Carr Finishing Specialties, Inc. and G.P.C. Construction, Inc. *and* International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers. Case 03–CA–027264

September 28, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND BLOCK

On August 20, 2010, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondents filed exceptions with supporting argument, and the Acting General Counsel and the Charging Party filed answering briefs. The Acting General Counsel filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions with supporting argument.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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, and conclusions only to the extent consistent with this Decision and Order.[1]

The principal issue presented here is whether the Respondent violated Section 8(a)(5) and (1) of the Act by failing to apply the terms of successive multiemployer collective-bargaining agreements to its bargaining unit employees. We find that it did.[2]

Background

The relevant facts are fully set forth in the judge's decision. The Upstate Iron Worker Employers' Association, Inc. (the Association) represented its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including several Iron Workers local unions (the Union). On September 29, 1997, the Respondent became a member of the Association when it executed a document entitled "Membership Application & Designation of Bargaining Agent." This document (the agency agreement) provided that the Association would be "the sole and exclusive agent" of the Respondent in collective bargaining with the Union. It also stated, in relevant part:

> It is further understood that no member of [the Association] may resign during the period beginning ninety (90) days prior to the expiration date of a collective bargaining agreement between [the Association] and [the Union].
>
> . . . .
>
> It is also understood and agreed that upon approval of this application, the applicant shall become a party to all collective bargaining agreements between [the Association] and [the Union] as now in effect or as negotiated hereafter.

On May 1, 2006, the Association and the Union executed a collective-bargaining agreement containing the following relevant language in article 29, Duration and Termination:

> The Agreement . . . shall remain in full force and effect from May 1, 2006 until Midnight of April 30, 2009 and unless written notice be given by [the Union] or [the Association] to the other at least four (4) months prior to such date of the desire for change therein or to terminate the same, it shall continue in effect for an additional year thereafter.

On September 26, 2006, in turn, the Respondent signed an individual "Letter of Assent" agreeing to the terms of the 2006–2009 agreement. The record does not clearly establish why the Respondent executed this letter of assent during the term of the contract when it was already bound to the 2006–2009 agreement by operation of its 1997 agency agreement with the Association.

Beginning in October 2008, the Respondent unilaterally ceased applying the terms and conditions of the 2006–2009 agreement to unit employees. At that time, however, the Respondent did not notify the Association or the Union that it was terminating either the 2006–2009 agreement or its 1997 delegation of bargaining authority to the Association.

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[1] We shall modify the judge's conclusions of law, and substitute a new remedy, Order and notice to conform to the violations found. In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we shall modify the judge's remedy by requiring that any monetary awards shall be paid with interest compounded on a daily basis. Our Order shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

[2] We agree with the judge, for the reasons set forth in his decision, that Respondent G.P.C. Construction, Inc. is an alter ego of Respondent Carr Finishing Specialties, Inc., and that the charge was timely filed. In the absence of exceptions, we also adopt the judge's finding that these two Respondents constitute a single employer. For clarity of reference in this Decision, we will refer to the two entities as the Respondent.

Not until February 17, 2009[3]—72 days prior to the expiration of the 2006–2009 agreement, but well after the contractual deadline to terminate—did the Respondent notify the Association and the Union that it was revoking its 2006 letter of assent and any authority of the Association to bargain on its behalf. The Respondent also declared that it was withdrawing from any collective-bargaining relationship with the Union. Thereafter, the Association and the Union executed a successor agreement that became effective on May 1, and remained in effect through April 30, 2012 (the 2009–2012 agreement).

The Judge's Decision

The judge found, and we agree, that beginning in October 2008 the Respondent violated Section 8(a)(5) and (1) by failing to apply the terms and conditions of the 2006–2009 agreement to unit employees. The judge then found that, because the Respondent's February 17 termination notice fell well short of the 4-month notice required by article 29 of that agreement, the Respondent was bound to the 2006–2009 agreement for an additional year, as prescribed by article 29. In so finding, the judge rejected the Acting General Counsel's argument that the Respondent instead should be bound to the 2009–2012 agreement by operation of the 1997 agency agreement. Although the basis for the decision is not entirely clear, it appears that the judge found that the agency agreement was somehow subordinate to the 2006–2009 agreement, and thus concluded that article 29 of the latter agreement determined the consequences of the Respondent's untimely notice.

Discussion

On exceptions, the Acting General Counsel and the Union argue that the judge erroneously failed to find that the Respondent was bound to the 2009–2012 agreement based on its agency agreement with the Association. As explained below, we find merit in their argument, and conclude that the Respondent further violated Section 8(a)(5) and (1) by failing to adhere to the terms of the 2009–2012 agreement.

It is undisputed that the Respondent was a construction industry employer and that its collective-bargaining relationship with the Union was governed by Section 8(f) of the Act. Under the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enf. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988), a collective-bargaining agreement permitted by Section 8(f) is enforceable for its term through the mechanism of Section 8(a)(5). Once the agreement expires, the employer may lawfully withdraw from the bargaining relationship—if it is not otherwise legally bound. It is settled that "a construction employer may become bound to successive 8(f) contracts, all enforceable under Section 8(a)(5), if the employer has expressly given continuing consent to a multiemployer association to bind it to future contracts and the employer has taken no timely or effective action, consistent with its own agreement, to withdraw that continuing consent from the association." *Haas Electric*, 334 NLRB 865, 866 and fn. 7 (2001) (collecting cases), enf. denied on other grounds 299 F.3d 23 (1st Cir. 2002). Further, our precedent makes clear that a "withdrawal of negotiating authority from a multiemployer association is an action distinct from terminating a contract." *Rome Electrical Systems*, 349 NLRB 745, 747 (2007), enfd. 286 Fed.Appx. 697 (11th Cir. 2008).

Applying those principles here compels a finding that the Respondent was bound to the 2009–2012 agreement. The unambiguous terms of the 1997 agency agreement barred the Respondent from resigning its membership in, and delegation of bargaining authority to, the Association during the final 90 days of any collective-bargaining agreement in effect between the Association and the Union. In the present case, the agreement in effect was the 2006–2009 agreement, which was scheduled to terminate on April 30, 2009. Accordingly, the Respondent was required to notify the Association of its withdrawal no later than January 30. The Respondent's February 17 notice was more than 2 weeks late. Consequently, the Association continued to hold the authority to bind the Respondent to successor agreements. Thus, we find that the Respondent was bound to the 2009–2012 agreement. The Respondent's failure to abide by the terms of that agreement violated Section 8(a)(5) and (1).

In reaching that conclusion, we reject, as a matter of law and fact, the judge's finding that the extent of the Respondent's contractual obligations was governed solely by the 2006–2009 agreement and that the 1997 agency agreement had no bearing on this issue. As we have explained, our cases plainly recognize that the requirements to withdraw negotiating authority from a multiemployer association are separate and distinct from the requirements to terminate a collective-bargaining agreement. See Id. Moreover, the judge's finding lacks any basis in the language of either the 1997 agency agreement or the 2006–2009 agreement. The 1997 agency agreement governed and expressly contemplated an ongoing relationship between the Respondent and the Association, manifested in a series of successive collective-bargaining agreements. The termination provision of the 1997 agency agreement, moreover, referenced

[3] All dates are in 2009, unless otherwise noted.

those collective-bargaining agreements only for the purpose of setting the date by which a member-employer had to resign from the Association in order to avoid becoming bound to a successor agreement between the Association and the Union. In these circumstances, the notion that the termination provision of a particular collective-bargaining agreement could somehow supersede the termination provision of the durable agency agreement is curious, at best. Certainly, if that was the parties' intent, we would expect to find clear language expressing it. But there was no such language in either the 1997 agency agreement or the 2006–2009 agreement. Cf. *Rome Electrical Systems*, supra at 747–748 (rejecting employer's argument that termination language in a particular collective-bargaining agreement superseded termination language in a previously executed letter of assent to be bound by association-union agreements).

Similarly, we find no merit to the arguments advanced by our dissenting colleague. He cites *James Luterbach Construction Co*., 315 NLRB 976 (1994), for the proposition that, once a multiemployer 8(f) agreement expires, a member-employer is not bound to a successor agreement absent "affirmative conduct" recommitting itself to multiemployer bargaining. As the Board observed in *Haas Electric*, supra at 869 fn. 14, "nothing in *Luterbach* undercuts the well-settled agency principle that an employer is bound by an agreement negotiated by an agent with apparent authority to act on its behalf," as illustrated by "decisions . . . before and after *Luterbach*[] involving employers . . . who have expressly given an association continuing consent to bargain a successor contract on a multiemployer basis."

A decision acknowledged and distinguished in *Luterbach—Kephart Plumbing*, 285 NLRB 612 (1987) — illustrates the principle that we apply here. See 315 NLRB at 979 fn. 8. In *Kephart*, a construction employer authorized an employer association to negotiate on its behalf and execute a collective-bargaining agreement with the union. The authorization continued unless the employer took some action effectively withdrawing it. The employer did not take any action—affirmative or negative—to divest the association of bargaining authority before the association and the union negotiated and signed a successor collective-bargaining agreement. The *Kephart* Board found that the employer was bound to the successor agreement, and that its refusal to abide by it violated Section 8(a)(5) and (1). The *Luterbach* Board did not purport to disturb the principle applied in *Kephart*. Observing that it would not find a waiver of an individual employer's right to bargain individually (or not at all) on expiration of an 8(f) agreement "based on actions of a *nonagent* association," the *Luterbach* Board distinguished the situation in *Kephart*, where "the association, because of the language of the authorization agreement previously signed by the employer, *remained the agent* of the employer and thus had the power to bind that employer to a new contract." Id. (emphasis added). In effect, the employer's delegation of ongoing bargaining authority to the association satisfied the "affirmative conduct" requirement applied in *Luterbach*. Indeed, the *Luterbach* Board acknowledged that "there can be cases where the employer has expressly given continuing consent to bargain a successor contract on a multiemployer basis." Id. at 981 fn. 11, citing *Kephart*, supra, and *Reliable Electric Co.*, 286 NLRB 834 (1987).

This is such a case. By way of the 1997 agency agreement, the Respondent authorized the Association to bargain on its behalf with the Union. The only question is whether the Association remained the Respondent's agent for purposes of binding it to the 2009–2012 agreement. On the record before us, the answer must be yes because, as discussed, the Respondent's February 17 attempt to withdraw from the Association was ineffective under the express terms of the 1997 agency agreement. See *Haas Electric*, supra, 334 NLRB at 866.[4]

"The essence of multiemployer bargaining is a consensual, tripartite relationship between the union, the multiemployer bargaining association, and the individual employer-members of the association." *Callier's Custom Kitchens*, 243 NLRB 1114, 1117 fn. 8 (1979), enfd. 630 F.2d 595 (8th Cir. 1980). Our colleague simply misunderstands the "essence of multiemployer bargaining" when he argues that the Respondent's untimely attempt to withdraw from the Association is irrelevant because, in his view, the 1997 agency agreement was a matter between the Respondent and the Association only. To the contrary, by that agreement the Respondent not only authorized the Association to bargain on its behalf, but also expressly agreed to "become a party to all collective-bargaining agreements between [the Association] and [the Union] as now in effect or as negotiated hereafter." The Respondent thus conferred actual authority on the Association to bind it to the 2009–2012 agreement. The Union, acting on behalf of the Respondent's

[4] For similar reasons, our colleague's reliance on *Retail Associates, Inc.*, 120 NLRB 388 (1958), is also misplaced. He cites *Retail Associates* for the proposition that, in the context of multiemployer bargaining under Sec. 9(a) of the Act, a member-employer may withdraw bargaining authority from the association any time prior to the scheduled or actual commencement of negotiations. *Retail Associates* simply does not address the present situation, where the Respondent voluntarily agreed to contractual terms requiring additional advance notice.

We also note that there is no evidence that the Association accepted the Respondent's untimely notice, much less that the Union was made aware of that fact.

employees that it represented, therefore had the right under Section 8(a)(5) and (d) of the Act to enforce *that* agreement against the Respondent. In this respect, our decision again falls comfortably under *Kephart*, supra, where the Board found that the employer was bound to a successor multiemployer agreement notwithstanding that the union apparently was not a party to either of two authorization agreements between the employer and the association. See *Kephart*, supra at 616.[5]

Conclusion

For all of the foregoing reasons, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to abide by both the 2006–2009 agreement and the 2009–2012 agreement, and we shall order appropriate make-whole relief.[6]

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 3:

"3. By failing and refusing to recognize the Union as the collective-bargaining representative of all employees performing work, as set forth in article I of the 2006–2009 and 2009–2012 collective-bargaining agreements between the Association and the Union, and by failing to apply to unit employees the 2006–2009 and 2009–2012 collective-bargaining agreements between the Association and the Union, the Respondents, alter egos and/or a single employer, violated Section 8(a)(5) and (1) of the Act."

AMENDED REMEDY

Having found that the Respondents are alter egos and/or a single employer which engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall require the Respondents to recognize and, on request, bargain with the Union as the collective-bargaining representative of all employees performing work, as set forth in article I of the 2006–2009 and 2009–2012 collective-bargaining agreements between the Association and the Union. We shall also require the Respondents to make whole the unit employees for any loss of earnings and other benefits suffered as a result of the Respondents' failure to apply the 2006–2009 and 2009–2012 collective-bargaining agreements between the Association and the Union as prescribed 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), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Finally, having found that the Respondents violated Section 8(a)(5) and (1) of the Act by failing, since October 2008, to make the contractually required contributions to the Union's fringe benefit funds set forth in the collective-bargaining agreements, we shall order the Respondents to make all required benefit fund contributions from October 2008 to April 30, 2012, including any additional amounts applicable to such funds as set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). In addition, we shall require the Respondents to reimburse unit employees for any expenses resulting from the Respondents' failure to make the required contributions to the funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Carr Finishing Specialties, Inc. and G.P.C. Construction, Inc., Phelps, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize the Union, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, as the collective-bargaining representative of all employees performing work, as set forth in article I of the 2006–2009 and 2009–2012 collective-bargaining agreements between the Upstate Iron Worker Employers' Association, Inc. (the Association) and the Union.

(b) Failing and refusing to apply to unit employees the 2006–2009 and 2009–2012 collective-bargaining agreements between the Association and the Union.

[5] Thus, the point of examining the agency agreement is not to resolve some contractual dispute between the Respondent and the Association over the Association's authority. Rather, we are applying Sec. 8(a)(5) of the Act and Board law interpreting the Act in the context of multiemployer bargaining. The point, then, is to determine, on the facts here, whether the Respondent may properly be treated as bound to the 20062009 agreement with the Union, based on the Respondent's prior delegation of authority to the Association and the Association's subsequent actions on its behalf.

[6] In light of our Decision and amended remedy, below, we find it unnecessary to consider our colleague's reliance on the 1997 agency agreement to find that a timely termination of the 20062009 agreement was made under art. 29, and that this severed the Respondent's 8(f) relationship with the Union. We note, however, that the record does not reveal when, or whether, the 20062009 agreement was actually terminated pursuant to art. 29.

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

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

(a) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

(b) Make whole all bargaining unit employees and all benefit funds for any loss of income, contributions or benefits, and for any expenses incurred in connection with those benefit fund losses by those employees, in the manner set forth in the amended remedy section of this decision.

(c) 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 including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this decision.

(d) Within 14 days after service by the Region, post at its Phelps, New York facility, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since October 31, 2008.

(e) 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. September 28, 2012

Mark Gaston Pearce, Chairman

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

I agree with my colleagues and the judge that the Respondents are alter egos who, beginning in October 2008, violated Section 8(a)(5) and (1) of the Act by failing to apply the terms and conditions of the 2006–2009 collective-bargaining agreement between the Union and Upstate Iron Worker Employer's Association, Inc. (the Association) (2006–2009 agreement). However, I disagree with my colleagues' finding that the Respondents are bound to the 2009–2012 agreement between the Union and the Association (2009–2012 agreement). I further disagree with the judge's finding that the Respondents were bound to a 1-year extension of the 2006–2009 agreement. I find that the Respondents severed their 8(f) relationship with the Union at the termination of the parties' contract ending April 30, 2009.[1]

Under Section 8(f) of the Act, employers and unions in the construction industry are free to repudiate a collective-bargaining relationship once an 8(f) agreement expires by its terms. *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). Furthermore, for an 8(f) employer to remain bound, there must be affirmative conduct that recommits that employer to multiemployer bargaining for a successor contract.[2] By contrast, where an employer is contractually bound to a multiemployer bargaining agency relationship under Section 9(a), the employer may timely withdraw from that relationship if

[7] 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."

[1] All dates are in 2009, unless otherwise noted.

[2] See *James Luterbach Construction Co*., 315 NLRB 976, 979980 (1994), where the Board announced that a "two part test will be used to decide whether an 8(f) employer has obligated itself to be bound by the results of the multiemployer bargaining." First, we will examine whether the employer was part of the multiemployer unit prior to the dispute giving rise to the case. If this first inquiry is answered affirmatively, then we will examine whether that employer has, by a distinct affirmative action, recommitted to the union that it will be bound by the upcoming or current multiemployer negotiations.

it gives unequivocal notice of such withdrawal prior to the date on which negotiations are set to commence or actually commence. *Retail Associates*, 120 NLRB 388, 393 (1958). The Respondents here timely withdrew under either standard.

Respondent Carr executed a Letter of Assent in September 2006, agreeing to be bound to the 2006–2009 agreement. Then, on February 17, 2009, Respondent Carr sent a letter to both the Association and the Union stating that it was revoking the Letter of Assent and any authority of the Association to bargain on its behalf, and withdrawing from any collective-bargaining relationship with the Union. Far from being the required affirmative recommitment to multiemployer bargaining required by *Luterbach*, this letter was an unambiguous and explicit withdrawal of the Association's authority to bind the Respondents to any successor to the 2006–2009 agreement.[3] Further, the notice was timely provided under *Retail Associates*, in the absence of evidence that it was given after any scheduled or actual commencement of successor contract negotiations between the Association and the Union.[4]

My colleagues nevertheless contend that the Respondents were bound to the 2009–2012 agreement based on provisions in the 1997 Association membership application (Association Application) stating that members shall become parties to all collective-bargaining agreements between the Association and the Union, and that to timely withdraw from membership in the Association, a member must do so more than 90 days before the expiration of a current agreement. I disagree.

The majority's position is contrary to Board law, as set forth above. Furthermore, this position is inconsistent with basic principles of contract law. The Association Application is not a contractual arrangement between Respondent Carr and the Union; it is, rather, a contract between Respondent Carr and the Association. The Union has no cognizable complaint when that contract is breached. It is only the Association that has a claim against Respondent Carr. Thus, the 90-day notification period is immaterial unless the Association refused to allow Respondent Carr's withdrawal from membership pursuant to this provision. There is no evidence here that the Association precluded Respondent Carr's withdrawal from multiemployer bargaining.

My colleagues rely on *Rome Electrical Systems*, 349 NLRB 745 (2007), to support their contention that Respondent Carr's ability to revoke its membership in the Association was governed by the 90-day notification period in the Association Application. In *Rome*, however, the notice provision governing the respondent's ability to withdraw from multiemployer bargaining was contained in a letter of assent, not in a multiemployer association membership agreement. 349 NLRB at 745. A notice provision in a letter of assent, unlike one in a multiemployer association membership agreement, is enforceable by a union against a signatory employer. This is because the letter of assent is a contractual arrangement between the union and the signatory employer whereby the employer agrees to be bound to the current collective-bargaining agreement (and often successor agreements) between the multiemployer association and the union. In *Rome*, the respondent signed the *union's* letter of assent, authorizing the multiemployer association to be the respondent's "collective-bargaining representative for all matters contained in or pertaining to the current and any subsequently approved contract." 349 NLRB at 745. The Board observed that it "has frequently enforced the withdrawal-of-agency requirements in IBEW letters of assent that were identical . . . to the *letter of assent* at issue here." Id. at 747 (emphasis added). The Association Application is not a letter of assent, and there is no support for treating it as such.

My colleagues further contend that I misunderstand the consensual, tripartite "essence of multiemployer bargaining." I do not. First of all, as *Luterbach* holds, the consensual element in multiemployer bargaining under Section 8(f) differs from that under Section 9(a) by requiring a 'distinct affirmative action" indicating to the union that an employer has recommitted to be bound by upcoming multiemployer negotiations. Moreover, as *Retail Associates* holds, even in a 9(a) bargaining relationship, it is well-established statutory policy that an employer may withdraw from a multiemployer association, without union consent, by giving clear and unequivocal notice prior to the commencement of contract negotiations.[5] These are the relevant statutory policies governing the effectiveness of Respondent Carr's unequivocal, prenegotiation withdrawal of the Association's bargaining authority. The fact that the withdrawal was untimely as a matter of a membership contract between the Respon-

[3] Thus, this case is materially different from *Kephart Plumbing*, 285 NLRB 612 (1987), relied on by my colleagues, where the respondent employer had previously authorized a multiemployer association to bargain on its behalf, the association engaged in the affirmative act of negotiating a new contract, and the employer did not withdraw its authorization until after the contract had been executed and ratified.

[4] The record is silent as to when the negotiations for the 20092012 agreement actually began.

[5] *Retail Associates*, supra. I note that *Callier's Custom Kitchens*, 243 NLRB 1114, 1117 fn. 8 (1979), enfd. 630 F.2d 595 (8th Cir. 1980), the case relied on by my colleagues to suggest that the Union has an enforceable right to prevent the Respondent's withdrawal from the Association, involves an application of *Retail Associates* rules to an employer's attempted withdrawal after negotiations had begun.

dent and the Association is of no moment absent evidence that the Association refused to accept it, and it seems questionable, under *Luterbach* at least, whether such refusal could bind the Respondent to a subsequent contract in any event.

Moreover, the evidence suggests that the Respondents were bound to the 2006–2009 agreement only because Respondent Carr executed the Letter of Assent, not because of its membership in the Association. When asked whether members of the Association were automatically bound to the collective-bargaining agreements between the Union and the Association, the Union's business agent testified that the members were not bound unless they signed the collective-bargaining agreement. Indeed, the complaint alleged that "Respondent Carr executed a Letter of Assent whereby it agreed to be bound to the 2006 Agreement . . . ." Respondent Carr would not have signed the Letter of Assent if it were already bound under the Association Application.

Finally, I disagree with the judge's finding that the Respondents were bound to a one-year extension of the 2006–2009 agreement. The judge's reliance on *Gem Management Co*., 339 NLRB 489, 497 (2003), citing *Fortney & Weygandt, Inc*., 298 NLRB 863 (1990), and *C.E.K. Industrial Mechanical Contractors*, 295 NLRB 635 (1989), enf. denied on other grounds 921 F.2d 350 (5th Cir. 1990), is misplaced. Those cases found that where individual employers signed employer association contracts as nonmembers, the employers were bound to the termination notification requirements in the underlying labor agreement between the union and multiemployer association.[6] 339 NLRB at 497. Here, however, Respondent Carr was a member of the Association and had delegated bargaining authority to the Association. It can be inferred that, consistent with the (art. 29) Duration and Termination provision in the 2006–2009 agreement, either the Association or the Union gave notice of its intent to terminate the 2006–2009 agreement and negotiate new terms for a successor agreement at least 4 months before the agreement's April 30 expiration. Thus, the Association or the Union's timely notification to terminate the 2006–2009 agreement at the end of its term applied to Respondent Carr because it was still a member of the Association at the time when such notification was provided. As stated above, Respondent Carr did not revoke the Association's authority to bargain on its behalf until February 17.

[6] In *C.E.K.,* the Board stated that "C.E.K. was not a member of the Plumbers Association and had not delegated bargaining authority to the Association. Thus, the Association's notice of a desire to change the contract does not operate to preclude the effectiveness of the automatic renewal clause as to C.E.K." 295 NLRB at 636.

In sum, I find that the Respondents timely withdrew from multiemployer bargaining and severed their 8(f) relationship with the Union at the April 30 termination of the parties' contract ending April 30.

Dated, Washington, D.C. September 28, 2012

Brian E. Hayes, Member

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 fail or refuse to recognize the Union, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, as the exclusive collective-bargaining representative of all employees performing work as set forth in article I of the 2006–2009 and 2009–2012 collective-bargaining agreements between the Upstate Iron Worker Employers' Association, Inc. (the Association) and the Union.

WE WILL NOT fail or refuse to apply to unit employees the 2006–2009 and 2009–2012 collective-bargaining agreements between the Association and the Union.

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 recognize the Union as the exclusive collective-bargaining representative of employees in the bargaining unit and will adhere to all provisions in our existing collective-bargaining agreement with the Union.

WE WILL make whole our bargaining unit employees, and all benefit funds, for any loss of income, contributions, or benefits suffered as a result of the failure to apply to those employees the 2006–2009 and 2009–2012

collective-bargaining agreements between the Association and the Union, and for any expenses incurred in connection with those benefit fund losses, with interest.

CARR FINISHING SPECIALTIES, INC. AND G.P.C. CONSTRUCTION, INC.

Linda M. Leslie, Esq., for the General Counsel.
Alan R. Peterman, Esq., of Syracuse, New York, for the Respondent-Employer.
Daniel R. Brice, Esq., of Syracuse, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on June 22, 2010, in Rochester, New York, pursuant to a complaint and notice of hearing (the complaint) issued by the Acting Regional Director for Region 3 of the National Labor Relations Board (the Board). The complaint, based upon a charge filed on August 3, 2009, by International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (the Charging Party or the Union), alleges that Carr Finishing Specialties, Inc. and GPC Construction, Inc. (the Respondents, Respondent Carr, or Respondent GPC), has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondents filed a timely answer to the complaint denying that they had committed any violations of the Act.

Issues

The complaint alleges that the Respondents violated Section 8(a)(1) and (5) of the Act when they failed and refused to apply the terms and conditions of the 2006 and 2009 collective-bargaining agreements with the Union and specifically ceased making contributions to the contractual benefit funds.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondents are corporations with an office and place of business located in Phelps, New York, and have been engaged in the construction industry as a metal roofing, siding, and architectural panel contractor. The Respondents in conducting their business operations provided services valued in excess of $50,000 to Rollison Construction Sales, LLC (Rollison), an entity directly engaged in interstate commerce. At all material times, Rollison, with an office and place of business located in Rochester, New York, has been engaged as a metal contractor and metal supplier. Rollison in conducting its business operations, purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of New York. The Respondents admit and I find that they are employers 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.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Prior to 1994, Galvin P. Carr III (Carr III) was a member of Local 60 and worked as a journeyman ironworker for various companies.[1]

In 1994, while Carr III was working on a job in Albany, New York, he was contacted by a representative of Rollison who inquired whether he was interested in performing some work on their behalf. Carr III accepted the offer and completed the job. Upon completion of the work, Carr III and his wife, Sandra J. Carr (Sandra), formed and incorporated Respondent Carr. Sandra served as president and was the only shareholder while Carr III held the position of supervisor and made all purchases, bid on each job, and ran the day-to-day field operations. Sandra, who was not an ironworker, primarily handled the books and finances for Respondent Carr.[2]

From the commencement of its operations in 1994, Respondent Carr exclusively performed erector work for Rollison who provided the sole source of revenue for Respondent Carr. Between 1994 and October 31, 2008,[3] Respondent Carr operated as a union contractor and obtained its manpower from the Union.

At all material times, Upstate Iron Worker Employers' Association, Inc. (the Association), has been an organization composed of employers, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union. On or about May 1, 2006, the Association and the Union executed a collective-bargaining agreement covering the unit effective by its terms from May 1, 2006, to April 30, 2009 (GC Exh. 5).[4] On or about April 30, 2009, the Associa-

[1] In the fall of 1994, Union Business Agent Michael Altonberg spoke with Carr III while they both were working at the outlet mall jobsite in Waterloo, New York. Carr III informed Altonberg that he intended to go into business for himself.

[2] On November 16, 2006, Sandra as president and Carr III as signor were authorized to execute checks on behalf of Respondent Carr with Manufacturers and Traders Trust Company. Sandra regularly paid Federal and New York State taxes, payroll checks, insurance premiums, and all necessary expenses incurred by Respondent Carr. Examples of such checks can be found at GC Exh. 19(b)-check 1243; GC Exh. 19(c)-check 10620; GC Exh. 19(d)-check 10619; and GC Exh. 22(f)-check 1044. Carr III also wrote business-related checks on the Respondent Carr checking account. Examples are found at GC Exh. 19(e)-check 1262; GC Exh. 19(r)-check 1362; and GC Exh. 19(l)-check 1328. Additionally, the record shows that Carr III signed a check made payable to Attorney John Polimeni for the incorporation of Respondent GPC (GC Exh. 19(d)-check 1259 and a check to purchase equipment for Respondent GPC, GC Exh. 19(r)-check 1362. These checks are evidence of the commingling of funds between Respondent Carr and Respondent GPC.

[3] All dates are in 2008, unless otherwise indicated.

[4] The 2006 Agreement contains the following language at art. 29, duration and termination. "The Agreement with any amendments thereof made as provided for therein, shall remain in full force and effect from May 1, 2006 until Midnight of April 30, 2009 and unless written notice be given by the Iron Workers Upstate Locals of New York and Vicinity

tion and the Union executed a collective-bargaining agreement covering the unit effective by its terms from May 1, 2009, to April 30, 2012 (GC Exh. 6).

On or about September 29, 1997, Respondent Carr paid a membership application fee and executed a designation of bargaining agent. Since then it has been an employer-member of the Association, and designated the Association to represent it in negotiating and administering collective-bargaining agreements with the Union (GC Exhs. 2, 3). On or about September 29, 1997, Respondent Carr granted recognition to the Union as the exclusive collective-bargaining representative of the unit and since that date the Union has been recognized as such representative by Respondent Carr without regard to whether the majority status of the Union has ever been established under the provisions of Section 9(a) of the Act.

On or about September 26, 2006, Respondent Carr executed a letter of assent whereby it agreed to be bound to the 2006 agreement between the Union and the Association (GC Exh. 8).

During the early part of 2008, Sandra informed Carr III that her full-time outside job combined with her duties and responsibilities for Respondent Carr were taking its toll.

Concurrently, Rollison informed Carr III that operating as a union contractor was causing it to lose business and it intended to operate as a nonunion contractor going forward.

Accordingly, based on both of these factors, Sandra and Carr III decided to form Respondent GPC. The company was incorporated on April 11 (GC Exhs. 11, 26).[5] Since that time Respondent GPC has continued to operate as a nonunion contractor and after Respondent Carr went out of business on October 31, it completed a number of projects that had been started by Respondent Carr. Thereafter, when Respondent Carr ceased making benefit contributions for November and December 2008, the Union obtained a court judgment freezing their banking account and subsequently obtained authorization to withdraw those funds.

On October 8, Carr III opened a commercial checking account at Manufacturers and Traders Trust Company for Respondent GPC (GC Exh. 20(a)). On October 24, Sandra was added as an authorized signer on the checking account (GC Exh. 20(c)). Thereafter, Sandra wrote the majority of the business checks for Respondent GPC including payments for Federal and New York State taxes, insurance premiums, and payroll expenses.[6] The record also confirms that Carr III wrote business checks from Respondent GPC's checking account and when Respondent GPC commenced work in October 2008, it did so with tools and insurance purchased with Respondent Carr's funds.

consisting of the Local Unions Nos. 33, 9, 440, 6, and 12 or the Employer Association to the other at least four (4) months prior to such date of the desire for change therein or to terminate the same, it shall continue in effect for an additional year thereafter."

[5] The record confirms that neither Sandra nor Carr III informed the Union about the April 11 incorporation or the existence of Respondent GPC. Likewise, the Union was not notified about the operation of Respondent GPC after Respondent Carr ceased to exist on October 31.

[6] Examples of such checks are found at GC Exh. 22(f)-check 1044; GC Exh. 21(r)-check 1021; and GC Exh. 21(a)-check 5000.

B. The 10(b) Affirmative Defense

Background and Facts

On December 31, the Respondents filed a motion with the Board seeking to dismiss the complaint because they asserted that the subject unfair labor practice charge was time barred. In this regard, the Respondents argue that the Union first learned that Respondent GPC was performing bargaining unit work in either October 2008 or January 2009 rather then March 2009 as alleged in the August 3, 2009, unfair labor practice charge. By order dated April 21, 2010, the Board denied the Respondents motion to dismiss the complaint but stated that the denial is without prejudice to the Respondent's right to renew its 10(b) argument at an appropriate time before the administrative law judge (Jt. Exh. 1(f)).

The Respondents assert that the subject charge alleges that they were operating as a single employer since March 1. However, the Respondents argue that one of the Union's attorneys in a letter dated January 30, 2009, stated, "that it was recently discovered by my clients that Carr Finishing Specialties, Inc. 'Carr' continues to perform bargaining unit work in the Union's jurisdiction," and in a subsequent letter dated February 13, 2009, the Union's attorney stated that "Carr Finishing Specialties, Inc., its successor and/or alter ego has performed bargaining unit work since October 2008, specifically, Galvin Carr, his son and employees of Carr Finishing were seen performing iron workers' work at the Rite Aid store in Canandaigua, New York in January 2009." (Jt. Exhs. 2(a) and (c).)

Discussion

Although Section 10(b) bars a complaint based on unlawful conduct occurring more than 6 months before the filing and service of the charge, the Board has consistently held that the 10(b) period does not commence until the charging party has 'clear and unequivocal notice' of the violation. *Broadway Volkswagen,* 342 NLRB 1244, 1246 (2004), enfd. sub nom. *East Bay Automotive Council v. NLRB,* 483 F.3d 628 (9th Cir. 2007). See also *Vallow Floor Coverings, Inc.*, 335 NLRB 20, 20 (2001). "[T]he burden of showing that the Charging Party was on clear and unequivocal notice of the violation rests on the Respondent." *A & L Underground*, 302 NLRB 467, 469 (1991). Where a "delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct," a finding of clear and unequivocal notice is unwarranted. Id. Board precedent has long distinguished between "a simple failure to abide by the terms of a collective bargaining agreement," or "material breach violation," on one hand, and "an outright repudiation of the agreement itself," or "total repudiation" on the other. *Vallow Floor,* supra (citing *A & L Underground*, supra.) In the latter situation, when an employer completely repudiates the contract, the unfair labor practice is committed at the moment of the repudiation, and the 10(b) period commences once the union has clear and unequivocal notice of the act of repudiation. Under these circumstances, any subsequent refusals by an employer to honor the terms of the collective-bargaining agreement do not constitute unfair labor practices; rather, these acts are simply the consequences of the respondent's clear and unequivocal act of repudiation. For this reason, the union must file its charge within 6 months upon receiving notice of the

repudiation, or a complaint based on that conduct will be time barred. Id. When an employer has not rejected a collective-bargaining agreement in its entirety, but has instead refused to apply one or more of its provisions to unit employees, this scenario presents a breach of the contract's terms. Under these circumstances, each successive breach of the contract terms constitutes a separate and distinct unfair labor practice. Id. It is for this reason that even when a union has clear and unequivocal notice outside the 10(b) period that the respondent is failing to observe the terms of the contract, the complaint would not be time barred. Instead, the 10(b) period would serve only as a limitation on the remedy to the 6 months prior to the filing of the unfair labor practice charge. Id. *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980), enfd. 661 F.2d 910 (2d Cir. 1981).

In support of their affirmative defense, Respondents assert that the January 30 and February 13, 2009 letters from the union attorney establish that the Charging Party knew by October 2008 or at least by January 2009 that Respondent Carr had created Respondent GPC as an alter ego. The fallacy of this argument is that no evidence has been presented to establish that Respondents provided the Union with clear and unequivocal notice that Respondent GPC existed. Indeed, neither the January 30 nor the February 13, 2009 letters, that the Respondents principally rely upon for this proposition, make any mention of Respondent GPC. Moreover, the Union in its January 30, 2009 letter requested the Respondents to provide its remittance reports, contributions, and deductions for the period November 2008 to date and the February 13, 2009 letter asked for an explanation as to why work was not covered by the collective-bargaining agreement, the identity of the company performing the work, and the name of the employer. Significantly, no such information was provided to the Union. *Hebert Industrial Insulation Corp.,* 319 NLRB 510 (1995) (charge not barred by Sec. 10(b) where respondent's failure to provide the union with any information or with accurate information was motivated by an intent to conceal the true nature of its relationship to its alter ego). Rather, without ever revealing the existence of Respondent GPC, Respondent Carr notified the Association and the Union on February 17, 2009 (GC Exh. 4), that it was revoking the September 26, 2006 letter of assent and effective immediately was withdrawing from the collective-bargaining relationship with the Union. In my view, the February 17, 2009 notification that is within the 10(b) period, confirms that Respondent Carr recognized that it was bound by the terms of the 2006 agreement, and since the notification was not provided prior to 4 months of its April 30, 2009 expiration, the 2006 agreement continued in effect until April 30, 2010 (art. 29-Duration and Termination).[7] See *Gem Management Co.,* 339 NLRB 489, 497 (2003).

In summary, since the Union did not receive clear and unequivocal notice outside the 10(b) period that Respondent GPC was an alter ego and/or a single employer, the subject unfair labor practice charge was timely filed. Furthermore, even assuming the Union received such notice, the Respondents conduct amounted to a breach of contract, not a repudiation of contract. Consequently, the complaint is not time barred, and a violation of Section 8(a)(5) may be found based on the Respondents failure to apply the contract during the 6 months prior to the filing of the charge.

C. The 8(a)(1) and (5) Allegations

The General Counsel alleges that Respondent Carr and Respondent GPC have had substantially identical management, business purposes, operations, equipment, customers, and supervision and are, and have been at all material times, alter egos and/or a single employer within the meaning of the Act. It further alleges that since in or around October 2008, Respondents have failed and refused to apply the terms and conditions of the 2006 and 2009 agreements in violation of Section 8(a)(1) and (5) of the Act or alternatively were bound to a 1-year extension of the 2006 agreement, by operation of the letter of assent, and have therefore violated Section 8(a)(1) and (5) of the Act by failing and refusing to apply the terms of the 1-year extension of the 2006 agreement.

Facts

The record confirms that Respondent Carr and Respondent GPC shared common premises and facilities and maintained the same fax numbers for both companies. Likewise, Respondents used the same business cell phone numbers for Carr III and Galvin P. Carr (Carr IV)[8] that were paid for by each respective

[7] Under these circumstances, I reject the General Counsels position that by the operation of the language set forth in par. 9(b) of the complaint, the Respondents were bound to the 2009 agreement. Rather, in my view, the Association agreement is subservient to the 2006 collective-bargaining agreement. In this regard, the language setting forth the resignation procedures defer to the parties' collective-bargaining agreement. Therefore, I find that since the Respondents gave notice on February 17, 2009, that it revoked the letter of assent, revoked the authority of the Association to bargain on their behalf, and withdrew from the collective-bargaining relationship with the Union, their obligation is to be bound by the terms of the 2006 collective-bargaining agreement until April 30, 2010. In its posthearing brief the Respondents relying on *Wilson & Sons Heating & Plumbing v. NLRB,* 971 F.2d 758 (D.C. Cir. 1992), argue that the renewal and notice provisions of a collective-bargaining agreement only apply to the signatories and not those who have signed letters of assent. In that case, the evidence disclosed that the contract was an 8(f) construction agreement and the employer was not a member of the Employer Association. In the subject case, Respondent Carr was a member of the Association and therefore, must adhere to the provisions of the parties' agreement due to its untimely termination of the letter of assent. *C.E.K. Industrial Mechanical Contractors, Inc. v. NLRB,* 921 F.2d 350, 355–356 (1st Cir. 1990).

[8] Carr IV is the son of Sandra and Carr III. He has been a field supervisor at Respondent GPC since at least October 31, and was a foreman at Respondent Carr prior to that date. Carr IV resigned from the Union on November 30 (R. Exh. 1). Altonberg testified that on January 22, 2009, he observed Carr III and Carr IV on a jobsite in Canandaigua, New York, performing ironworkers work within the Union's jurisdiction. Accordingly, he alerted the representatives of the union benefit funds regarding his observations. Thereafter, the fund attorney wrote a series of letters to Respondent Carr's attorney concerning the performance of work in the Union's jurisdiction and the delinquent payments that were due to the benefit funds (Jt. Exh. 2). Altonberg stated that that he first learned about the existence of Respondent GPC from his secretary in April 2009. He then wrote a letter to the communications officer of the Rochester School System seeking information about Respondent GPC (GC Exh. 13). The response that Altonberg received

company. Additionally, the same computers and email addresses were maintained by Respondent Carr and Respondent GPC.

The evidence establishes that Carr III was the primary supervisor for Respondent Carr and serves as the owner, president and sole shareholder of Respondent GPC including his responsibilities of running the day-to-day field operations. Likewise, Sandra held the position of president for Respondent Carr, and primarily handled the Company's financial obligations. She continued with those duties and responsibilities at Respondent GPC. The record confirms that on a number of occasions Sandra wrote checks to cash or to herself while handling the finances of Respondent GPC.

The General Counsel presented unrebutted evidence that Respondent Carr and Respondent GPC use the same insurance, disability, and workers' compensation carriers. They also use the same payroll service provider, the identical contractor to rent lifts, and purchase supplies, and both Respondent Carr and Respondent GPC worked exclusively for Rollison.

The evidence further establishes that both Respondent Carr and Respondent GPC performed work for the Rochester City School System. Indeed, Respondent Carr completed phase one of the Wayland-Cohocton Central School job and Respondent GPC completed the second phase (GC Exh. 16). The record shows that Carr III, hired Carr IV and Roger Carr (brother of Carr III) to work for Respondent Carr and Respondent GPC. Indeed, Carr IV and Roger Carr are presently employees of Respondent GPC.

The General Counsel also presented evidence that the funds of Respondent Carr and Respondent GPC were commingled. In this regard, checks that were made payable to Respondent Carr were deposited into Respondent GPC's checking account (GC Exh. 19(s)–(u) and GC Exh. 21 (t)). Moreover, the General Counsel firmly established that Sandra wrote checks from Respondent GPC's checking account to pay Respondent Carr's unemployment insurance (GC Exh. 28-check 1131), Respondent Carr's taxes (GC Exh. 23(d)-check 1048), and Respondent Carr's payroll service provider (GC Exh. 21(p)-check 1020).

Discussion

In determining whether two nominally separate employing entities constitute a single employer, the Board examines four factors: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) common control of labor relations. No single factor is controlling, and not all need to be present. Rather, single-employer status ultimately depends on all the circumstances. It is characterized by the absence of an arm's length relationship among seemingly independent companies. *Mercy Hospital of Buffalo,* 336 NLRB 1282, 1283–1284 (2001), and *Dow Chemical Co.,* 326 NLRB 288 (1998).

With respect to the General Counsel's alternative theory that Respondents are alter egos, the Board utilizes additional factors and a broader standard in determining whether two ostensibly distinct entities are in fact alter egos. The Board considers whether the entities in question are substantially identical, including the factors of management, business purpose, operating equipment, customers, supervision, as well as common ownership. *Crawford Door Sales Co.,* 226 NLRB 1144 (1976); *Advance Electric,* 268 NLRB 1001, 1002 (1984).

The evidence shows that Respondent GPC was established by Respondent Carr as a disguised continuation of Respondent Carr without informing the Union of its existence. In this regard, Carr III served as a supervisor in both entities and ran the day-to-day field operations while Sandra handled the financial obligations for both companies. Carr III was the owner of Respondent GPC while Sandra was the owner, president, and sole shareholder of Respondent Carr. *Fallon-Williams, Inc.,* 336 NLRB 602 (2001) (Board has not hesitated to find alter ego status even though entities had different owners, when the owners were in a close familial relationship). See also *Alexander-Painting, Inc.,* 344 NLRB 1346 (2005).

The lines of responsibility often crossed with the commingling of funds. Indeed, the evidence conclusively establishes that Sandra deposited funds of Respondent Carr into the checking account of Respondent GPC and paid obligations of Respondent Carr from the checking account of Respondent GPC.

Central control of labor relations is present since Roger Carr and Carr IV were employed by both companies during the relevant time period.[9] While Respondent Carr operated as a union contractor until it ceased to exist on October 31, it operated with the above two employees in addition to new hires as a nonunion contractor after that date.

There is no question that there was interrelation of operations between Respondent Carr and Respondent GPC. In this regard, both companies were engaged in the construction industry as metal roofing and siding panel contractors, shared common premises and facilities, and worked solely for Rollison who provided both companies their sole source of revenue. Likewise, as discussed above, their books were commingled along with records and financial information. Additionally, the record confirms that the same office equipment, tools of the trade, cell phones, and computers were used by both Respondent Carr and Respondent GPC. Lastly, the testimony establishes that both Respondent Carr and Respondent GPC used the same providers for payroll services (Paychex), workers' compensation (Main Street America), insurance broker (CIG), disability insurance (First Reha-bilitation Life), and equipment supplier (Harmco).

The Respondent argues, in its posthearing brief, that the creation of an enterprise (Respondent GPC) for the purpose of obtaining nonunion work does not establish an unlawful motive and cites for this proposition *First Class Maintenance Service,* 289 NLRB 484 (1988), and other cases. The fallacy of relying on this argument, in comparison to the facts in the subject case, is that the Board held in *First Class Maintenance* that the separate entity did not share supervision, manage-ment, or ownership, and the former company continued as a separate ongoing business. Here, as found above, Respondent GPC shares these indicia with Respondent Carr. Moreover, Carr III or Sandra

confirmed that Respondent GPC was incorporated on April 11, and was presently performing work for the School System.

[9] The record confirms that Roger Carr worked for Respondent Carr in 1994 and 2006 and presently is employed with Respondent GPC.

never informed the Union that it established Respondent GPC, a factor that indicates unlawful motivation.

Based on the forgoing, I find that the General Counsel has conclusively established the criteria for alter ego and/or single-employer status. Therefore, since the Respondents have failed and refused to apply the terms and conditions of the 2006 collective-bargaining agreement, they have failed and refused to bargain in good faith with the exclusive bargaining representative of their employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondents are employers 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 to recognize the Union as the collective-bargaining representative of all employees performing work, as set forth in article I of the 2006 Working Agreement between the Association and the Union, and by failing to apply to unit employees their collective-bargaining agreement with the Union, the Respondents,' alter egos and/or a single employer, violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondents are alter egos and/or a single employer which engaged in certain unfair labor practices, I shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents shall be required to recognize and, on request, bargain with the Union as the collective-bargaining representative of all employees performing work, as set forth in article I of the 2006 Working Agreement between the Association and the Union. The Respondents shall also be required to make whole the unit employees for any loss of earnings and other benefits suffered as a result of the Respondents' failure to apply the collective-bargaining agreement between the Association and the Union as prescribed 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).

Finally, having found that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to continue in effect all the terms and conditions of their existing collective-bargaining agreement by failing, since October 2008, to make the contractually required contributions to the Union's fringe benefit funds set forth in the collective-bargaining agreement, I shall order the Respondents to make all required benefit fund contributions since October 2008 to April 30, 2010, including any additional amounts applicable to such funds as set forth in *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondents shall reimburse unit employees for any expenses resulting from the Respondent's failure to make the required contributions to the funds, as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts are to be computed in the manner set forth in *Ogle Protection Service,* supra, with interest as prescribed in *New Horizons for the Retarded,* supra.

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

ORDER

The Respondents, Carr Finishing Specialties, Inc. and GPC Construction, Inc., Phelps, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize the Union as the collective-bargaining representative of all employees performing work, as set forth in article I of the 2006 agreement between the Association and the Union.

(b) Failing and refusing to apply to unit employees the collective-bargaining agreement between the Association and the Union.

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

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

(a) Bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees.

(b) Make whole all bargaining unit employees and all benefit funds for any loss of income contributions, or benefits, and for any expenses incurred in connection with those benefit fund losses by those employees, in the manner set forth in the remedy section of this decision.

(c) 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 including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this decision.

(d) Within 14 days after service by the Region, post at its facility in Phelps, 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 Respondents authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate

[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 the judgment of the 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."

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 October 31, 2008.

(e) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 20, 2010

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 abide this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to recognize the Union as the exclusive collective-bargaining representative of all employees performing work as set forth in article I of the 2006 Agreement between the Association and the Union.

WE WILL NOT fail or refuse to apply to unit employees the collective-bargaining agreement between the Association and the Union.

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 recognize the Union as the exclusive collective-bargaining representative of employees in the bargaining unit and will adhere to all provisions in our existing collective-bargaining agreement with the Union.

WE WILL make whole our bargaining unit employees, and all benefit funds, for any loss of income, contributions, or benefits suffered as a result of the failure to apply to those employees the collective-bargaining agreement between the Association and the Union, and for any expenses incurred in connection with those benefit fund losses, with interest.

CARR FINISHING SPECIALISTS, INC. AND G.P.C. CONSTRUCTION, INC.