

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CIMATO BROTHERS., INC. AND CIMATO BROTHERS
CONSTRUCTION, INC., A SINGLE EMPLOYER

and

Case 3-CA-25918

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL UNION NO. 17

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

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.)

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

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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

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Findings of Fact

I. Jurisdiction

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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.

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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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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.

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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

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² The Respondents deny proper service of the charges because one copy was served on both companies. (GC 1[k], pars. I[a], [b]; GC 1[l], pars. I[a], [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], [h].)

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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 knowledge 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 Kremer, 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.)

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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

Continued

II. Alleged Unfair Labor Practices

A. Cimato 1

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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.

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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

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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

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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

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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); *National Broadcasting Co.*, 61 NLRB 161, 169 (1945).

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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.

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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.

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 5 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 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

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.

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), 4.

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

5 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
10 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
15 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
20 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
25 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

30 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
35 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,

40 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
45 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
50 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, 4.

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

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.

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.

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.)

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

5 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 10 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:

15 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, 20 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 25 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.

30 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 35 accompanied and reflected Cimato 2's employer contributions towards said employees' union pension and health and welfare training funds. A preprinted portion of each report stated, in pertinent part:

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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.)

45 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.)

50 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)

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 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

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.)

applicable agreement and demanded, pursuant to Section 8(d) of the National Labor Relations Act, that Anthony and/or Ferdinando Cimato execute the agreement on behalf of Cimato 2. Furlong also stated the following:

5 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
10 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 17 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.

15 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
20 relationship between the two aforementioned firms, an unfair labor practice charge will,
similarly, be filed.

25 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

30 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:

35 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
40 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, partners, sole proprietors, or independent contractors.
[Emphasis provided.]³⁰

45 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

²⁹ GC Exh. 19(e), Exh. A.

50 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.)

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

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.)

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.

5 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
10 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
15 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.

20 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
25 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.

30 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 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)
35 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 No. 15, slip op. at 3 (2007); *Park Maintenance*, 348 NLRB No. 98, slip op. at 20-21 (2006); *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283-1284 (2001).

40 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
45 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.

50 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.

5 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.

10 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.

20 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.

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

30 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.

40 As previously noted, Section 8(f)(1) 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 No. 114, slip op. at 2 (2007), citing *John Deklewa & Sons*, 282 NLRB 1375, 1386-1387 (1987), enf. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

45 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 No. 98, slip op. at 7 (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 (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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³²

³² 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

Continued

ORDER

5 The Respondents, Cimato Brothers, Inc. and Cimato Brothers Construction, Inc., East Amherst, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

10 (a) Failing and refusing to apply the terms and conditions of the 2005–2008 building, utility and heavy/highway agreements between the Union and the Council of Utility Contractors (the Council), and any successor agreements thereto, unless and until they timely and effectively withdraw from multiemployer bargaining through the Council, to its employees in the bargaining unit set forth in the attached notice.

15 (b) Bypassing the Union and dealing directly with its employees in the unit, in regard to wages, hours, benefits and other terms and conditions of their employment.

20 (c) 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 in the unit.

25 (d) In any like or related manner, failing or refusing to bargain collectively with International Union of Operating Engineers, Local 17 as the recognized exclusive collective-bargaining representative of employees in the unit.

2. Take the following actions necessary to effectuate the purposes and policies of the Act:

30 (a) Adhere to the terms and conditions of the 2005–2008 building, utility and heavy/highway agreements between the Union and the Council, and any successor agreements thereto unless and until they timely and effectively withdraw from multiemployer bargaining through the Council.

35 (b) Jointly and severally, make whole its employees in the unit for losses suffered as a result of the Respondents’ failure to adhere to the terms and conditions of the 2005–2008 building, utility and heavy/highway agreements between the Union and the Council, with interest, from April 1, 2005.

40 (c) Furnish the Union with the information it requested on June 16, 2006.

45 (d) Preserve and, within 14 days of a request, or such additional times 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. If requested, the originals shall be provided to the Board or its agents.

50 _____
waived for all purposes.

(e) Within 14 days of service by the Regional Office, post at its facility in East Amherst, New York, copies of the attached notice.³³ 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 defaced, altered, 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 April 1, 2005.

(f) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix, at its own expense, to Joseph Kerlin and James Mulholland, the employees in the unit who were employed by the Respondent at its Hamburg, New York jobsite in June 2006. The notice shall be mailed to the last known address of Kerlin and Mulholland after being signed by the Respondent's authorized representative.

(g) 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 with the terms of this Order.

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

Dated, Washington, D.C. July 18, 2007

Michael A. Rosas
Administrative Law Judge

³³ 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 a United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that violates these rights. More specifically,

WE WILL NOT fail or refuse to bargain collectively with International Union of Operating Engineers, Local 17 (the Union), as the recognized representative of our employees in an appropriate unit for the purpose of collective bargaining in regard to wages, hours, and other terms and conditions of employment. The appropriate unit is:

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.

WE WILL NOT fail or refuse to apply the terms and conditions of the 2005-2008 building, utility and heavy/highway collective-bargaining agreements (the agreements) between the Council and the Union, and any future agreements between the Union and the Council, unless and until we have properly withdrawn our bargaining authority from the Council.

WE WILL NOT bypass the Union and deal directly with employees in the unit with respect to wages, hours, and terms and conditions of employment.

WE WILL NOT fail or refuse to furnish the Union with information it requests, that is relevant and necessary to the Union in order to carry out its duties as your representative.

WE WILL NOT in any similar way fail or refuse to bargain with the Union.

WE WILL apply the wages, benefits, and other terms and conditions of employment contained in the agreements to our employees in the unit, and WE WILL apply to our employees in the unit the wages, benefits, and other terms and conditions of employment contained in future agreements between the Union and the Council, unless and until we have properly withdrawn our bargaining authority from the Council.

WE WILL make unit employees whole, with interest, for losses they have suffered since April 1, 2005, as a result of our failure to apply the agreements to all employees in the unit.

WE WILL furnish the Union with the information it requested on June 16, 2006.

CIMATO BROTHERS, INC. AND CIMATO
BROTHERS CONSTRUCTION, INC.

(A Single Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

111 West Huron Street, Federal Building, Room 901
Buffalo, New York 14202-2387
Hours: 8:30 a.m. to 5 p.m.
716-551-4931.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.