sets of working rules are substantially similar.

> If the registration list is exhausted and the Union is unable to refer applicants for employment to the Employer within 48 hours from the time of receiving the Employer's request, Saturdays, Sundays and holidays excepted, the Employer shall be free to secure applicants without using the referral procedure, but such applicants, if hired, shall have the status of 'temporary employees.' The Employer shall notify the Business Manager promptly of the names and Social Security numbers of such temporary employees, and shall replace such temporary employees as soon as registered applicants for employment are available under the referral procedures.

Article XII (Trustee's Ex. 2; Creditor's Ex. A). It appears that some of Debtor's employees joined the Union when Debtor signed on to the Agreement in order to keep working for Debtor. (Tr. at 99).

Under Article VIII of the working rules, Debtor became obligated to make regular payments to the Union's fringe benefits funds. Debtor was required to submit regular payroll reports to the funds. Debtor was also required to post a bond ensuring timely payment of the contributions. Article VIII states, in part:

> **Sec. 1** BENEFIT TRUSTS. The Employer hereby agrees to adopt and be bound by the trust agreements establishing the fringe benefit funds described in paragraph[s A through K] here below. [These include, among other things, an insurance fund, a vacation fund, and a pension plan].
> . . .
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> **Sec. 6** (A) All Employers who are now or may during the period of this Collective Bargaining Agreement become parties to, bound by or participate in any one or more of the Employee Benefit Funds established by the parties hereto shall within ten (10) days of becoming parties to, bound by, or participants in any such Funds, deliver to the Trustees of the Electrical Workers' Insurance Fund, the receiving Trust, a surety bond, bonds, letter of credit, or cash in an amount or amounts as set forth in the schedule below. . . The bond shall be conditioned so that in the event the Employer fails to make the contribution due by it to any one or more of said Funds when the same are due and payable without further notice or demand, the surety or corporate obligator shall be required to make payment to the Trustees of such Fund or Funds in the amount then due

> and payable including not only the amount of the contribution as determined by the terms of this Agreement but also any reasonable interest, late charge or other charge levied and assessed by such Trustees.

Article VIII (Trustee's Ex. 2; Creditor's Ex. A).

Under the working rules, fringe benefit contributions are calculated, in part, based on the number of hours an employee spends doing work specifically defined as "covered" by the contract. An employer is required to make fringe benefit funds contributions for every employee who does "covered" work, whether that employee is a member of the union or not. (Tr. at 24-25).[4] Even a temporary employee, who may be a non-union employee, is covered by the terms of the Agreement.

The working rules include grievance procedures for settling disputes between the Union and employers. Article I, section 4 states in part:

> (A) There shall be a Labor-Management Committee ["LMC"] of three (3) representing the Union and three (3) representing the Employers. It shall meet regularly at such stated times as it may decide. . .
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> (B) All grievances or questions in dispute shall be adjusted by the duly authorized representatives of each of the parties to this Agreement. In the event that these two are unable to adjust any matter within 48 hours, they shall refer the same to the Labor-Management Committee.

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[4]As explained in the Funds' post-hearing brief:

> The CBA requires an Employer to pay into the various employee benefit trust funds identified in the CBA either "for each hour worked by all employees covered under the terms of this Agreement" (for the "hourly" funds i.e. the Insurance Fund, the Pension Fund, the Supplemental Unemployment Benefit Fund, the Annuity Fund, the Training Fund and the National and Local Labor-Management Cooperation Funds) or "for each employee working under the terms of this Agreement" (for the Vacation Fund and the NEBF).

Funds' Post-Hearing Brief at 4. *See also* working rules Article VIII.

> (C) All matters coming before the Labor-Management Committee shall be decided by a majority vote. . .
>
> (D) Should the Labor-Management Committee fail to agree or to adjust any matter, such shall then be referred to the Council on Industrial Relations for the Electrical Contracting Industry for adjudication. The Council's decision shall be final and binding.
> . . .

(Trustee's Ex. 2; Creditor's Ex. A). Article I, section 5 requires that grievances be filed "within 21 calendar days from the time of the alleged violation", but expressly excludes grievances for "delinquencies on Fringe Benefit Funds" from the 21 day limitation.

Under Article I of the working rules, either party could terminate the Agreement by way of written notice. Specifically, Article I, section 2 of the working rules states:

> (A) Either party or an Employer withdrawing representation from the Chapter or not represented by the Chapter, desiring to change or terminate this Agreement must provide written notification at least ninety (90) days prior to the expiration date of the Agreement or any anniversary date occurring thereafter.

(Trustee's Ex. 2; Creditor's Ex. A. See also Tr. at 48).

Throughout the first part of 2002, Debtor's relationship with the Union appears to have been relatively untroubled. By late 2002, Debtor's relationship with the Union started to deteriorate. Debtor was apparently experiencing difficulties on a project with a school district. (Tr. at 107, 145-146). Around September, 2002, Debtor fell behind on contributions to the fringe benefit funds (Tr. at 144) and the Union filed grievances against Debtor. The exact nature of these initial grievances is unclear. However, Shull testified that he attended the LMC hearings for the initial grievances and felt that "[the Union] didn't want to hear what I had to say and just did what they wanted to do". (Tr.

at 103).[5]

Between May 5, 2003 and December 2, 2003, the Union filed 24 grievances against Debtor.(Trustee's Ex. 4).[6] The grievances (which covered several different projects) alleged violations of the following articles of the working rules: Article III, section 1 (employer must employ at least one journeyman and cannot act in capacity of non-working foreman), Article VI, section 1 (prohibition on assigning electrical work to non-union employee), Article V, section 2 (employees not hired in accordance with Article VII's wages, hours and working conditions), Article XI, section 13 (ratio of apprentices to journeymen), and Article XII, section 1 (Union shall be sole source of employee referrals). (Trustee's Ex. 4).

As required by the working rules, each of the grievances was submitted to the LMC for determination. Of the five LMC grievance hearing dates (June 19, 2002, August 21, 2003, October 8, 2003, December 11, 2003 and February 25, 2004), Debtor sent a representative (its principal, Tod Shull) to only one hearing (February 25, 2004)(Minutes of LMC meetings, Trustee's Ex. 5). The LMC found Debtor guilty as charged in each grievance and issued written decisions to Debtor regarding its findings. (*See* decision letters from LMC to Debtor dated June, 20, 2003, August 27, 2003, October 13, 2003, and March 1, 2004, attached to Proof of Claim, Trustee's Ex. 1).

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[5]Shull testified that the fringe benefit payments were late because there were issues between Debtor and the school district regarding liens and joint checks. (Tr. at 103, 145-46).

[6]These are the grievances giving rise to claim one.

While the LMC's letters informed Debtor that it was guilty as charged in each grievance, the letters did not compute or specify a dollar amount of damages owed to either the Union or the Fringe Benefit Funds. The damages were specified in terms of how many days and/or hours of wages and fringe benefits were owed (e.g. "Pay two days wages and fringe benefits (16 hours) in a form and manner acceptable to the local union.") Debtor did not seek to vacate the LMC's decisions. (Tr. at 126, 128).[7]

Notwithstanding Shull's decision not to contest the grievances at the LMC hearings, Shull's testimony discloses his belief that the grievances were unfounded, inaccurate, and largely a result of the Union's refusal to refer employees to Debtor. (Tr. at 92-109). Shull testified that starting in mid-2003, the Union routinely refused to send employees to Debtor's job sites (Tr. at 97) and/or removed employees from the job sites (Tr. at 98-99, 134-35), making it impossible for Debtor to complete jobs without violating the work rules. Shull indicated that Debtor was routinely forced to run jobs with fewer employees than required by the work rules and/or hire non-union employees. Shull admitted that Debtor did not comply with the temporary worker provision of the working rules in hiring outside of the hall (Tr. at 137). He also testified that the Union's business agent was routinely visiting work sites and was aware of who was working on Debtor's projects. (Tr. at 106-107). Debtor had approximately 20

[7]When asked why Debtor did not appear and dispute the grievances before the LMC, Shull indicated that in light of what had happened at the initial grievance proceedings, he chose not to attend the later hearings. (Tr. at 104; Tr. at 127-128). At some point, the timing is unclear, Debtor met with a local attorney. His decision not to dispute the grievances through the LMC appears to be based, in part, on the advice of counsel. The advising attorney was not a labor lawyer. (Tr. at 126-28).

employees at the time it signed the Agreement in 2002. By mid-2003, Debtor was down to 4 or 5 employees. (Tr. at 107).

According to Shull's testimony, the Union refused to refer workers to Debtor's job site in the summer of 2003 because Debtor was behind on fringe benefits contributions. By way of example, in explaining the circumstances surrounding a grievance dated August 4, 2003 (which alleged that the job was not properly staffed as required by the work rules), Shull indicated that he "basically begged them [the Union] to get people there; that we had a job to start. There was no way we were going to perform it with two people."[8] However, when he called the union hall, he was told that "they would let the members know, but they doubt that they would refer anybody because they didn't want to put them into a situation where their benefits were not going to get paid." (Tr. at 98). This continued throughout mid-to-late 2003. Shull testified that each time the Union's business agent visited a job site to ask what was going on, Shull called the union hall to request workers. (Tr. at 130). Union workers were not sent to Debtor's job sites.

The Union's business manager, Gary Hellmer, testified that he could not remember whether the Union refused to send employees to Debtor's job sites. (Tr. at 70-71). He went on to state that Debtor never filed any complaints against the Union, nor did it ask for records relating to referrals. (Tr. at 71-75). According to Hellmer, if the Union had refused to send employees, Debtor's remedy was found in Article XII's

[8]Grievance I-12-03 (Trustee's Ex. 4) was filed for alleged violations of the working rules at a 46,000 square foot Circuit City store under construction in Auburn Hills, MI.

temporary worker provision– a provision applicable when the Union's "registration list is exhausted and the union is unable to refer applicants." (Tr. at 79).

Shull contends that Debtor was current (or "close to current") on fringe benefit contributions through July, 2003. (Tr. at 117, 146-47).[9] Shull admitted that Debtor did not file any fringe benefits reports with the Union's fringe benefit funds after July, 2003. (Tr. at 129, 147-49). From July, 2003 until the time the Debtor stopped operating, no fringe benefits reports were filed. (Tr. at 129). When asked why Debtor stopped submitting reports, Shull stated that there were no Union members left:

> Because the union pulled the journeymen people that we had, placed them with another shop, so those people obviously weren't going to be paid anymore. The other members were told that they were going to lose their benefits if they stayed with the business and that they would be blackballed or not allowed to go back to the hall. I hate to use that term. It's just something that runs around, but they were told that they would not be union members. They were no longer union members. . . [.]
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> After that point. . . there were no IBEW members, quote, unquote, that were left to be paid through the hall.

(Tr. at 148-49, 151).

In the winter of 2004, Debtor did not engage in any electrical work. (Tr. at 110). Debtor negotiated a contract to do electrical work for Circuit City in Brighton, Michigan in the summer of 2004. (Tr. at 110). Debtor did not, however, seek referrals from the union hall. (Tr. at 110 and 121-22). According to Shull, in April, 2004, he met "with the hall. . . one more time to try and work this out, and basically their position was that we owed all this money. The company owed all this money; that we needed to come

[9]While the timing is unclear, at some point, Debtor relinquished a $45,000 bond to pay fringe benefit contributions. (Tr. at 135, 146).

forward with it or they would just . . . they would basically do whatever they needed to do to . . . shut the company down. . .” (Tr. At 110-111). After this meeting, Shull indicated that Debtor no longer considered itself bound by the working rules.” (Tr. at 138).[10] Neither party, however, terminated the Agreement in writing. (Tr. at 78-79, 116).

Shull testified that Debtor paid wages and health insurance benefits to every employee who worked on the Circuit City job in 2004. (Tr. at 117).[11] While the employees were not union workers, the wages paid were “very close” to the levels specified in the working rules. (Tr. at 140.) Shull testified that Debtor did not make any fringe benefit funds contributions for those employees in 2004. (Tr. at 121 and 124).

On September 24, 2004, the Union filed a complaint against Debtor and Tod Shull in Federal District Court seeking a judgment based on the LMC awards (which the Union refers to as “arbitration” awards) in the amount of $304,740.50. The complaint did not break down the damages between wages owed to the Union and contributions owed to the Fringe Benefit Funds. A judgment was not entered and the case was stayed by Debtor’s voluntary chapter 7 bankruptcy petition filed on October 13, 2004.

On October 21, 2004, the Fringe Benefit Funds filed claim two in the amount of $10,000, an estimated claim based on fringe benefits contributions allegedly owed for

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[10]This belief was based, in part, on consultation with a local attorney--an attorney who did not specialize in labor law. (Tr. At 116, 127-28).

[11]This was the Debtor’s only contract in 2004. (Tr. at 139-140).

2004. The entire amount of claim two is designated as a priority claim.[12] On January 3, 2005, the Union filed claim one in the amount of $304,740.50 (of which $120,000 is designated as a priority claim for wages under 11 U.S.C. § 507(a)(3) and employee benefit contributions under 11 U.S.C. § 507(a)(4)). This amount represents the damages allegedly owed to the Union pursuant to the 24 grievances filed against Debtor between May and December, 2003. Other claims totaling approximately $895,000 were filed by trade creditors, the Internal Revenue Service, the Michigan Department of Treasury, prior counsel for Debtor, and IBEW Local 948. On July 17, 2006, the Trustee filed Objections to claims one and two.

The Trustee makes several arguments in support of the objections. With respect to claim one, the Trustee argues that the Fringe Benefit Funds and the Union are two separate entities. While the Union may be entitled to collect unpaid wages, only the Fringe Benefit Funds may collect unpaid fund contributions. To the extent claim one seeks money owed to the Fringe Benefit Funds, the claim should be disallowed. The Trustee asserts that the LMC awards do not constitute binding arbitration; thus this Court is not bound by its findings regarding liability or damages.[13]

To the extent that the Court finds that the Union has a valid claim, the Trustee asserts that the claim should be subordinated to other general unsecured creditors as a

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[12]The Fringe Benefit Funds seek to amend the amount of the claim to $73,891.81 priority and $126,321.84 general unsecured, based on an audit of Debtor's payroll records.

[13]The Trustee raises several substantive challenges to the LMC's findings: timeliness, inaccuracy, duplicate grievances, and bad faith. He also notes that the findings do not specify a dollar amount for damages.

matter of equity or because the damages are a penalty pursuant to 11 U.S.C. §§ 510(c) and § 726.

With respect to the Fringe Benefit Funds' claim (claim two), the Trustee contends that the original claim was an unsubstantiated estimate which the Funds are tardily attempting to amend. Moreover, the Trustee argues that the Agreement was abandoned by the Union in 2003; thus, no fringe benefit contributions are owed for 2004. Alternatively, if the Agreement was in place in 2004, the Trustee asserts that the Funds cannot pursue payment of contributions because the Union failed to file any grievances against Debtor in 2004.[14]

The Trustee objects to the payment of these claims arguing that the Union acted in bad faith. The Trustee contends that payment of the claims filed by the Union and the Funds effectively favors a creditor who is profiting by its own misconduct over other general unsecured creditors-- specifically, suppliers who actually provided materials to Debtor. According to the Trustee, it is inequitable to distribute the limited assets of the estate to the Union when the money paid to the Union will not be distributed to any individual who actually worked for Debtor. As weighed against the claims of other unsecured creditors who provided Debtor with goods and services, payment to the

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[14]The Union filed a grievance against Debtor on September 8, 2004 for violations of the referral procedure allegedly occurring at the Circuit City, Brighton, Michigan site on August 20, 2004. The grievance alleges that there were nine non-union electricians working on the project and it seeks wages and fringe benefits for all hours worked. At an LMC hearing on October 27, 2004, Debtor was found to be violation of the Agreement. Debtor was notified by letter dated November 4, 2004 that it owed 4000 hours of wages and benefits as a result of the violations. (Trustee's Ex. 6). Enforcement of the grievance was stayed by the filing of Debtor's petition.

Union is unfair.

The Union contends that claim one is based on the findings of the LMC– findings which it believes are final and binding on this Court. Those findings resulted in damages for breach of contract and are not penalties within the meaning of 11 U.S.C. § 726(a)(4). The Union also argues that its alleged failure to refer workers to Debtor's projects did not excuse Debtor's obligation to make timely fringe benefit contributions to the Funds, nor were the Funds required to file grievances in order to collect contributions owed. Thus, the Fringe Benefit Funds' claim is valid and is entitled to priority status.

II. Jurisdiction

Bankruptcy courts have jurisdiction over all cases under title 11 and all core proceedings arising under title 11 or arising in a case under title 11. *See* 28 U.S.C. §§ 1334 and 157. Core proceedings include allowance or disallowance of claims. 11 U.S.C. § 157(b)(2)(B).

III. Analysis

A. Law on Allowance of Claims

The Bankruptcy Code permits a creditor to file a proof of claim either executed by the creditor, or by the creditor's authorized agent. 11 U.S.C. § 501(a); Fed. R. Bankr. P.3001(b). A proof of claim is deemed allowed unless an objection is filed. 11 U.S.C. § 502(a). If an objection is filed, a hearing is held by the bankruptcy court to determine whether the claim should be allowed or disallowed and the amount of the claim. 11 U.S.C. § 502(b); *See Pension Benefit Guar. Corp. v. Belfance*, *(In re CSC*

Industries, Inc.), 232 F.3d 505, 509 (6th Cir. 2001) ("bankruptcy courts have the statutory authority to determine the *allowability* and *amount* of" claims).

During the claims allowance process, the burden of proof shifts between the parties. Initially, a creditor bears the burden of establishing its claim. *See* Fed. R. Bankr. P. 3001(f). If a claim is based on a writing, a copy of the writing is to be filed along with the proof of claim. Fed. R. Bankr. P.3001(c). Once a creditor properly executes and files a proof of claim in accordance with the Federal Rules of Bankruptcy Procedure, its proof of claim is considered "*prima facie* evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f); *In re Stoecker*, 5 F.3d 1022, 1028 (7th Cir. 1993); *Ashford v. Consolidated Pioneer Mortgage, (In re Consolidated Pioneer Mortgage*), 178 BR. 222 (B.A.P. 9th Cir. 1995). Generally, courts have held that when a proof of claim fails to comply with the requirements of Rule 3001(c), the claim will not be considered *prima facie* valid as to the claim or amount. *See In re Henry*, 311 B.R. 813, 817 (Bankr. W.D. Wash. 2004) (citations omitted).

If a party objects to the claim, the objecting party carries the burden of going forward with evidence to overcome the *prima facie* validity and amount of the claim. *See In re Dow Corning Corp*., 250 BR. 298, 321 (Bankr. E.D. Mich. 2000) (citing *Juniper Dev. Group v. Kahn*, 993 F.2d 915, 925 (1st Cir. 1993) and *In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991). If the objecting party produces evidence to refute at least one of the allegations essential to the claim's legal sufficiency, the burden of persuasion shifts back to the claimant. *Id*. (quoting *In re Allegheny Int'l, Inc*., 954 F.2d 167, 173-74 (3d Cir. 1992). The claimant ultimately bears the burden of proving the

validity of the claim by a preponderance of the evidence. *Id*.; *accord In re Hollars*, 198 BR. 270, 271 (Bankr. S.D. Ohio 1996).

B. Equitable Subordination of Claims

11 U.S.C. § 510 (c) of the Bankruptcy Code provides:

> Notwithstanding subsection (a) and (b) of this section, after notice and a hearing, the court may –
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> > (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or
> >
> > (2) order that any lien securing such a subordinated claim be transferred to the estate.

"Congress did not identify what the 'principles of subordination' might be because it intended that the courts would be allowed to continue to develop the doctrine. *See United States v. Noland*, 517 U.S. 535, 539(1996). It is clear, however, that equitable subordination must be 'justified by particular facts,' *Id*., 517 U.S. at 540, so that the determination must be made on a case by case basis." *In re White Trailer Corp.*, 266 B.R. 390, 393 (Bankr. N.D. Ind. 2000).

The legal standard for establishing equitable subordination was set forth by the U.S. Supreme Court in *U.S. v. Noland*, 517 U.S. 535 (1996). There are three conditions which must be shown by a preponderance of the evidence to justify the application of equitable subordination:

(1) The claimant must have engaged in some type of inequitable conduct;

(2) The misconduct must have resulted in injury to the creditors of the bankrupt, or conferred an unfair advantage on the claimant; and

(3) Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Code.

Id. at 538 (*citing Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692 (5th Cir. 1977). *See also First Nat'l Bank of Barnesville v. Rafoth (In re Baker & Getty Financial Services, Inc.*, 974 F.2d 712, 717-718 (6th Cir. 1992).

As explained by the Sixth Circuit,

> The legal standard in applying this test varies depending on whether the creditor is an insider or a non-insider. . . The primary distinctions between subordinating the claims of insiders versus those of non-insiders lie in the severity of the misconduct required to be shown, and the degree to which the court will scrutinize the claimant's actions toward the debtor or its creditors. Where the claimant is a non-insider, egregious conduct must be proven with particularity. It is insufficient for the objectant in such cases merely to establish sharp dealing; rather he must prove that the claimant is guilty of gross misconduct tantamount to 'fraud, overreaching or spoliation to the detriment of others.' Where the claimant is an insider, his dealing with the debtor will be subjected to more exacting scrutiny.

In re Baker & Getty, 974 F.2d at 718 (citation omitted). "Overreaching" has been defined as "that which results from an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties." *Black's Law Dictionary 1104 (6th ed. 1990).*

C. <u>Equitable Subordination of the Union's Claim</u>

Claim one, filed by the Union, is based solely on the 24 grievances filed against Debtor in 2003. The Union contends that the Court must take those grievances at face value and that the findings of the LMC are final and binding. In light of the express

language of the Agreement, the fact that the LMC decisions do not provide specific damage amounts, and the lack of any enforceable federal or state court judgment on the grievances, that conclusion is not obvious to this Court.[15] However, this Court need not decide whether the grievances are binding against the employer/Debtor. The focus of this Court's inquiry is the amount and status of the Union's claims relative to the claims of other creditors in bankruptcy.

The Court finds that claim one arises out of the Union's failure to comply with the working rules, and that a claim arising out of the Union's misconduct must be equitably subordinated to the claims of other creditors. Debtor's principal testified that between May and December, 2003, Debtor repeatedly attempted to comply with the Agreement by requesting workers through the union hall. The Union repeatedly refused to send employees to Debtor's job sites and/or removed Union employees from Debtor's job sites because Debtor was behind on its fringe benefit contributions. Knowing that it had refused to supply workers as requested by Debtor, the Union would then send a business agent to Debtor's job sites, note that Debtor was using non-union employees, and file grievances against Debtor.

The Court finds the testimony of Debtor's principal, Tod Shull, entirely credible. He testified that Debtor was unable to comply with the Agreement because the Union

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[15]The working rules do not provide that decisions of the joint labor management committee are final and binding. The working rules (Article I, Section 4) specifically provide that "should the labor management committee fail to agree or adjust any matter, such may be submitted jointly or unilaterally by the parties to this Agreement to the Council on Industrial Relations for the Electrical Contracting Industry for adjudication." Under Article II, Section 4(D), only decisions of the Council on Industrial Relations for the Electrical Contracting Industry are "final and binding on the parties."

failed to supply him with workers. His testimony was uncontroverted by any other witness. Mr. Hellmer, the Union's business agent, had no personal knowledge of whether debtor had contacted the Union hall to request workers, nor did he have personal knowledge of the circumstances underlying the grievances filed by the Union against Debtor.

The Union's position at the hearing was that, regardless of the reason the Union failed to supply workers, the Agreement required Debtor to comply with the temporary worker provisions of the Agreement in hiring non-union employees. According to the Union, Article XII required Debtor to notify the Union's business manager of the names and social security numbers of temporary employees and replace those employees as soon as registered applicants for employment became available under the referral procedures. Debtor never did so; thus the grievances are valid and enforceable. The Court finds that the Union's reading of the Agreement is inaccurate.

Pursuant to Article XII of the Agreement, the Union is obligated to supply Union employees and the employer is obligated to use Union employees unless the registration list is "exhausted." The only evidence offered on the issue of why Debtor failed to comply with Article XII was Debtor's testimony that the Union would not send him workers because the Union chose not to do so, not because the registration list was exhausted. The fact that the registration list was not exhausted is corroborated by Debtor's testimony that there were occasions when he had Union workers on a job, and the Union came to the job site and pulled those workers off the site. The Union's conduct in failing to supply workers made it impossible for Debtor to comply with the

Agreement, yet the Union seeks to collect from the bankruptcy estate for violations of the Agreement. The Union's position is that it can selectively enforce the terms of the Agreement without suffering any repercussions, yet an employer who cannot comply with the rules because of the Union's misconduct is subject to grievances and money damages. This conduct, by which the Union places Debtor in a position where it had no meaningful choice, constitutes overreaching and allows the Court to equitably subordinate the Union's claim.

The Court makes no findings as to whether the Union, outside of bankruptcy, could prevail on a claim against the Debtor based on the grievance awards issued by the LMC. In bankruptcy, the Union's claim will not be collected from Debtor. Rather, the claim will be paid from the assets of Debtor's estate pursuant to the priorities set forth in the Bankruptcy Code. The Union's claim is competing with the claims of all other priority and unsecured creditors. Given that this Court finds that it is the Union's own misconduct which generated the grievances on which the Union bases its claim, it is appropriate to subordinate the Union's claim to the claims of creditors who provided goods and services (as well as the tax creditors)– parties who have clean hands in the bankruptcy proceeding.

D. <u>Equitable Subordination of the Funds' Claim</u>

The Trustee argues that this Court should either deny or equitably subordinate the claim of the Fringe Benefit Funds. First, the Trustee contends that the original estimated claim filed in the amount of $10,000 was not supported by documentation, and it is now too late to amend the claim. Further, the Trustee argues that the

Agreement was terminated by acts of the Union in 2003. Because Debtor's contractual obligation to make Fund contributions arises from the Agreement, the termination of the Agreement relieved Debtor of its obligation to make any such contribution for 2003 or 2004. The Court rejects these arguments.

First, the Court finds that the Funds' original estimated claim was timely filed pursuant to Fed. R. Bankr. P. 3002(c). The Funds filed an estimated claim because, at the time the Debtor filed for bankruptcy, the Funds had not performed an audit to determine the amount of the Funds' claim, and the Funds were relying on the Union to collect amounts owed for fringe benefit contributions. There is nothing in the Bankruptcy Code or Bankruptcy Rules which prevents a creditor from amending a timely filed claim once the claimant obtains the information necessary to determine the correct dollar value of the claim. The Trustee or Debtor retains the right to object to an amended claim, just as they have the right to object to the original claim under 11 U.S.C. § 502(a).

As to the Trustee's contention that the Union's conduct effectively terminated the Agreement, thereby relieving Debtor from any obligation to contribute to the benefit funds, the Court disagrees. Neither the facts nor the law support the Trustee's argument regarding termination. While the Court finds that both the Union and the Debtor breached certain provisions of the Agreement, there is no basis for finding that the Agreement was actually terminated. According to the Agreement, the only method of terminating the contract is to provide written notification of the intent to terminate at least ninety (90) days prior to the expiration date of the Agreement or any anniversary

date occurring thereafter. Neither the Union nor the Debtor gave such notice, thus, both parties remained bound by the contract. Since the Agreement remained in effect until Debtor ceased doing business, Debtor remained contractually bound to pay fringe benefit contributions for employees performing work covered by the Agreement.

E. The Differences between the Union's Claim and the Funds' Claim

At the hearing, the Trustee lumped the claims of the Union together with the claims of the Fringe Benefit Funds for purposes of equitable subordination, arguing that the misconduct of the Union required the subordination of both parties' claims. Because the nature of the two claims differ, and the claims arise from separate contractual provisions, the claims cannot be treated similarly.

The Agreement requires an employer to make contributions to various pension and fringe benefit funds in a specified dollar amount on behalf of every employee who is performing the type of work covered by the contract. It makes no difference whether the employer covered by the Agreement uses employees referred by the Union. The Funds calculate their claim by auditing the records of an employer and determining how many employees were performing work covered by the contract on any given day.[16] The contributions paid by the employer are held in trust for the employees on whose

[16]The Fringe Benefit Funds cannot double charge an employer. To the extent that the Fringe Benefit Funds allow the Union to collect on its behalf by way of the grievance proceedings, the Funds cannot turn around and sue an employer based on an audit. An employer only has to pay fringe benefits once: it either pays benefits on behalf of Union employees it failed to use (recovered by the Union through a grievance procedure) or it pays benefits on behalf of the employees who are not Union employees but are performing work that should have been performed by the Union employees (collected independently by the Fund based on an audit of Debtor's work records).

behalf the contributions are made. Because the Fringe Benefit Funds are entitled to payment and committed no misconduct, there are no grounds for equitably subordinating the Funds' claim.

The Union's claim, on the other hand, is based on grievances related to Debtor's failure to use Union employees-- notwithstanding the fact that the Union's conduct made it impossible for Debtor to obtain Union employees. The grievances themselves do not seek a specific dollar amount. They simply contend that Debtor was not using Union employees or was requiring Union employees to work outside their classification. Any damages awarded are not awarded to specific employees, rather the damages are awarded to enforce compliance with the Agreement.

There are no allegations in this case that Debtor failed to pay his employees wages or health benefits. The Union's claim is solely that Debtor failed to comply with the Agreement, and that non-compliance allows the Union to collect money damages. Under the standards set by the Supreme Court in *Noland,* the Union's claim may be equitably subordinated. The Union engaged in inequitable conduct with regard to the Debtor. The misconduct gives rise to a claim which, if paid, will substantially reduce the funds available to pay other, more deserving creditors. Subordination of the claim is not inconsistent with any provision of the Bankruptcy Code.

F. Damages

The dollar amount of both claims remains an issue. However, it is unnecessary for the Court to determine the value of the Union's claim. The Court is subordinating the Union's claim to the claims of all other creditors. The claims of creditors, excluding

claims one and two, exceed $895,000.00. At the hearing, the Trustee stated that the estate has total assets in the approximate amount of $240,000 (Tr. at 38). The Trustee will not have funds on hand to pay all claims to which the Union's claim is subordinated, thus, there is no need for the Court to determine the dollar amount of the Union's claim. If the Trustee ultimately has sufficient funds to pay all unsubordinated claims in full, the balance on hand will be paid to the Union.

With regard to the Fringe Benefit Funds' claim, as of the hearing date, Counsel for the Funds indicated that an audit was complete and the Funds were prepared to file an accurate amended claim immediately as to contributions owed for 2004. In light of the Court's ruling, however, it appears that some additional work regarding the amount of the Funds' claim may be necessary–specifically, any amounts sought by the Funds for unpaid fringe benefit contributions in 2003. The Funds must file an amended unsecured claim within 30 days from the entry of this Order.

IV. Conclusion

For the foregoing reasons, the Trustee's Objections to Claims One and Two are sustained in part and overruled in part. Claim one is allowed as a general unsecured claim, but is subordinated to other general unsecured claims. Claim two is allowed as a general unsecured claim for benefits owed on employees performing covered employment prior to July 15, 2004, and a priority claim for benefits owed for July 15, 2004 through October 13, 2004.

Signed on February 09, 2007

/s/ Marci B. McIvor

Marci B. McIvor
United States Bankruptcy Judge