

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

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**INTERNATIONAL ASSOCIATION OF  
BRIDGE, STRUCTURAL, ORNAMENTAL AND  
REINFORCING IRON WORKERS,**

*Charging Party,*

And

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

*Respondents.*

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**AFFIDAVIT OF  
SERVICE**

Case No. 3-CA-27264

STATE OF NEW YORK     )  
COUNTY OF ONONDAGA ) ss.:

**TERESA L. DEC**, being duly sworn, deposes and says that deponent is not a party to the within action, is over eighteen (18) years of age and resides in Auburn, New York. That on September 16, 2010, deponent served **Respondents' Exceptions To The Decision Of The Administrative Law Judge** by Overnight Delivery Service addressed as follows:

Lester A. Heltzer, Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street N.W.  
Washington, D.C. 20570  
(Eight copies)

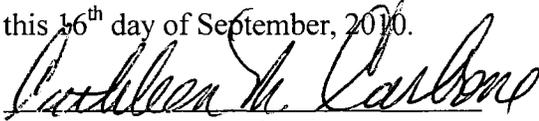
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**Teresa L. Dec**

Subscribed and sworn to before me  
this 16<sup>th</sup> day of September, 2010.



Notary Public

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**CATHLEEN M. CARBONE**  
Notary Public, State of New York  
Qualified in Onon. Co. No. 01CA6037703  
My Commission Expires Feb. 22, 2014

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September 16, 2010

**VIA UPS OVERNIGHT**

Lester A. Heltzer, Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street N.W.  
Washington, D.C. 20570

Re: Carr Finishing Specialties, Inc. and G.P.C. Construction, Inc. and  
International Association of Bridge, Structural, Ornamental and  
Reinforcing Ironworkers  
Case No. 03-CA-27264

Dear Mr. Heltzer;

Pursuant to the Order, dated August 20, 2010, transferring the above-referenced proceeding to the National Labor Relations Board, enclosed for filing please find eight (8) copies of the Respondents' Exceptions to the Decision of the Administrative Law Judge. As evidenced by the affidavit of service enclosed herein, copies of the Exceptions have been served on the Acting General Counsel and the attorney for the Charging Party by copy of this letter.

Please feel free to contact me if you have any questions.

Very truly yours,



Alan R. Peterman

ARP/  
Enclosures

cc: Linda M. Leslie, Esq. (w/ Enclosure)  
**Via UPS Overnight**

Daniel R. Brice, Esq. (w/ Enclosure)  
**Via UPS Overnight**

Dutch Carr (w/ Enclosure)

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**CARR FINISHING SPECIALTIES, INC.  
AND GPC CONSTRUCTION, INC.,**

and

Case: 03-CA-27264

**INTERNATIONAL ASSOCIATION OF  
BRIDGE, STRUCTURAL, ORNAMENTAL  
AND REINFORCING IRONWORKERS.**

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**RESPONDENTS' EXCEPTIONS TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE**

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**RESPONDENTS' EXCEPTIONS TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE**

Carr Finishing Specialties, Inc. ("Carr Finishing") and GPC Construction, Inc. ("GPC") (collectively, "Respondents") submit the following exceptions to the August 20, 2010 Decision ("Decision") of Administrative Law Judge Bruce D. Rosenstein ("ALJ") pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (the "Board").

**STATEMENT OF THE CASE**

The matter before the Board is a Complaint issued by Region Three of the National Labor Relations Board on February 25, 2010. The Complaint was based on an unfair labor practice charge filed on August 3, 2009 by the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (the "Union" or "Charging Party") alleging that the Respondents violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the "Act"). According to the allegations in the Complaint, "[s]ince in or about October 2008, Respondents have failed and refused to apply the terms of the 2006 and 2009 agreement" and "[s]ince on or about May 1, 2009, Respondents have failed and refused to apply the terms of the one-year extension of the 2006 Agreement."

The General Counsel had previously issued a Complaint based on the same charge on December 4, 2009. That Complaint was subsequently withdrawn in response to Respondents'

motion to dismiss the Complaint as untimely. After the Complaint was refiled, Respondents filed a second motion to dismiss on the grounds that the unfair labor practice charge was untimely. *See* Joint Exhibits 1(A) and 1(B). The Board denied the motion but held that the “denial is without prejudice to the Respondent’s right to renew its Section 10(b) argument at an appropriate time before the administrative law judge.” *See* Joint Exhibit 1(F).

A hearing on the Complaint was held in Rochester, New York on June 22, 2010 at which time the Respondents renewed their motion to dismiss. The parties were afforded the opportunity to call witnesses on their behalf, introduce exhibits into evidence and to cross-examine the opposing parties’ witnesses. Post hearing briefs were submitted by July 27, 2010 and the ALJ issued his decision on August 20, 2010 denying Respondents’ motion to dismiss and finding that Respondents had violated Section 8(a)(1) and 8(a)5 of the Act. The Respondents respectfully submit the following Objections to that Decision.

**OBJECTIONS TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

Respondents respectfully submit the following objections to the Decision of the Honorable Bruce D. Rosenstein dated August 20, 2010. The ALJ, applying the incorrect legal standard, improperly held that the unfair labor practice charge filed by the Charging Party in August, 2009, was within the six month statute of limitations for such a charge contained in Section 10(b) of the Act, 29 U.S.C. § 160(b). Application of the proper standard and a review of the evidence of the record demonstrates that the Charging Party had clear and unequivocal notice of the alleged violations of the Act more than six months before the charge was filed. Respondent’s motion to dismiss, therefore, should have been granted.

The ALJ also erred in finding that Carr Finishing and GPC were alter egos. The ALJ failed to give proper weight to the economic justification offered by the Respondents’ witness for

the formation of GPC, justification that was not rebutted in any way by the General Counsel or the Charging Party. Given the unrebutted evidence in the record that the sole motivation for the formation of GPC was economic survival, the ALJ improperly found that Carr Finishing and GPC were alter egos.

In addition, although the ALJ held that Carr Finishing was not bound by the 2009-2012 collective bargaining agreement, the ALJ erred in determining that Carr Finishing was a member of the multi-employer bargaining association. The evidence in the record demonstrates that the General Counsel failed to prove, by a preponderance of the evidence, that Carr Finishing was a member of that association. The ALJ also erred in determining that Carr Finishing failed to effectively terminate any relationship with the Union effective the expiration date of the 2006-2009 collective bargaining agreement.

Finally, the proposed Order contained in the Decision is inconsistent with the ALJ's findings. Whether the collective bargaining agreement between Carr Finishing and the Union was terminated as of April 30, 2009, as claimed by Respondents, or April 30, 2010 as found by the ALJ, the Remedy and proposed Order in the Decision requires the Respondents to bargain in good faith with the Union as the exclusive bargaining representative of the unit employees. Given that there was no collective bargaining relationship between Carr Finishing and the Charging Party after, at the latest, April, 2010, the requirement that the Respondents bargain with the Union is not warranted.

**I. Exceptions to ALJ's Determination that the Union's Charge was Timely.**

The ALJ erred in determining that the Union's charge was timely filed within six months from the date that the Union was first put on notice of an alleged unfair labor practice. Decision, p. 5. Generally, the Board "recognizes that the six month limitations period of section 10(b)

does not begin to run until the charging party has ‘knowledge of the facts necessary to support a ripe unfair labor practice.’” *Regency Grande Nursing & Rehab. Ctr.*, 347 N.L.R.B. 1143, 1143 (2006) (citation omitted). Moreover, “a party will be charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence.” *St. Barnabas Medical Center and New Jersey Nurses Union*, 343 N.L.R.B. 1125, 1126 (2004); *see also John Morrell & Co.*, 204 N.L.R.B. 896, 899 (1991) (10(b) period begins to run when “aggrieved party knows or *should know* that his statutory rights have been violated.”) (emphasis added).

In *Moeller Bros. Body Shop, Inc.*, 306 N.L.R.B. 191 (1992), the Board concluded that:

While a union is not required to aggressively police its contracts aggressively in order to meet the reasonable diligence standard, it cannot with impunity ignore an employer or a unit, as the Union in this case did, and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer's unilateral changes. This is not a case where information regarding misconduct is only in the hands of the employer, where an employer has concealed its misconduct, or where the size of an employer's operation prevents ready discovery of the misconduct. Rather, this is a case where the Union, if it had exercised reasonable diligence, would clearly have been alerted much earlier to the misconduct.

*Id.* at 193.

In *Moeller Bros.* the respondent failed to make fringe benefit fund payments on behalf of journeymen and utility employees and failed to pay the utility employees contractually required wages. However, throughout the period in issue, the respondent reported, at most, four journeymen to the Union but had at least twice that number of employees working in its shop. The Board held that the “Union could have readily discovered the discrepancy had it visited the Respondent's shop during operating hours.” *Id.* Additionally, had “the Union made any effort to enforce the union-security provisions, it would have become aware that the Respondent was

hiring employees without providing fringe benefits and without paying contract wages.” *Id.* See also *CAB Associates*, 340 N.L.R.B. 1391, 1391 (2003)(in determining whether a party has constructive notice, the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence) citing *Moeller Bros. Body Shop, supra*.

The issue, therefore, is whether, under all the circumstances, the Union had constructive knowledge of changes in that relationship, whether or not the Respondents expressly notified the Union of those changes. The concept of constructive knowledge incorporates the notion of “due diligence,” i.e., a party is on notice not only of facts actually known to it but also facts that with “reasonable diligence” it would necessarily have discovered. *Nursing Center at Vineland*, 318 N.L.R.B. 337 (1995).

The uncontroverted evidence in the record clearly demonstrates that the Union knew, or should have known, as early as January 23, 2009, of the claimed violation of the Act. The Union’s Business Agent, Michael Altonberg, testified that on January 22, 2009 (six and one-half months before the charge was filed), he saw Kip Carr enter the office of Carr Finishing’s sole customer, Rollison Construction and Sales (“Rollison”). P. 51, ll. 1-7 (references in this form are the pages and lines of the minutes of the hearing held on June 22, 2010). When Kip Carr left Rollison’s office, Altonberg followed him to see “whether he had come back to work or whether he was just doing some errands.” P. 51, ll. 8-9. Altonberg followed Carr to a jobsite in Canandaigua, New York where he observed three men, including Kip Carr, performing bargaining unit work at a Rite Aid store. Altonberg also saw Dutch Carr at the job site. At the time that Altonberg saw Kip Carr performing bargaining unit work in Canandaigua he knew that Kip Carr had withdrawn from the Union and that the Union Benefit Funds had frozen Carr Finishing’s bank accounts.

Altonberg's observations are reflected in correspondence from the Ironworkers' Funds' counsel, in which Respondents were accused, in January 2009, of "attempting to avoid their obligations under the collective bargaining agreement" and unlawfully "perform[ing] bargaining unit work in the Union's jurisdiction" since October 2008. *See* Joint Exhibit 1(a); Exhibit C.

Any idea that Carr Finishing was performing such work without abiding by the contract was put to rest when, by letter dated January 30, 2009, Carr Finishing's attorney informed the Union's attorney that Carr Finishing "had not done any work covered by its collective bargaining agreement with the Ironworkers since the Ironworkers Funds froze Carr Finishing's bank account. Nor has Carr Finishing employed an union members performing bargaining unit workers since that date." *See* Joint Exhibit 1(d); Exhibit E. As of that date, therefore, the Union knew that former union members were performing bargaining unit work that had once been performed by one of its signatory contractors. The Union also knew that the employees that the Business Manager saw working were not employed by Carr Finishing. That information was sufficient to put the Union on notice of the alleged violation of the Act.

The ALJ categorized Respondents' actions as "vague and ambiguous." Carr Finishing's attorney's January 30 letter, however, explicitly put the Union on clear notice that Carr Finishing had not done any bargaining unit work since October, 2008. In fact, the Union admitted that it was on notice in the Union's attorney's February 13, 2009 letter in which she stated that "[a]ccording to my clients, Carr Finishing Specialties, Inc, *its successor or alter ego*, has performed bargaining unit work since October, 2008. *See* Joint Ex. 1(a); Exhibit D (emphasis supplied). Tellingly, this letter was written before Carr Finishing's February 17, 2009 letter to the Union and multi-employer association which revoked the 1996 Letter of Assent and was the first communication from the Union after the January 30, 2009 letter from Carr Finishing's

attorney. The Union, therefore, had knowledge of the alleged violation prior to the six month period set forth in Section 10(b).

The Union also argued that, when Altonberg observed Kip Carr working at Canandaigua, he thought he was looking at Carr Finishing performing the work. The Union, however, does not explain why Altonberg did not think that there was a violation of the Act when he knew that Kip Carr was no longer an ironworker.

The fallacy behind that ALJ's application of the standard of clear and unequivocal repudiation of the contract is that Carr Finishing never repudiated the contract. Carr Finishing gave notice, pursuant to the terms of the Letter of Assent, that it did not intend to be bound by any successor agreement. The Union was on notice long before that date, however, that Carr Finishing had not performed any bargaining unit work since October, 2008.

Unlike *A&L Underground*, 302 NLRB 467 (1991), on which the ALJ relies, the current situation involves additional facts beyond the mere cessation of payments to a fund – namely, Kip Carr withdrawing from the Union, Altonberg observing the former Union member performing bargaining unit work for a sheet metal supplier that had previously used only union labor and Altonberg's knowledge, when he observed the employees performing bargaining unit work, that the Ironworker Funds had frozen Carr Finishing's bank accounts for not remitting contributions to the pension fund. The 10(b) period, therefore, commenced at this point in time.

The ALJ also erred in determining that GPC intended to conceal its existence. (Decision, p. 5). Rather, at all times, as admitted and observed by Altonberg, the Union's Business Agent, GPC was operating in the open and in public. (Transcript, p. 51, ll. 1-7). No affirmative representations were communicated to the Union nor did Carr Finishing take any steps to conceal the existence of GPC

Under the standard applied by the ALJ, the only way that the Section 10(b) period could be triggered is for the signatory contractor to inform the Union that it was going to violate the Act. The Act does not require such notification.

**II. Exceptions to the ALJ's Determination that Carr and GPC were Alter Egos.**

The ALJ erred in determining that Carr Finishing and GPC were alter egos. Decision, p. 8. Although there was no dispute that there was a substantial similarity in operations and customers between Carr Finishing and GPC, the uncontroverted evidence in the record demonstrates that Dutch Carr's motivation in forming GPC was his desire to continue to perform work for Rollison. Dutch Carr testified that he would have been "sitting down in the street" if he did not form GPC because Carr Finishing's sole customer, Rollison, decided to do business with non-union contractors only. (Transcript, p. 133, ll. 10-13). In short, Respondents' motivation was based on the permissible reason of economic survival, not on ill-will towards the Union.

The ALJ erred in discounting the fact that economic survival is a legitimate business purpose that outweighs the finding of alter ego status. Decision, p. 8. *See e.g., Local Union No. 38, Sheet Metal Workers' Int'l Assoc. v. A&M Heating, Air Conditioning, Ventilation & Sheet Metal, Inc.*, 314 F. Supp. 2d 332, 350 (S.D.N.Y. 2004); *Polis Wall Covering Inc.*, 323 N.L.R.B. 873, 880 (1997) (holding that the signatory's financial difficulties leading to its bankruptcy filing weighed against a finding of alter ego status). Specifically, in *Polis, supra*, the Board held that "the creation of an enterprise for the purpose of obtaining nonunion work does not establish an unlawful motive." *Polis*, 323 N.L.R.B. at 877.

In addition, the ALJ failed consider that close familial relationships do not necessarily support a finding of alter ego status. *See Mason Tenders Dist. Council Welfare Fund v. ITRI Brick and Concrete Corp.*, No. 96 Civ. 6754, 1997 U.S. Dist. LEXIS 17039 (S.D.N.Y., Oct. 31, 2007). Contrary to the ALJ's citation to *Fallon-Williams, Inc.*, 336 N.L.R.B. 602 (2001), "were courts to assume alter ego status merely from the closely held ownership of two companies by members of the same immediate family, families would be effectively precluded from organizing their business affairs in any but a single corporate entity. Children would be barred from creating companies distinct from those owned by their parents. The alter ego doctrine does not compel these results." *Itri Brick* at \*45.

In *First Class Maintenance Service, Inc.*, 289 N.L.R.B. 484 (1988), a husband and wife, who owned a cleaning service, learned that one of its clients would only be accepting "nonunion" bids. *Id.* at 484. Knowing this, their son, who worked as a supervisor for his parents' business, decided to form his own corporation and bid on the contract. This bid was successful, and the son's newly-formed entity was awarded the contract.

The union argued that the son's corporation was the alter ego of his parent's corporation, based largely on the undisputed fact that the two organizations had substantially identical business purposes, operations, equipment, and customers. *Id.* However, the Board, while noting that "substantially identical ownership is not compelled merely because a close familial relation is present between the owners of the two companies," ruled that the son's decision to create a union-free corporation was not motivated by union animus. *Id.* at 485. The Board specifically stated that the parents "knew that it was losing the contract with [its client] due to an internal decision within that organization and outside [their control]. Given this state of affairs, [their]

decision to assist their son in going into business does not indicate an unlawful motivation.” *Id.* at 486.

The ALJ attempted to distinguish *First Class Maintenance*, on the ground that the Board found that the new entity did not share supervision, management or ownership and that the former company was an ongoing business. A review of *First Maintenance*, however, shows that the facts in that case are much closer to the facts in the instant case than the ALJ would lead the Board to believe. Specifically, the owner of the new company in *First Maintenance* was the son of the owners of the original company and had been a supervisor in the original company. The new company performed the identical work performed by the old company at the same location and employees of the old company were told to apply to the new company for employment. At least one of the supervisors in the new company had been employed by the old company. 289 N.L.R.B. at 485. Finally, the fact that the original company did not stay in business is not dispositive. *See, e.g., Gilroy Sheet Metal, Inc.*, 280 N.L.R.B. 1075 (1986)

The ALJ also mischaracterized the record in determining that Carr Finishing and GPC use of the same office equipment, tools of trade, cell phones and computer supported a finding of alter ego. Decision, p. 8. The testimony in the record shows that the cell phones used by Dutch Carr and Kip Carr were actually their personal cell phones, not owned by either Carr or GPC P. 173, ll. 9-17. Similarly, the computer used by GPC was not owned by Carr Finishing but was Dutch Carr’s personal computer. P 122, ll. 4-11. The record also shows that although Roger Carr worked for both Carr Finishing and GPC, the last time he worked for Carr Finishing was in 2006, two years before GPC started operations. Roger Carr, therefore, did not go directly from Carr Finishing to GPC. P. 127, ll. 5-7. Finally, the evidence in the record shows that the only

Carr Finishing work completed by GPC was a project where there was a substantial lapse in time between two different installations of metal siding. Dutch Carr testified that by the time the project was available to be completed, Carr Finishing was out of business. P. 125, l. 18 – p. 126, l. 3.

In addition, Dutch Carr testified, once again without contradiction, that GPC did not use any equipment, vehicles or other tools owned by Carr Finishing. The fact that GPC used the same type of tools as Carr Finishing is not surprising given the fact that GPC was in the same line of business as Carr Finishing. Dutch Carr also testified that he rented equipment and purchased tools from the same suppliers as Carr Finishing because those suppliers had the best prices. P. 126, ll. 4-9. In addition, those supplies and equipment were charged to GPC accounts, not Carr Finishing accounts. P. 126, ll. 10-15. The General Counsel questioned Dutch Carr about a payment from Carr Finishing to the tool supplier after GPS had started operations. Dutch Carr subsequently testified that the payment was not for GPC tools but on Carr Finishing's account. P. 128, l. 20 – p. 128, l. 2.

The Board attempted to prove co-mingling of funds based on certain checks written from GPC accounts for the benefit of Carr Finishing. However, the Union Fund's freeze on Carr Finishing's bank accounts in October, 2008 forced Carr Finishing to place its funds in GPC's account so that Carr Finishing could satisfy ongoing obligations. The payments from GPC's accounts were necessary to satisfy Carr's obligations. That is the reason the Carr funds were placed in GPC's account. In any event, the co-mingling relied upon by the ALJ was de minimis at best and was of very limited duration.

The Board routinely upholds the application of the economic survival doctrine even if some indicia of common ownership exists. The factual situation in *Gilroy Sheet Metal, Inc.*, 280 N.L.R.B. 1075 (1986), is almost identical to the instant case. In *Gilroy*, the wife owned the company. The husband, however, operated the company on a day-to-day basis. The wife developed health problems and was advised by her physician to shut the business down. At the same time, the company was having financial problems because it was not competitive when bidding on non-union work.

The husband formed a new, non-union company “not to get out of the union contract, but I did it to survive.” 280 N.L.R.B. at 1077. The new company operated out of the same location as the old company. In addition the new company rented equipment and office space from the old company at below market rates. When the new company refused to apply the terms of the collective bargaining agreement signed by the old company to its employees, the Union filed an unfair labor practice charge. The ALJ dismissed the complaint finding that the two companies were not alter egos:

On the basis of the foregoing, more particularly the lack of continuity in ownership and the fact that the new entity was created for a legitimate purpose rather than to evade responsibilities under the Act, I find that *Gilroy Sheet Metal, Inc.* is not the alter ego of *Billie Hanoum*, a sole proprietorship, d/b/a *Gilroy Heating and Air Conditioning*.

280 N.L.R.B. at 1078.

In the instant case, Carr Finishing ceased its operations because of Sandra Carr’s personal concerns and because Rollison announced it would only work with non-union contractors. In addition to her work with Carr Finishing, Sandra Carr also had a full-time job. In the Fall of 2008, it became apparent that Sandra Carr could not maintain her full-time job and manage Carr

Finishing. P. 171, l. 20 – p. 172, l. 3. To make matters worse, Rollison, Carr Finishing's sole customer, informed Carr Finishing of its desire to work with non-union contactors. Carr Finishing had no choice but to cease operations.

Similar to *Gilroy*, Dutch Carr incorporated a new entity to survive economically. In fact, Dutch Carr's economic future was much more bleak than the situation in *Gilroy*. While business of the old company in *Gilroy* was decreasing, Dutch Carr was faced with the complete loss of Rollison's business. The decision to form GPC was based on Dutch Carr's knowledge of Rollison and its procedures and processes – not based on a desire to evade Carr Finishing's responsibilities under the Act. If it were not for the incorporation of GPC, Dutch Carr would be forced to cease business indefinitely – a deprivation of livelihood that does not further the purpose of the Act. Dutch Carr testified:

I have one supplier now. That's it. I've done all the work for them since '94, but it's – the way I was going with the union, he was moving on. That would have left me sitting down in the street.

P. 133, ll. 10-13. Economic survival was the motivation for the formation of GPC, not any desire to avoid obligations under the collective bargaining agreement.

The ALJ, stretching to find some evidence of anti-union animus, held, without citation, that Sandy and Dutch Carr's failure to tell the Union about the new company indicates unlawful motivation. There is no requirement, statutory or otherwise, that requires a person forming a new business to voluntarily inform a labor organization of the formation of that business.

The General Counsel has the burden of proving alter ego status. The evidence in the record demonstrates that Dutch Carr's motivation in forming GPC was not to avoid Carr Finishing's Union obligations but economic survival. Carr Finishing's only customer was not going to use union contractors any longer. Dutch Carr's wife, who owned Carr Finishing and did

all the office work for Carr Finishing wanted out of the business. Faced with economic extinction, Dutch Carr had no choice but to form GPC. The Act cannot be construed to prevent a person from earning a living which is exactly what the ALJ's decision in this case would do. The decision of the ALJ that GPC is the alter ego of Carr Finishing should be overturned and the Complaint dismissed.

**III. Exceptions to the ALJ's Determinations with Respect to Carr Finishing's Membership in The Multiemployer Association.**

**A. Carr Finishing Was Not A Member Of The Multi-Employer Association.**

The General Counsel, in its Complaint, alleged that Carr Finishing was a member of the Upstate Iron Workers Employers' Association, Inc. (the "Association"), the multi-employer bargaining association that bargained with the Union. *See* Complaint ¶ IX. That allegation was denied by Carr Finishing in its Answer. *See* Answer, ¶ IX. The ALJ, in his decision, without discussion, found that Carr Finishing was a member of the Association and, therefore, was bound by the termination provisions of the 2006-2009 collective bargaining agreement. Decision, p. 5, fn. 7. The evidence in the record, or more specifically, the lack of evidence in the record, shows that the ALJ's decision was in error.

At the hearing, the General Counsel introduced into evidence a Membership Application signed by Sandra Carr and dated September 27, 1997. *See* GC Ex. 2. The Application, however, had Carr Finishing's name crossed out. John Gorczynski, the current President of the Association, could not explain why Carr Finishing's name was crossed out on the application. P. 17, l. 11. In addition, there was no indication that the Application was ever accepted by the Board of Directors of the Association. Mr. Gorczynski could not offer an explanation why there was no indication that the Board of Directors had accepted Carr' Finishing's Application, other

than “[w]e rarely use” that section of the Application that indicated Board of Director approval.”

P. 17, l. 16. Gorczynski, however, was not an officer of the Association in 1997. P. 18, l. 19.

According to the Membership Application:

It is understood and agreed *that upon approval of this application by the UIWEA Board of Directors*, the UIWEA shall become the sole and exclusive agent of the applicant in collective negotiations and grievance procedures with those Unions listed below.

*See* GC Ex. 2 (emphasis added). Neither the General Counsel nor the Union introduced any evidence that the UIWEA ever approved Carr Finishing’s Membership Application. Absent proof that the Board of Directors ever approved Carr Finishing’s application, the General Counsel failed to carry its burden of proof with respect to that allegation in the complaint.

The General Counsel also introduced an invoice for the Application fee marked “PAID.” *See* GC Ex. 3. The invoice is dated nine months before the actual Application is dated. Gorczynski could not explain the difference in dates. P. 20, l. 11-12. The statement did not contain the date that the payment was made nor who received the payment. It is clear that the statement contained no indication of acceptance of the application by the Board of Directors.

The General Counsel also attempted to show that Carr Finishing was a member of the Association because Carr Finishing remitted seven cents per hour to the Association for every hour worked by its employees. That contribution, however, was required by the collective bargaining agreement whether or not the contractor was a member of the Association. P. 24, l. 21 – p. 25, l. 5. The fact that Carr Finishing remitted such contributions, therefore, is not dispositive.

Furthermore, Michael Altonberg, the Business Manager for the Union, could not explain why, if Carr Finishing was a member of the Association, Carr Finishing was asked to sign a Letter of Assent on September 26, 2006. P. 74, ll. 23-24. Nor could Altonberg why the Letter of

Assent had a different effective date than the collective bargaining agreement in effect at the time.

Finally, although Carr Finishing was allegedly a member of the Association, Sandy Carr, President of Carr Finishing, testified that she never receive any communication from the UIWEA while she was President of Carr Finishing. P. 174, ll. 17-21. The General Counsel, therefore, failed to prove that Carr Finishing was, in fact, a member of the Association.

**B. Carr Finishing Effectively Terminated the Letter of Assent.**

The ALJ held that because Carr Finishing was a member of Association, the termination of the Letter of Assent, dated February 17, 2009, was ineffective. Decision, p. 5, fn. 7. As was demonstrated above, however, there was no proof in the record that Carr Finishing was, in fact, a member of the Association. Absent that membership, the termination of the Letter of Assent must be considered effective.

Carr Finishing effectively terminated the collective bargaining relationship with the Union after the 2006-2009 Collective Bargaining Agreement by terminating the Letter of Assent. Carr Finishing did not execute any agreement to be bound by any new collective bargaining agreement. Carr Finishing executed only a “me-too” agreement with the Ironworkers in the form of a Letter of Assent. *See, e.g., N.L.R.B. v. Oklahoma Fixture Co.*, 74 Fed. Appx. 31, 34 (10th Cir. 2003) (noting that “me-too” agreements and letters of assent are essentially the same thing). “Me-too” agreements “allow smaller employers to obtain the benefits of the master collective bargaining agreement negotiated by the principal employers in the industry without bearing the burden and expense of such negotiations and without assigning their bargaining rights to a collective bargaining representative.” *Id.* at 32. Under the Letter of Assent, Carr agreed to be

bound by the terms of the collective bargaining agreement negotiated between the Ironworkers and the Association.

Furthermore, the Letter of Assent was not an agreement to delegate bargaining authority to the Association. The Letter of Assent merely stated that Carr Finishing would abide by the terms of the collective bargaining agreement. This case is similar to both *Oklahoma Fixture, supra*, and *Wilson & Sons Heating & Plumbing, Inc. v. N.L.R.B.*, 971 F.2d 758 (D.C. Cir. 1992), in that Carr Finishing signed a letter of assent without assigning its bargaining rights to the Association. In *Wilson*, when the collective bargaining agreement expired, the employer attempted to terminate the letter of assent. The Board adopted the position that the company was bound to the collective bargaining agreement for another year based on the collective bargaining agreement's automatic renewal and notice provisions. *Id.* On appeal, the Court of Appeals for the District of Columbia overturned the Board and held that the renewal and notice provisions of the collective bargaining agreement only apply to the signatories and not those who signed letters of assent. *Id.* at 761.

Moreover, because multi-employer bargaining units “are creatures of mutual consent,” the ability to withdraw from such a unit is necessarily “limited by the agreement of the parties.” *See Sheet Metal Workers Int’l Assoc., Local 104 v. Simpson Sheet Metal, Inc.*, 954 F.2d 554, 555 (9th Cir. 1992). Thus, to be effective, “withdrawal must be carried out *as specified in the agreement*” of the parties. *Id.* (emphasis added).

Here, Carr Finishing was free to terminate the Letter of Assent according to the terms of that agreement and not the terms of the Collective Bargaining Agreement. The Letter of Assent, however, is silent with respect to the termination of the agreement and does not contain any

notice requirements for termination of the agreement. Thus, the Letter of Assent was effectively terminated by Carr Finishing by letter dated February 17, 2009.

Because the Letter of Assent (and thereby the collective bargaining relationship) was effectively terminated, Carr Finishing never agreed to be bound by the new collective bargaining agreement. In addition, Carr Finishing never signed a new Letter of Assent. There is, therefore, no obligation on behalf of Respondents to apply any collective bargaining agreement with the Union.

#### **IV. Exceptions to the ALJ's Remedy and Order**

As is demonstrated above, the Complaint in this case should be dismissed because the underlying unfair labor practice charge was untimely. In addition, Carr Finishing and GPC are not alter egos given the legitimate reasons for the formation of GPC. Should the Board determine, however, that some type of remedy is required, the remedy proposed by the ALJ is improper and should be amended.

As demonstrated above, Carr Finishing was not a member of the multi-employer association and effectively terminated its Letter of Assent with the Union as of April 30, 2009. Any relief proposed by the ALJ, therefore, should be limited to the time period through April 30, 2009. In addition, whether Carr Finishing was bound to the collective bargaining agreement until April 30, 2009, or whether, as found by the ALJ, Carr was bound to the 2006-2009 collective bargaining agreement for one additional year, the direction to recognize and, on request, bargain with the Union is inappropriate. There is no dispute that any relationship between Carr Finishing and the Union was a Section 8(f) relationship that can be terminated by the contractor at any time, with appropriate notice. *See John Deklewa & Sons*, 282 NLRB 1375 (1987), *enf'd sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). The

collective bargaining agreement between Carr and the Union was either terminated effective April 30, 2009 or effective April 30, 2010. An order requiring GPC to bargain with the Union after those dates is not warranted. See *CAB Associates*, 340 N.L.R.B. 1391, 1392 (2003) (proposed remedy that employer in a Section 8(f) relationship with union recognize and bargain with that union not appropriate where the collective bargaining agreement had expired).

### CONCLUSION

The Decision of the ALJ should be reversed. The unfair labor practice charge underlying the Complaint was untimely in that it was filed more than six months after the Union had clear and unequivocal notice of a possible violation of the Act. In addition, the evidence in the record demonstrates that Carr and GPC are not alter egos as that term is defined by the Act. GPC was not formed to avoid Carr's obligations under the collective bargaining agreement but out of economic necessity. For the above-stated reasons and authorities, the Decision of the ALJ should be reversed and the Complaint in this proceeding should be dismissed.

DATED: September 16, 2010

HISCOCK & BARCLAY, LLP

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