Cimato Brothers, Inc. and Cimato Brothers Construction, Inc. *and* International Union of Operating Engineers, Local Union No. 17. Case 3–CA–25918

June 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On July 18, 2007, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.[4]

The principal issues in this case are whether the Respondents, Cimato Brothers, Inc. (Cimato 1) and Cimato Brothers Construction, Inc. (Cimato 2), violated Section 8(a)(5) of the Act by: (1) failing to apply the terms and conditions of the collective-bargaining agreements with the Union to employees of Cimato 2; (2) dealing directly with employees of Cimato 2; and (3) failing to provide the Union with requested information concerning the relationship between Cimato 1 and Cimato 2. Resolution of these issues turns on whether, as alleged in the amended complaint, the Respondents are a single employer or, alternatively, on whether Cimato 2 voluntarily adopted the collective-bargaining agreements with the Union. Although this case presents close factual and legal issues, we find, contrary to the judge, that the General Counsel has failed to establish either that the Respondents are a single employer or that Cimato 2 voluntarily adopted the collective-bargaining agreements. Thus, we do not find that the Respondents' conduct violated the Act, and we dismiss the amended complaint.

I. FACTS

The facts, set forth more fully in the judge's decision, are summarized as follows.

Brothers Anthony, Carmen, and Pasquale Cimato formed Cimato 1 in 1963 to perform sewer construction work. In the 1980s, Cimato 1 also became involved in residential construction and real estate development. Around 1995, the Company ceased performing sewer and residential construction work and was thereafter involved almost exclusively in buying, selling, and developing real estate. At the time of the hearing in April 2007, Anthony Cimato owned 60 percent of the stock of Cimato 1, and he was the only shareholder active in the Company's operations.

Anthony Cimato and his five adult children formed Cimato 2 in 1996 to perform residential construction work. The new company purchased construction equipment and vehicles from Cimato 1 for the sum of $601,000.[5] The shareholders of Cimato 2 at the time of its incorporation were Anthony Cimato (50 percent), Ferdinando Cimato (10 percent), Francesca Cimato (10 percent), Robert Cimato (10 percent), Anthony Cimato Jr. (10 percent), and Maria Cimato-Circulli (10 percent).[6] Since its inception, Ferdinando Cimato has been the president of Cimato 2, Anthony Cimato Jr. has been the vice president, and Anthony Cimato Sr. (Anthony Cimato) has been the secretary treasurer.

In 1976, Anthony Cimato formed the Council of Utility Contractors, Inc. (the Council) and, since its inception, has been its president and chief negotiator. The Council and the Union have entered into successive Heavy and Highway, Building, and Utility collective-bargaining agreements, the most recent of which are ef-

[1] Subsequently, the Respondents filed a citation of supplemental authority to *Panek v. Cimato Bros. Construction, Inc.*, 2007 WL 3033948 (W.D.N.Y. 2007) (not reported in F.Supp.2d). We have accepted the Respondents' submission pursuant to *Reliant Energy*, 339 NLRB 66 (2003).

[2] The General Counsel moves to strike the Respondents' exceptions to the extent they contain argument in contravention of Sec. 102.46(b)(1) and (c) of the Board's Rules and Regulations. Although the Respondents' exceptions do not conform in all respects with the pertinent sections of the Board's Rules and Regulations, they are not so deficient as to warrant striking them. Accordingly, the General Counsel's motion is denied.

[3] We correct two factual errors in the judge's decision: on p. 5, fn. 17, "2006" should be "2002"; and in the fourth full paragraph on p. 11, "2005" should be "2002."

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

[5] Anthony Cimato testified that he loaned his children about $100,000 of the purchase price, some of which he later forgave as a gift.

[6] Commencing in 2000, Anthony Cimato began gifting his shares of Cimato 2 stock to his children. By the date of the hearing, his stock in Cimato 2 had been reduced to a 10-percent share, and the shares of each of his five children mentioned above had increased to 17.4 percent. A sixth sibling, Dominic Cimato, was also given a 3-percent stock share. There is no allegation that the division of shares by Anthony Cimato among his children was motivated by a desire to evade any obligations under the Act.

fective by their terms from April 1, 2005, to March 31, 2008.[7]

At all times material, Cimato 1 has been a member of the Council, to which it has delegated authority to negotiate and administer collective-bargaining agreements with various labor organizations, including the Charging Party Union.

By contrast, Cimato 2 has never been a member of nor delegated its bargaining authority to the Council, and it has never been signatory to a collective-bargaining agreement with the Union. Nevertheless, for many years, when it hired members of the Union, Cimato 2 gave them the option of participating in either the Union's benefit funds or the Company's 401(k) plan, and it submitted dues, fringe benefit fund contributions, and remittance reports to the Union on behalf of its union-member employees who chose to participate in the Union's benefit funds. The remittance reports submitted by Cimato 2 to the Union contained preprinted language stating, "By submitting this remittance report and/or contributions to the Funds, the Employer agrees that it is bound to a Collective Bargaining Agreement with [the Union]." Cimato 2 did not pay dues or submit fringe benefit fund contributions or remittance reports for its employees who were not union members electing those deductions.

By letter dated June 16, 2006, addressed to Cimato 2, the Union requested information about the relationship between Cimato 1 and Cimato 2, in order to determine whether the two entities constitute a single employer. Cimato 2 did not provide the requested information.

II. JUDGE'S DECISION

The judge found that the Respondents violated Section 8(a)(5) and (1) of the Act by failing to apply the terms and conditions of the 2005–2008 collective-bargaining agreements with the Union to employees of Cimato 2, dealing directly with employees of Cimato 2, and failing to provide the Union with requested information concerning the relationship between Cimato 1 and Cimato 2. In finding these violations, the judge first concluded that Cimato 1 and Cimato 2 are a single employer and that Cimato 2 was obligated to recognize the Union and to abide by the terms of the 2005–2008 agreements by virtue of that single-employer relationship. The judge further concluded that, even assuming arguendo the Respondents are not a single employer, Cimato 2 voluntarily adopted the collective-bargaining agreements by its conduct. More specifically, the judge found that, by paying its union-member employees prevailing wages and submitting remittance reports, employee fringe benefit fund contributions and dues to the Union, Cimato 2 granted recognition to the Union and consented to be bound by the 2005–2008 collective-bargaining agreements.

III. DISCUSSION

A. Single-Employer Status

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 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. *Bolivar-Tees, Inc.*, 349 NLRB 720, 720 (2007); *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283–1284 (2001); and *Dow Chemical Co.,* 326 NLRB 288 (1998).

Applying this four-factor test to the record before us, we find, contrary to the judge, that the General Counsel has failed to demonstrate that Cimato 1 and Cimato 2 constitute a single employer.

1. Common ownership

Because Anthony Cimato is a majority owner of Cimato 1 and a minority owner of Cimato 2, some degree of common ownership is present. However, common ownership alone does not establish a single-employer relationship.

2. Common management

The judge found that Anthony Cimato is active in the day-to-day operations of both Cimato 1 and Cimato 2. In finding that Anthony Cimato is active in the operations of Cimato 2, the judge relied heavily on publicly filed documents obtained from the Web sites of the Federal Election Commission and the New York Department of State. Based on those documents, the judge found that

[7] The Respondents concede that Cimato 1 was signatory to successive Heavy and Highway, Building, and Utility collective-bargaining agreements. However, Anthony Cimato testified without contradiction that those agreements were never applied to Cimato 1's private residential construction work. The record reveals that the Union has a separate collective-bargaining agreement covering residential construction work. It is undisputed that neither Cimato 1 nor Cimato 2 has ever been signatory to the residential agreement. The General Counsel asserts, however, that the Heavy and Highway, Building, and Utility agreements cover residential construction work, and that the residential agreement, which allows employers to pay lower wage rates for such work, is offered by the Union only to employers who are already signatory to one of those agreements. The Respondents dispute this. Thus, Anthony Cimato testified, "We always knew that the residential [work] was never part of the bargaining." We find it unnecessary to resolve whether the Heavy and Highway, Building, and Utility agreements cover residential construction work in view of our finding below that Cimato 2 is not bound by those agreements.

Anthony Cimato has held himself out to the public as an executive, owner, board member, or manager of Cimato 2. The judge also relied on Anthony Cimato's presence at Cimato 2 jobsites and his testimony in an arbitration proceeding involving Timothy Ells, an employee of Cimato 2.

Contrary to the judge, we find that this evidence is insufficient to establish common management. The record does not show whether Anthony Cimato supplied or approved the information on the website documents. Regardless, the public filings alone do not establish that Anthony Cimato actually exercises management authority.

Common management exists where one of the nominally-separate enterprises exercises actual or active control, as distinguished from potential control, over the other's day-to-day operations. See *Dow Chemical Co*., supra at 289. Accord: *Grass Valley Grocery Outlet*, 332 NLRB 1449, 1450 (2000). That standard has not been met here. Although Anthony Cimato is an officer and shareholder of Cimato 2 and he is present on occasion at Cimato 2 jobsites, the record contains no evidence that he exercises actual or active control over the day-to-day operations of Cimato 2. To the contrary, the record indicates that it is Ferdinando Cimato who exercises that control.[8]

We are not persuaded that Anthony Cimato's testimony in the Ells arbitration establishes actual or active control over the day-to-day operations of Cimato 2. First, the arbitration took place in 2002, but the amended complaint alleges that the Respondents violated the Act by their conduct on and after April 1, 2005. The test for single-employer status therefore applies only to the relationship between the Respondents on and after that date; evidence of their prior relationship would be relevant only to the extent it cast light on their subsequent relationship. *Richmond Convalescent Hospital, Inc.*, 313 NLRB 1247, 1249–1950 (1994). Second, the recitation of facts in the arbitration award indicates that Anthony Cimato testified as an "observer" of the events underlying the grievance, and that it was Ferdinando Cimato who dealt with the Union and made the personnel and policy decisions that were the subject of the grievance. Finally, while Anthony Cimato prepared a check drawn on Cimato 2's bank account to satisfy the arbitration award, this ministerial act was consistent with his admitted role as secretary and treasurer of Cimato 2. It does not by itself evince actual or active control over the day-to-day operations or management of Cimato 2.

3. Centralized control of labor relations

Centralized control of labor relations is not present here because Cimato 1 had no statutory employees during the relevant time period. This circumstance does not necessarily bar a single-employer finding.[9] Yet, it is significant that, with regard to Cimato 2, the record demonstrates that Ferdinando Cimato decides which employees to hire, sets their wages and benefits and, together with his brothers, supervises employees and makes decisions regarding discipline and discharge. There is scant evidence of Anthony Cimato's involvement in any of these matters.[10]

Nevertheless, the judge drew the inference that Anthony Cimato exercises control over the labor relations of Cimato 2 based on his role as president of the Council. However, as noted, Cimato 2 has never been a member of nor delegated its bargaining authority to the Council. Cimato 2 appeared on the Council's membership list for several years, but, as explained below, this appears to have been a mistake. In any event, Cimato 2 was removed from the list in 2002, see footnote 3, supra, long before the alleged unlawful conduct in this case. In these circumstances, we find no basis for inferring that,

[8] Anthony Cimato testified that he sometimes visits Cimato 2 jobsites "if I don't feel like doing any paperwork . . . right now I'm 74 years old." He testified further that after Cimato 2 was formed, his sons "pretty much took over," with Ferdinando Cimato responsible for overseeing the day-to-day operations of the Company and his other sons sharing responsibility for running the jobs in the field.

[9] Although the Board typically accords centralized control of labor relations substantial importance in the single-employer analysis, the absence of this factor is given less weight where, as in this case, one of the companies has no employees. See *Bolivar-Tees*, *Inc.,* supra, slip op. at 3 (finding single-employer status despite absence of centralized control of labor relations where one company had no statutory employees); *Three Sisters Sportswear Co.*, 312 NLRB 853, 863 (1993) (where one company has no employees, factor of centralized control of labor relations becomes less important), enfd. 55 F.3d 684 (D.C. Cir. 1995).

[10] The General Counsel argues that Anthony Cimato's control over the labor relations and operations of Cimato 2 is demonstrated by his alleged hiring of two employees through referral by the Union, the first in 2002 and the second in 2005. We find no merit in the General Counsel's argument. The judge specifically found that "Anthony Cimato does not have the right to hire and fire employees," and the General Counsel did not except to that finding or any other portion of the judge's decision.

The General Counsel points out that, in *Denart Coal Co.*, 315 NLRB 850, 853 (1994), enfd. sub nom. *Vance v. NLRB*, 71 F.3d 486 (4th Cir. 1995), the Board found centralized control over labor relations where one company's involvement in a second company's labor relations was "limited" but "significant." The first company's "significant" involvement consisted of meeting with the union about matters related to the second company, agreeing to pay dues on behalf of the second company's employees, and representing the second company in a state administrative proceeding. By comparison, Anthony Cimato's involvement in Cimato 2's labor relations was less weighty. Moreover, in *Denart Coal*, the Board relied on the foregoing evidence "in combination with the ample evidence relating to the other [single-employer] factors" present in that case. In this case, there is comparatively little evidence substantiating the other single-employer factors.

through his role as Council president, Anthony Cimato controls or even shares responsibility for the labor relations policies of Cimato 2.

4. Interrelation of operations

We also find that the General Counsel has not demonstrated interrelation of operations. In essence, the Respondents are engaged in different businesses. Cimato 1 is involved in the buying, selling, and developing of real estate, and Cimato 2 is involved in residential construction. There is no evidence of employee interchange or commingling of books, records, or financial information.

It is true, as the judge found, that Cimato 1 and Cimato 2 share the same office facility, office equipment, and support staff. But the record reflects that Cimato 2 pays rent for the use of the office facility to Anthony Cimato, the owner of the facility. The record also reflects that Cimato 1 reimburses Cimato 2 for its share of office expenses, in the amount of $6750 per year. There is no evidence that the amount paid by Cimato 2 for rent or the amount paid by Cimato 1 for office expenses is any more or less than fair market value.[11] In the absence of any indication that these arrangements are not arm's length, we do not find that they detract from the corporate independence of the entities. See, e.g., *Mercy Hospital,* supra at 1286.

In finding interrelation of operations, the judge relied heavily on the testimony of Hector Titus, the executive director of the Council. Titus testified that in 1996 he replaced Cimato 1 with Cimato 2 on the list of Council members after he received notice of an address change for "Cimato Brothers Construction," which led him to assume that Cimato 1 had changed its name. Titus testified further that he was informed in 2002 by Anthony and Ferdinando Cimato that Cimato 1 and Cimato 2 are separate entities and that Cimato 2 was not a member of the Council. As a result, in November 2002, Titus removed Cimato 2 from the Council's membership list and put Cimato 1 back on the list.[12]

We are unwilling to infer from this testimony the degree of interrelation of operations necessary to support a finding of single-employer status. Significantly, there is no suggestion in the record that Titus' belief that the Respondents were a single entity was based on anything other than his receipt of a change of address form for Cimato 2. In sum, Titus' belief that Cimato 1 and Cimato 2 were a single entity does not substitute for the required proof.

5. Conclusion

Although there is some degree of common ownership, the General Counsel did not adduce sufficient evidence of the other three factors of the single-employer test. Accordingly, he has not met his burden of proving that Cimato 1 and Cimato 2 are a single employer.

B. Adoption by Conduct

We next consider whether Cimato 2, by its conduct, voluntarily adopted the 2005–2008 collective-bargaining agreements. A binding 8(f) agreement may be formed even when the parties have not reduced to writing their intent to be bound if the employer has engaged in "conduct manifesting an intention to abide by the terms of an agreement." *E.S.P. Concrete Pumping, Inc.*, 327 NLRB 711, 712 (1999). However, the voluntary payment of wages and benefits equivalent to those specified in a collective-bargaining agreement does not "alone" establish an intent to be bound. See, e.g., *E.S.P.,* supra at 714 fn. 13 (stating that nothing in the Board's decision should be read to hold that an employer is bound by an 8(f) agreement merely because it has paid wages and benefits equivalent to those specified in the agreement). Rather, the "formation of a binding contract on the theory of adoption or notification must be based on some element of mutual consent and obligation." *Cab Associates*, 340 NLRB 1391, 1401–1402 (2003). Whether particular conduct in a given case demonstrates adoption of a contract is a question of fact. *DST Insulation, Inc.*, 351 NLRB 19 (2007).

Applying the foregoing principles, we find that Cimato 2's conduct, viewed as a whole, is insufficient to establish an intent to be bound. For example, the record reveals, as reflected in the judge's own factual findings, that Cimato 2 did not apply the collective-bargaining agreements to employees who were not union members, and it dealt directly with both member and nonmember employees regarding wages and benefits. The record also reveals that Cimato 2 has consistently maintained that it is not bound by any collective-bargaining agreements with the Union. Finally, there is no evidence that Cimato 2 has ever held itself out as a union-signatory contractor in order to obtain work. The Board considers such conduct by an employer to be a significant factor indicating voluntary adoption. *E.S.P.*, supra at 713 ("Al-

[11] In finding that the two companies are functionally interrelated, the judge emphasized that there was no evidence as to the amount of rent, if any, paid by Cimato 2 for the use of the office facility. In fact, Anthony Cimato testified without contradiction that Cimato 2 does pay rent for the use of the office facility. Admittedly, he did not specify the amount. But the burden was on the General Counsel to produce affirmative evidence that would establish the absence of an arm's-length relationship. Here, the General Counsel chose not to cross examine Anthony Cimato regarding the rental amount paid by Cimato 2 or to introduce any other evidence bearing on that issue.

[12] Although, as stated, Cimato 2 appeared on the Council's membership list from 1996 until 2002, Cimato 2 has never been a member of, nor delegated its bargaining authority to, the Council.

lowing employers . . . to obtain work . . . by claiming to be a union signatory employer, and then to avoid their contractual obligation by claiming that no valid agreement exists, would subvert the intent of Congress in enacting the 8(e) construction industry provision . . . ."). See also *DST*, supra (employer voluntarily adopted collective-bargaining agreement by, inter alia, holding itself out as a union-signatory contractor to obtain work); *Scandia Stucco Co.,* 319 NLRB 850 (1995), enfd. 103 F.3d 135 (8th Cir. 1996) (same).[13]

ORDER

The amended complaint is dismissed.

Ron Scott, Esq., for the General Counsel.
James I. Myers, Esq. (Myers, Quinn & Schwartz, LLP), for the Respondent.
John Lichtenthal, Esq. (Lipsitz, Green, Scime & Cambria, LLP), for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Buffalo, New York, on April 23–24, 2007. The original charge in this proceeding was filed by the International Union of Operating Engineers, Local Union No. 17 (the Union) on June 19, 2006. An amended charge was filed by the Union on August 10, 2006. The complaint issued September 29, 2006.

The complaint, as amended,[1] alleges that Cimato Bros. Inc. (Cimato 1) and Cimato Bros. Construction, Inc. (Cimato 2) have been affiliated business enterprises with common ownership, management, supervision, personnel, operations, facilities, and labor policy, have held themselves out to the public as single-integrated business enterprises, and are, therefore, a single employer within the meaning of the National Labor Relations Act (the Act). The complaint further alleges that Cimato 2 agreed, by its actions on or about April 1, 2005, to be bound by the terms of a collective-bargaining agreement between the Council of Utility Contractors (the Council) and the Union, and granted recognition to the Union as the exclusive collective-bargaining representative of the unit without regard to whether the Union attained majority status. It is further alleged that the Respondents have violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees as follows: by failing and refusing, since on or about April 1, 2005, to apply the terms and conditions of the collective-bargaining agreements to work performed by employees in the unit; by bypassing the Union, since on or about April 1, 2005, and dealing directly with unit employees by offering them a choice of having their contractually-required fringe-benefit fund contributions remitted to the Union, or having an equivalent amount invested in their behalf in a 401(k) plan; by failing and refusing since, on or about June 16, 2006, to furnish the Union with requested information, which was relevant to the Union's duties as the unit's exclusive bargaining representative. The Respondents admit that there is some overlapping of officers and shareholders, but essentially deny the rest of the allegations.[2]

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

FINDINGS OF FACT

I. JURISDICTION

Cimato 1, a corporation, with an office and principal place of business in East Amherst, New York, has been engaged in the business of buying, selling, and developing residential real estate. During the past 12 months, Cimato 1, in conducting its business operations, derived gross revenues in excess of $500,000 and sold properties valued in excess of $100,000 to Marrano Marc Equity Homes, an entity directly engaged in interstate commerce.

Cimato 2, a corporation, with an office and principal place of business in East Amherst, New York, has been engaged in the construction of residential real estate. During the past 12 months, Cimato 2, in conducting its business operations, provided services valued in excess of $50,000 to Marrano Marc Equity Homes, an entity directly engaged in interstate commerce.[3]

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[13] The General Counsel cites additional evidence, not relied on by the judge, in support of the argument that Cimato 2 voluntarily consented to be bound by the 2005–2008 collective-bargaining agreements. Specifically, the General Counsel points to: (1) Cimato 2's alleged compliance in 2000 with a demand by the Union that it replace two nonunion heavy-equipment operators with members of the Union; (2) its alleged request around 2002 that the Union send an operator to one of its jobsites; and (3) its participation in the 2002 Ells arbitration proceeding. Contrary to the General Counsel, these events have no probative value in determining whether Cimato 2 voluntarily consented to be bound by the 2005–2008 agreements, for they occurred years before the effective date of those agreements. Furthermore, it is undisputed that Cimato 2 took the position in the Ells arbitration proceeding that it was not bound by any collective-bargaining agreement with the Union. While Cimato 2 subsequently complied with the arbitration award, we are not willing to infer that it thereby consented to be bound. Thus, as suggested by the Respondents in their brief, Cimato 2's conduct in this respect may reflect a simple economic comparison of the cost of appealing the award with the cost of compliance, which was less than $1000.

[1] At the hearing, the General Counsel's motion to amend the complaint, to allege that Cimato 1 has at all material times been a member of the Council of Utility Contractors, was granted. (Tr. 160–164.)

[2] The Respondents deny proper service of the charges because one copy was served on both companies. (GC 1[k], pars. I[a] and [b]; GC 1[l], pars. I[a] and [b].) That denial, however, lacks merit, as the affidavit of service indicates that it was made upon Anthony Cimato, president of Cimato 1 and secretary-treasurer of Cimato 2, at the principal place of business of both. (GC 1[b], [d], [f] and [h].)

[3] Cimato 1 admitted in its answers to the complaints, that it "derived gross revenues in excess of $500,000" and "sold properties in excess of $100,000 to Marrano Marc Equity Homes." It denied knowledge, however, as to "whether Marrano Marc Equity Homes is engaged in interstate commerce." (GC Exh. 1[k], par. II[f].) Cimato 2 admitted it "provided services in excess of $50,000 to Marrano, but also denied knowl-

The Union is an organization that files grievances, takes care of its members, and negotiates contracts for the wages, hours, and terms and conditions of employment of heavy equipment operators within the Union's jurisdiction.

Accordingly, I find that Cimato 1 and Cimato 2 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.[4]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Cimato 1

Cimato 1 was incorporated on July 5, 1963, by three brothers: Anthony, Pasquali, and Carmen Cimato. The three Cimato brothers were the sole shareholders of Cimato 1 until at least 1980. Sometime in the 1980s, Pasquale Cimato disposed of his shares. At that point, Anthony and Carmen Cimato became equal 50-percent shareholders of Cimato 1. Anthony Cimato presently owns 60 percent of the shares, and serves as secretary and a director of Cimato 1. Carmen Cimato owns the remaining 40 percent of Cimato 1's stock ownership. They are Cimato 1's only directors.

Until the 1980s, Cimato 1's business consisted almost exclusively of sewer construction. Sometime in the 1980s, Cimato 1 became involved in residential development. Cimato continued engaging in both types of activities until 1995 or 1996, when Carmen Cimato suffered a heart attack and retired from the active operation of Cimato 1. Thereafter, Cimato 1 focused on real estate development, while its residential construction work was essentially assumed by Cimato 2. Cimato 1's presence in the residential construction industry, however, did not disappear. An example of the interrelationship between the two companies on subsequent real estate construction projects is demonstrated on an Employer's remittance agreement and report, dated September 23, 2002, and submitted by Cimato 1 to Local 210. That form was signed by Anthony Cimato, as secretary, on behalf of Cimato 1. Anthony Cimato, however, was secretary of Cimato 2, not Cimato 1. Moreover, the check submitted along with the remittance form was signed by Anthony Cimato and drawn on the account of Cimato 2. The circumstances indicated that Cimato 1 acted as a layer between Cimato 2 and the labor organizations.[5]

Cimato 1's principal place of business is located in a portion of a building located at 9220 Transit Road. The building is owned by Anthony Cimato, but Cimato 1 operates out of the portion of the premises occupied by Cimato 2.[6] Cimato 1 does not have any clerical staff or office equipment. Instead, it uses Cimato 2's clerical staff, faxes, and telephones. For such services, Cimato 1 paid Cimato 2 the sum of $6750 per year in 2004, 2005, and 2006.[7]

B. Cimato 2

Cimato 2 was formed at or around the time that Cimato 1 turned its focus to real estate development. It was incorporated on January 4, 1996, and has engaged almost exclusively in residential construction work.[8] With a loan from Anthony Cimato, the new Company acquired equipment and construction vehicles from Cimato 1 for the sum of $601,000.[9] The shareholders at the time of incorporation were Anthony Cimato and five of his children—Ferdinando, Francesca, Robert, Anthony, and Maria Cimato-Circulli. Anthony Cimato was a 50-percent shareholder, while each of his children had a 10-percent stock share. Since Cimato 2's inception, Ferdinando Cimato has served as president, Anthony Cimato Jr. as vice president, and Anthony Cimato as secretary-treasurer.

Since December 2000, Anthony Cimato has made a series of gifts of his Cimato 2 stock to his children. As of January 3, 2004, Anthony Cimato was a 40-percent shareholder in Cimato 2, while each of his five children held a 12-1/2-percent stock share. By February 1, 2006, Anthony Cimato's stock in Cimato 2 was reduced to a 10-percent share, while the stock share of each of five aforementioned children increased to 17.4 percent, and another sibling, Dominic Cimato, was added to the ownership mix with a 3-percent stock share. Cimato 2's directors have always been Ferdinando Cimato, Anthony Cimato, and Anthony Cimato Jr.[10]

In addition to continuing to maintain an ownership interest, Anthony Cimato remains Cimato 2's secretary-treasurer. In publicly filed documents with the Federal Elections Commission and the New York Department of State, Anthony Cimato

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edge as to whether the latter was or is engaged in interstate commerce. (GC Exh. 1[l], par. II[e].) In a sworn affidavit received in evidence without objection, Michael Kreamer, Marrano's executive vice president, established that his company and/or its wholly owned or majority-owned companies build and sell homes in Boston, Massachusetts, and Hillsboro Beach, Florida, for amounts well in excess of $50,000 annually. (GC Exh. 3.)

[4] The Respondents, for the first time, in their proposed findings of fact 97 and 98, assert that the General Counsel failed to establish jurisdiction because it is not premised on Marrano Marc Equity Corporation's own interstate activity, but rather, Marrano's wholly or majority-owned entities. The Board has long recognized, however, that a business will be deemed to be engaged in interstate commerce based on its affiliation, common ownership, and control over businesses located or performing work in other states. *Professional Eye Care*, 289 NLRB 738, 739 (1988); *Liberty Scrap Materials, Inc.*, 152 NLRB 480, 482 (1965); *P-M Garages, Inc.,* 139 NLRB 987 fn. 7 (1962); and *National Broadcasting Co.,* 61 NLRB 161, 169 (1945).

[5] Anthony Cimato's assertion that Cimato 1 discontinued all construction activities after 1996 was contradicted by GC Exh. 29, which lists Cimato 1 as the "Employer" on the September 23, 2002 form. (Tr. 34–35.) However, it appears that Cimato 1 was actually acting as a conduit for the submission of union members' fringe benefits on behalf of Cimato 2, who actually performed the work.

[6] There was no proof offered to establish that Cimato 2 pays Anthony Cimato rent for the use and occupancy of a portion of his property.

[7] Tr. 84–86, 113–115, 136–137; GC Exh. 30.

[8] Ferdinando Cimato testified that Cimato 2's business is approximately "99.9 percent" residential developmental of single-family homes. (Tr. 134, 139; GC Exh. 26.)

[9] The transfer of assets was documented by a New York State tax return. (Tr. 134–135; R. Exh. 3.)

[10] R. Exh. 4; Tr. 107–111.

has held himself out as an executive, owner, or board member of Cimato 2.[11]

Since 2000, the only construction work performed by Cimato 2 for Cimato 1 was on the Meadows North Subdivision development project, with invoices dated August 3 and December 28, 2001. Anthony Cimato does not have the right to hire and fire employees, but has been active with respect to Cimato 2's construction work, as evidenced by his presence at Cimato 2's construction site in Hamburg on August 8, 2006.[12]

C. The Council

The Council of Utility Contractors (the Council) was formed as an employer association in or around 1976, primarily for the purpose of bargaining collectively with various labor organizations on behalf of its employer-members.[13] In order to become a member, an employer is required to submit an application and a form designating the Council as its bargaining agent in negotiating and administering collective-bargaining agreements with the Union. Cimato 1 and three other Buffalo area construction-industry contractors were the Council's charter members. Since its inception, Anthony Cimato has been the Council's only president.[14]

Hector Titus has been employed by, and responsible for the day-to-day operations of, the Council since 1991. When first hired, Titus was designated as the Council's secretary. His title subsequently changed to executive director, but his responsibilities remained the same. Upon arriving in 1991, virtually all of the Council's records, including membership applications and bargaining designation forms, were missing. Titus was unable to get an explanation from the members of the Council as to the absence of such records.[15]

The Council has, however, maintained membership lists since Titus' employment in 1991. The Council membership lists, dated 1991 and February 2, 1996, listed Cimato 1 as a Council member.[16] In 1996, after Cimato 1 stopped performing construction work, Cimato 2 took Cimato 1's place on the Council membership lists provided to the Union. Titus made the change after receiving notice of an address change for "Cimato Brothers Construction." At that time, Titus assumed that Cimato 1 simply changed its name, since Cimato 2 never paid Council dues, submitted a membership application and designation of bargaining agent, or signed a cloaking agreement authorizing the Council to negotiate on its behalf.[17] As a result, the Council's membership list, dated October 30, 1996, January 15, 1998, and April 4, 2000, listed Cimato 2, not Cimato 1, as a member.

On November 26, 2001, Mark Kirsch, the Union's business manager, requested the Council's membership list and cloaking documents in preparation for upcoming collective bargaining. On December 12, 2001, Titus replied with a letter asking what a cloaking document was. On January 8, 2002, Kirsch replied that a cloaking document is a letter signed by a contractor authorizing the Council to act as the contractor's bargaining representative. On or around February 20, 2002, Titus provided the Union with a list indicating that Cimato 2 continued to be a Council member.[18]

Titus' belief that Cimato 1 and Cimato 2 were the same company was evident from his work on behalf of both companies in connection with an arbitration proceeding held on February 22, 2002. The employer listed in the caption of that arbitration decision was Cimato 1. However, Titus' August 6, 2001 letter in support of the employer's position referred to Cimato 2 as the grievant's employer.[19] Sometime after March 4, 2002, Ferdinando and/or Anthony Cimato informed Titus, for the first time, that Cimato 1 and Cimato 2 were separate companies, and that Cimato 2 was not a member of the Council. This directive was precipitated solely by their response to the result of the arbitration award, since Anthony Cimato, as Council president, presided over several labor negotiations prior to that point, knew or had reason to know that Cimato 2 was on the list as a member, and took no action to correct the membership list.[20] As a result, Titus removed Cimato 2 from the Council membership list and added Cimato 1. This change is reflected in the Council's November 2002 and February 2005 Council membership lists. At some point after April 1, 2005, and prior to September 2005, Anthony Cimato orally instructed Titus to remove Cimato 1 from the Council's membership list. Anthony Cimato's explanation was that Cimato 1 was inactive in construction.[21]

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[11] The Respondents contend that such publicly filed information is either wrong or of limited probative value. I disagree. Listing Anthony Cimato's name with the FEC in connection with Cimato 2's political contributions, and with the New York Department of State as Cimato 2's agent for personal service, were clearly significant. Moreover, the Respondents were given an opportunity at trial to contact those agencies to determine the information source leading to the posting of Anthony Cimato's name on their websites, but declined the opportunity.

[12] Ferdinando Cimato was not too sure if there were any other projects that Cimato 2 did for Cimato 1, but there was no credible proof offered by the General Counsel to indicate otherwise. (R. Exh. 9: Tr. 137, 142.) Gerald Franz, the Union's business agent, testified about an incident in August 2006 when he spoke to Anthony Cimato about a construction project in Hamburg, New York, but the facts support an inference that Cimato 2 was the contractor. (Tr. 166–170.)

[13] GC Exhs. 1(e) and 4.

[14] GC Exhs. 16–17; Tr. 46–47, 84.

[15] The failure of Anthony Cimato, as the sole president of the Council since its inception, to address Titus' contention that the Council was devoid of records, leads me to infer that the organization's membership administration was run in a loose manner prior to Titus' arrival in 1991. In any event, it was not disputed that Cimato 1 was a Council member and party to its collective-bargaining agreements with the Union throughout the 1990s.

[16] GC Exhs. 4–5.

[17] Anthony Cimato, as president and Titus' superior at the Council, never corrected Titus inclusion of Cimato 2 on the Council's membership list until 2006 *and* prevailed over several collective-bargaining sessions with Cimato 2 as a listed member. Tr. 25, 29–30, 47, 140.

[18] R. Exhs. 10, 11; GC Exh. 9.

[19] GC Exh. 18, pp. 1 and 4.

[20] I did not attribute any weight to the arbitrator's decision, which was issued prior to April 1, 2005, in deciding whether Cimato 2 was bound to a collective-bargaining agreement with the Council or one of its members. (GC Exhs. 36, 37; Tr. 31–33.) However, I did take note of the references in the arbitrator's decision to Cimato 1, Cimato 2, Anthony Cimato, and Ferdinando Cimato, and the roles played by each in that controversy, with respect to the single employer issues in this case.

[21] GC Exhs. 10–13; Tr. 32–35, 195.

D. The Collective-Bargaining Agreements

During the period of time that Cimato 1 performed sewer construction work, it applied the Council's collective-bargaining agreements with the Union. Cimato 1 was aware of the existence of a collective-bargaining agreement with respect to residential construction work, but refused to sign it.[22] In or around 1996, Cimato 1 essentially ceased primary responsibility for the construction aspect of its real estate development activities. It did not, however, ever give written notice to the Union that it was no longer engaged in construction or that it was withdrawing or intended to withdraw from a collective-bargaining agreement.[23]

Contrary to the practice of Cimato 1, Cimato 2 has never actually signed a collective-bargaining agreement with the Union. During the Council's collective-bargaining negotiations with the Union in 1999 and 2002, however, no one stated that Cimato 2 was a corporate entity distinct from Cimato 1, or that Cimato 1 was no longer an employer-member of the Council. On December 6, 2004, Ferdinando Cimato on behalf of Cimato 2, invoked the terms of a February 13, 2003 settlement with another labor organization, Local 210, by sending that organization the following letter:

> This letter will reiterate that is [Cimato 2's] position that [Cimato 2] is not now nor has it ever been a party to any Collective Bargaining Agreement between the [Council] and [the Union]. Moreover, [Cimato 2] is not now and has never been a member of the [Council].
>
> In accordance with the Settlement Agreement dated 2/13/03, this letter will further serve as written notice that [Cimato 2] is withdrawing from bargaining with Local 210 and will not be a signatory at the expiration of the Collective Bargaining Agreement.
>
> This letter will also provide notice that [Cimato 2] does not intend to become a member of [the Council] and therefore in the event [Council] and [Local 210] enter into future collective bargaining agreements, [Cimato 2] will not be a party to that agreement.[24]

As previously noted, Cimato 1 was on the Council's February 2005 membership list submitted to the Union for collective bargaining in 2005. However, prior to those negotiations, union representatives reasonably believed that "Cimato Brothers" and "Cimato Brothers Construction" were names used interchangeably to denote the same Company.[25]

On or about April 1, 2005, the Council and the Union entered into "building," "heavy and highway" and "utility" collective-bargaining agreements, effective from April 1, 2005, to March 31, 2008 (the April 2005 collective-bargaining agreement). Anthony Cimato was involved in the negotiations on behalf of the Council. There was also, as was customary in the past, a related agreement covering residential construction wages and benefits.[26] The appropriate bargaining unit of operating engineers, as stated in the agreement, was:

> All employees performing work as described in the "Working Conditions" section set forth at page 1 of the 2005–2008 "building agreement" between the Union and the Council of Utility Contractors, Inc. (Council), in Article II, section 1 of the 2005–2008 "heavy and highway" agreement between the Union and the Council, and in Article I of the 2005–2008 "utility" agreement between the Union and Council.

Although Cimato 2 has never formally executed a collective-bargaining agreement with the Union, Cimato 2 has employed members of the Union without any consultation with, or referral by, the Union. In such cases, it has given those employees a choice as to whether they want their benefits paid to the Union or to participate in the Company's 401(k) retirement plan. In the case of other employees who were not union members, Cimato 2 did not submit remittance reports and/or contributions to the Union on their behalf. Instead, Cimato 2 allowed such employees to participate in the Company's retirement and profit-sharing plans.

Joseph Kerlin and James Mulholland are two union members who have been employed by Cimato 2. Cimato 2 paid them paid $28.86 an hour—the prevailing wage set forth in the Union's collective-bargaining agreement for 2004–2005. In addition, since at least January 1, 2005, and until June 28, 2006, Cimato 2 submitted completed, but unsigned, remittance reports to the Union, entitled "COUC Utility & Heavy/Highway Agreement-Engineers Only." The forms accompanied and reflected Cimato 2's employer contributions towards the employees' union pension and health and welfare training funds. A preprinted portion of each report stated, in pertinent part:

> By submitting this remittance report and/or contributions to the Funds, the Employer agrees that it is bound to a Collective Bargaining Agreement with the International Union of Operating Engineers Local Union No. 17, 106, 463, 545, and/or 832 and the Agreements and Declarations of Trust of the Engineers Joint Welfare, Pension, Supplemental Unemployment Benefit, and Training Funds, the Agreement and Declarations

[22] Anthony Cimato conceded that Cimato 1 was a signatory to a collective-bargaining agreement with respect to utility construction work, but not residential construction. (Tr. 102–103.) He was aware, however, that such an agreement existed with respect to residential construction, but refused to sign it. (GC Exh. 18, pp. 2–3.)

[23] This finding is not disputed. As Anthony Cimato conceded, "(w)hy should we tell anybody?" (Tr. 62–64, 101–103.) Moreover, there was a written notice given by Cimato 2, but not Cimato 1, and that was to a different labor organization—Local 210. (GC Exh. 15.)

[24] The December 6, 2004 letter was sent to Local 210, but there is no credible proof that it was sent to Local 17 and the Council. (GC Exh. 15; Tr. 26–27.) Furthermore, based on Franz' credible testimony, I find that he was unaware of that letter at or around the time he entered collective-bargaining negotiations with Anthony Cimato and the Council in 2005. (Tr. 194–196.)

[25] This finding is based on the credible and uncontradicted testimony of Union Representatives Gerald Franz and Thomas Freedenberg. (Tr. 169, 224–226.) Franz corroborated Freedenberg insofar as the 2005 negotiations were concerned; Franz was not involved in negotiations during 2002 or 1999. (Tr. 188–189.)

[26] That agreement was not offered into evidence either, but I base this finding on Franz' credible and unrefuted testimony, as well as the background contained in the arbitrator's 2002 decision. (GC Exh. 18, pp. 2–3; Tr. 166–172.)

of the Central Pension Fund of the International Union of Operating Engineers and Participating Employers, and any restatements or amendments thereof and any policies adopted thereunder. By submitting this report, the Employer certifies that it does not include any owners, partners, sole proprietors, or independent contractors.[27]

On or around June 10, 2006, suspecting that Cimato 1 may have been subcontracting bargaining unit work to a nonunion contractor, Franz visited a residential construction site in Hamburg, New York. He spoke with two individuals who were performing site preparation work. Franz concluded that they were employed by Wolf Landscaping, a subcontractor for Cimato 1. He spoke with Anthony Cimato a few days later and told him that Cimato 1 was violating the April 2005 collective-bargaining agreement by using Wolf Landscaping as a subcontractor on the Hamburg project. Anthony Cimato denied the allegation, but explained that Cimato 2 was doing the work. Anthony Cimato also told Franz that Cimato 1 gave work to Cimato 2, but insisted that neither company was a signatory contractor.

Franz, who was unaware, prior to this conversation, of any distinction between Cimato 1 and Cimato 2, responded that he was present at the 2005 negotiations, which Anthony Cimato led on behalf of the Council, and the Council membership list presented to the Union included Cimato 1. He also told Anthony Cimato that Cimato 1 sent fringe benefit contributions to the Union on behalf of union members, which the Union could not, by law, have accepted in the absence of a collective-bargaining agreement. Anthony Cimato refused to discuss the matter further and referred Franz to Titus.

Franz immediately called Titus about his conversation with Anthony Cimato and insisted that "they" were bound by the collective-bargaining agreement. Titus said he would speak with Anthony Cimato and get back to Franz. After speaking with Anthony Cimato, Titus called Franz back. He told Franz that neither Cimato 1 nor Cimato 2 was a signatory to the collective-bargaining agreement, were not bound by it, and that payments to the Union on behalf of union members was simply one option given to them regarding benefits. Franz also mentioned that Anthony Cimato, as the lead negotiator for the Union during the 2005 negotiations, portrayed himself to be a signatory contractor. Titus defended Anthony Cimato's position, but could not explain why Cimato 1 was listed as a Council member. Franz accused Cimato 1 of bad-faith bargaining and proceeded to file a grievance.[28]

On June 16, 2006, the Union's counsel, Richard D. Furlong, Esq., sent a letter to Cimato 2, specifically to the attention of Anthony and Ferdinando Cimato, responding to Anthony Cimato's contention that Cimato 2 does not have a collective-bargaining agreement with the Union. Furlong stated that Cimato 2 had been following many of the terms and conditions of the collective-bargaining agreement and was, therefore, bound by it. He enclosed a copy of the applicable agreement and demanded, pursuant to Section 8(d) of the Act, that Anthony and/or Ferdinando Cimato execute the agreement on behalf of Cimato 2. Furlong also stated the following:

> We are also currently investigating what clearly appears to be a single employer/alter-ego relationship between Cimato Bros. Construction, Inc. and Cimato Bros., Inc. It is that latter firm, Cimato Bros, Inc., that has been a member of the Council of Utility Contractors, Inc., going back many years, and most recently during the collective bargaining negotiations that transpired in the spring of 2005. Therefore, as Cimato Bros., Inc. is clearly bound by the Council of Utility Contractors, Inc.—Local 1—collective bargaining agreement, Cimato Bros. Construction, Inc. is similarly bound by virtue of its single employer/alter-ego status with Cimato Bros., Inc. And presumably, you share this analysis as evidenced, by among other proofs, the Taft-Hartley contributions that Cimato Bros. Construction, Inc. periodically tenders.
>
> In any event, we await to get back the signed agreement from Cimato Bros. Construction, Inc. An appropriate unfair labor practice charge will be filed if we do not receive the document back, fully executed, by the close of business Friday, June 23, 2006. And, in the event that you deny that there is a single employer/alter-ego relationship between the two aforementioned firms, an unfair labor practice charge will, similarly, be filed.
>
> Lastly, enclosed is a questionnaire which you are required to complete and return to the undersigned. Please supply the information, together with the signed collective bargaining agreement, once again, by the close of business Friday, June 23, 2006.[29]

The Union waited 3 days and, on June 19, filed a grievance and an unfair labor practice charge. Cimato 2 never did provide the requested information or submit an executed collective-bargaining agreement. It continued submitting fringe benefits to the Union on behalf of union members Kerlin and Mulholland, but modified the remittance forms that accompanied them after June 29, 2006, as follows:

> By submitting this remittance report and/or contributions to the Funds, the Employer *does not agree* that it is bound to a Collective Bargaining Agreement with the International Union of Operating Engineers Local Union No. 17, 106, 463, 545, and/or 832 and the Agreements and Declarations of Trust of the Engineers Joint Welfare, Pension, Supplemental Unemployment Benefit, and Training Funds, the Agreement and Declarations of the Central Pension Fund of the International Union of Operating Engineers and Participating Employers, and any restatements or amendments thereof and any policies adopted thereunder by submitting this report, the Employer certifies that it does not include any owners, part-

[27] During the term of the current collective-bargaining agreements, union benefit contributions have been paid with Cimato 2's checks, but the contribution report forms have identified the employer as either "Cimato Brothers" or "Cimato Brothers Construction." (Tr. 121–124, 137–139, 143–145; GC Exhs. 20–23; R. Exhs. 5–8.)

[28] I based this finding on Franz' credible and essentially unrefuted testimony. (Tr. 166–172.)

[29] GC Exh. 19(e), Exh. A.

> ners, sole proprietors, or independent contractors. [Emphasis added.][30]

Based on the fringe benefit forms submitted by Cimato 2 to the Union and a conversation with union member Kerlin, Franz knew that Kerlin and Mulholland were still working for Cimato 2 at the Hamburg jobsite. On August 8, 2006, Franz returned there and approached Ferdinando Cimato. Franz identified himself and said he had members working at that location. Ferdinando Cimato accused Franz of trespassing and harassment, and told him to leave. Franz insisted he had a right to speak with union members working at that location pursuant to the collective-bargaining agreement. Ferdinando Cimato repeated his directive that Franz leave the jobsite, and suggested he communicate with union members after work, but conceded that Cimato 2 remitted their fringe benefits to the Union.

At this point, Anthony Cimato walked across the jobsite and joined the conversation. Franz told Anthony Cimato that he was there to work things out. Anthony Cimato explained that Cimato 2 would be at a disadvantage in competing with other contractors if it had to pay the higher wage rates required by the collective-bargaining agreement for residential construction work. Although the Union is a signatory to a residential construction collective-bargaining agreement, which provides for a significantly lower hourly wage rate, neither Cimato 1 nor Cimato 2 were signatories to such an agreement.[31]

III. LEGAL ANALYSIS

A. Cimato 2's Responsibilities Under the Collective-Bargaining Agreement By Virtue of Cimato 1's Council Membership

The complaint alleges that Cimato 1 and Cimato 2 violated Section 8(a)(5) of the Act by failing and refusing to apply the terms and conditions of the collective-bargaining agreement with respect to operating engineers employed by Cimato 2. The Respondents do not deny refusing or failing to comply with the April 2005 collective-bargaining agreement. Cimato 1 contends, however, that it neither had a collective-bargaining agreement with the Union nor employed operating engineers. Cimato 2 concedes that it employed operating engineers, but contends that it was not a signatory to a collective-bargaining agreement.

An employer commits an unfair labor practice in violation of Section 8(a)(5) by refusing to engage in collective bargaining with its employees' representative. Neither Cimato 1 nor Cimato 2 had an agreement with a majority of the employees in a covered bargaining unit. Due to the occasional nature of employment in the construction industry, however, Section 8(f) permits a construction industry employer to enter into collective-bargaining agreements with a labor organization, even where the union's majority status has not been established. *Progressive Construction Corp.*, 218 NLRB 1368 (1975). Such agreements are enforceable through their term, unless repudiated by the unit employees in a secret ballot election. *John Deklewa & Sons*, 282 NLRB 1375, 1377 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). Moreover, a construction employer may be bound to successive 8(f) contracts if it expressly gives continuing consent to a multiemployer association to bind it to future contracts. The only exception is where the employer withdraws its consent from the association in a timely and unequivocal manner. *Den-Ral, Inc.*, 315 NLRB 538 fn. 2 (1994); *Retail Associates*, 120 NLRB 388, 393 (1958).

The General Counsel contends that an 8(f) relationship between Cimato 2 and the Union existed by virtue of Cimato 1's Council membership, Cimato 1's designation of the Council as its bargaining representative for the April 2005 collective-bargaining agreement, the Council's April 2005 collective-bargaining agreement with the Union, and Cimato 1 and Cimato 2's collaboration as a single employer.

The applicable collective-bargaining agreement became effective on April 1, 2005. The most recent Council membership list prior to that date was the one generated in February 2005 and submitted to the Union prior to collective bargaining. The Council had a custom and practice of including only members on such lists and, in order to be a member, an employer had to submit a membership application and designation of the Council as its bargaining representative. Cimato 1 was on the February 2005 membership list. Coupled with the fact that Cimato 1's president, Anthony Cimato, served a similar position with the Council and was very actively involved in those negotiations, it is clear that Cimato 1 was a Council member as of April 1, 2005. By acknowledging that its president, Anthony Cimato, was actively involved in negotiations, yet suggesting that his Company was something less than a member of that organization would be, as characterized by the Board, tantamount to "hedging its bets" and "an after-the-fact attempt by the Respondent to position itself so it could have 'the best of both worlds.'" *Hass Electric*, 334 NLRB 865, 867–869 (2001). As such, Cimato 1 was bound by the terms and conditions of the April 2005 collective-bargaining agreement.

Anthony Cimato did, at some time after the April 2005 collective-bargaining agreement became effective and before September 2005, direct Titus to remove Cimato 1 from the Council membership list that was used for bargaining with Local 210 on the ground that the Company was inactive. Cimato did not, however, provide timely written notice to the Union that it was withdrawing its membership, as required by the Council's bylaws. His attempted withdrawal was also inconsistent with his conduct during collective bargaining. Therefore, Cimato 1 continued to be bound to the April 2005 collective-bargaining agreement. *Hass Electric*, supra at 867.

The more complex issue, however, is whether Cimato 2 should be held to apply the terms of the collective-bargaining agreement because it, in fact, operates with Cimato 1 as a single employer. The Board has traditionally deemed two employers

[30] Ferdinando Cimato testified that he did not sign the forms after that date because he was not agreeing to be bound by the terms of the collective-bargaining agreement and that, with respect to any forms signed prior to that date, Cimato 2 was only verifying that the numbers were correct. (Tr. 97, 137–139, 142–143; R. Exh. 5–8; GC Exh. 20.)

[31] Franz' testimony about the August 8, 2006 discussion was not controverted by either Anthony or Ferdinando Cimato. Nor was there any evidence to indicate that Cimato 1 or Cimato 2 was ever a signatory to a residential construction collective-bargaining agreement with the Union. (Tr. 173–177, 211.)

to be a single employer if they are, in fact, a single-integrated enterprise. See *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir. 1983), cert. denied 464 U.S. 892 (1983). In such instances, the Board considers whether the two companies have: (1) common ownership; (2) common management; (3) functional interrelation of operations; and (4) centralized control of labor relations. Not all of these criteria need to be present, however, and single-employer status is generally determined based on all the circumstances of a case and the absence of an arms-length relationship. *Communication Systems Corp.,* 350 NLRB 168, 170 (2007); *Park Maintenance*, 348 NLRB 1373, 1392–1393 (2006); and *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283–1284 (2001).

Cimato 1 and Cimato 2's operations are functionally interrelated. They share the same business facility, office equipment, and support staff. Their joint office is located in a building owned by Anthony Cimato. While there was proof that Cimato 1 reimburses Cimato 2 for its portion of the office expenses, there was no evidence as to what, if anything, Cimato 2 paid Anthony Cimato, as building owner, in rent. Most telling is Titus' belief, at all times prior to April 2005, that Cimato 1 and Cimato 2 were names used interchangeably to denote the same Company. In any event, he certainly believed that one or the other was a Council member.

Regarding common management, Cimato 1's only active employee is Anthony Cimato. He serves, however, as president of Cimato 1 and secretary-treasurer of Cimato 2, and is active in the operations of both companies. As illustrated in the Ellis arbitration decision, and in several publicly filed documents with the Federal Elections Commission and the New York Department of State, Anthony Cimato has held himself out, at various times, as an executive, owner, board member, or manager of Cimato 2. He has also been present at Cimato 2 construction jobs.

Cimato 1 and Cimato 2 have common ownership. Anthony Cimato is a majority owner in Cimato 1 and a minority shareholder in Cimato 2. He became a minority owner of the latter, however, only after gradually granting gifts of shares to each of his children. Moreover, there is no evidence that his children have been required to pay back the loan he gave them to purchase equipment from Cimato 1.

Lastly, there is a centralized control of labor relations between Cimato 1 and Cimato 2 as illustrated by Anthony Cimato's actions as Council president. Since Cimato 1 formally joined the Council, but Cimato 2 never did, it must be inferred that Anthony Cimato, as the Council's president and lead negotiator, knowingly approved the Council's membership list, which listed Cimato 2 and was used during several collective-bargaining sessions prior to April 2005. In the negotiations for the April 2005 collective-bargaining agreement, Cimato 1 was, once again, on the membership list.

Under the circumstances, it is clear that: (1) Cimato 1 was a Council member as of April 1, 2005; (2) Cimato 1 did not effectively timely withdraw from the April 2005 collective-bargaining agreement and is, therefore, bound, by its terms and conditions; (3) Cimato 1 and Cimato 2 have operated as a single employer since the late 1990s through the present and, thus, Cimato 2 is also bound by the collective-bargaining agreement.

B. The Implications of Cimato 2's Remittances to the Union Pursuant to the Collective-Bargaining Agreement

The complaint alleges that Cimato 2, by remitting fringe benefits to the Union on behalf of union members, "granted recognition to the Union as the exclusive bargaining representative of the unit without regard to the majority status of the unit and without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act." Cimato 2 concedes that it remitted fringe benefit contributions to the Union on behalf of union members, but denies that such payments amounted to recognition of the Union. Cimato 2 insists that it remitted such payments only because it gave its employees options with respect to their fringe benefits. In the case of union members, Cimato 2 gave such employees the option of making payments into the Company's 401(k) retirement plan or having fringe benefit contributions submitted to the Union on their behalf.

As previously noted, Section 8(f)(l) allows employers and labor organizations in the construction industry to enter into collective-bargaining agreements without the union having to establish that it has the support of a majority of employees in the applicable unit. An 8(f) relationship may, however, be terminated by either the labor organization or the employer upon the expiration of their collective-bargaining agreement. *Madison Industries,* 349 NLRB 1306, 1307 (2007), citing *John Deklewa & Sons*, 282 NLRB 1375, 1386–1387 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

It is undisputed that Cimato 2 remitted union benefit fund contributions and dues payments to the Union prior to, around the time of, and long after the effective date of the April 2005 collective-bargaining agreement. The forms were submitted unsigned, but that is of no consequence, as the forms expressly stated that, by "submitting this remittance report and/or contributions to the Funds, the Employer agrees that it is bound" to a collective-bargaining agreement with the Union. There was no stated requirement that the forms be signed in order for its terms and conditions to become effective. As such, Cimato 2 did not effectively withdraw consent to be bound by the agreement. Moreover, even though Cimato 2 subsequently modified the form to state that it did not agree to be bound by a collective-bargaining agreement, its actions in continuing remit Union members' fringe benefits was inconsistent with withdrawal of consent. Under the circumstances, I find that Cimato 2, by its actions in paying Kerlin and Mulholland the Union's prevailing wages and submitting remittance reports, employee fringe benefits, and dues to the Union, recognized the Union and was therefore bound by the terms of the April 2005 collective-bargaining agreement. Furthermore, by dealing directly with Kerlin and Mulholland regarding their wage rates and benefits, Cimato 2 violated Section 8(a)(5).

C. The Union's Information Request

Section 8(d) requires an employer to comply with the terms and conditions of any collective-bargaining agreement that it has agreed to. In its answer, Cimato 2 asserted that it did not provide such information because it did not have a relationship with the Union. As previously explained, Cimato 2 did have a

collective-bargaining relationship with the Union at the time of the request. Moreover, the information requested in the June 16, 2006 letter is relevant. The letter sought information relevant to the Union's reasonably objective basis for believing that a single-employer relationship existed between Cimato 1 and Cimato 2. Both companies had, at one time or the other during the past 10 years, appeared on the Council membership list provided to the Union for collective-bargaining. In June 2006, Anthony Cimato suddenly told the Union that Cimato 1 and Cimato 2 were, in fact, separate companies and that neither one had a collective-bargaining agreement with the Union. *Maier,* 349 NLRB 1052, 1058 (2007), citing *Cannelton Industries,* 339 NLRB 996 (2003).

Conclusions of Law

1. Cimato Brothers, Inc. and Cimato Brothers Construction, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union of Operating Engineers, Local Union No. 17 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to deal with the Union and dealing directly with its employees in the unit regarding wages and fringe benefits, and failing and refusing to furnish the Union, upon request, with information that is relevant and necessary to the Union's function as the exclusive collective-bargaining representative of employees of the unit, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

Remedy

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

[Recommended Order omitted from publication.]