United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: April 22, 2015
Docket #: 15-1275ag
Short Title: R & S Waste Services, LLC v. National Labor Relations Board

Agency #: 02-CA-65928
Agency: NLRB Agency #: 02-CA-65930
Agency: NLRB Agency #: 02-CA-66512
Agency: NLRB Agency #: 02-CB-69408
Agency: NLRB

DOCKETING NOTICE

A petition for review filed by R & S Waste Services, LLC in the above referenced case was docketed today as 15-1275. This number must appear on all documents related to this case that are filed in this Court. For pro se parties the docket sheet with the caption page, and an Acknowledgment and Notice of Appearance Form are enclosed. In counseled cases the docket sheet is available on PACER. Counsel must access the Acknowledgment and Notice of Appearance Form from this Court's website http://www.ca2.uscourts.gov.

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

R & S WASTE SERVICES LLC ***Petitioner,*** **v.** **NATIONAL LABOR RELATIONS BOARD,** ***Respondent.***	)	**PETITION FOR REVIEW**

R & S Waste Services LLC hereby petitions the Court for review of the Order of the National Labor Relations Board dated April 8, 2015, a copy of which is attached hereto.

Dated: April 20, 2015

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Rogan Brothers Sanitation, Inc., and R&S Waste Services, LLC, as single employer, alter ego and/or successor International Union of Journeymen and Allied Trades, Local 726 *and* International Brotherhood of Teamsters, Local 813. Cases 02–CA–065928, 02–CA–065930, 02–CA–066512, and 02–CB–069408

April 8, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On June 17, 2013, Administrative Law Judge Raymond P. Green issued the attached decision. Respondent R&S Waste Services (R&S) filed exceptions and a supporting brief, the General Counsel filed an answering brief, and R&S filed a reply brief. The Charging Party Union (Local 813) filed exceptions and a supporting brief, and R&S filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief, R&S filed an answering brief, and the General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions, cross-exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

The principal issues in this case are (1) whether R&S and Respondent Rogan Brothers Sanitation (RBS) are alter egos and a single employer, jointly liable for the discharge of employees, and (2) whether the collective-bargaining agreement between RBS and Local 813 was unenforceable as a "members-only" agreement, i.e., one applied only to bargaining unit employees who were Local 813 members.

The judge found that the Respondents were not alter egos but were a single employer. As a single employer, the judge found that the Respondents violated Section 8(a)(3) and (1) of the Act by discharging three employees and violated Section 8(a)(1) by their agents' statements to employees. The judge further found that R&S violated Section 8(a)(3) by refusing to hire one of the discharged employees.

The judge found that the RBS-Local 813 agreement was an invalid and unenforceable members-only contract. As a consequence, he dismissed complaint allegations that the Respondents violated Section 8(a)(5) and (1) by failing to apply the contract's wage and benefit provisions to all unit employees and by refusing to furnish Local 813 with relevant requested information.

R&S excepts to the single-employer finding and to the 8(a)(3) and (1) violations predicated on single-employer status. R&S also excepts to the 8(a)(3) refusal-to-hire violation. Local 813 excepts to the dismissal of the 8(a)(5) allegations, and to the judge's failure to find that the Respondents were alter egos.

For the reasons stated by the judge, we adopt his finding that the RBS-Local 813 contract was an unenforceable members-only contract and his dismissal of the 8(a)(5) allegations on that basis.[3] Accordingly, we find it unnecessary to address Local 813's exceptions to the judge's finding that the Respondents were not alter egos, a finding relevant only to the 8(a)(5) allegations. As explained in sections 1 and 2 below, we also adopt the judge's finding that the Respondents were a single employer and that they violated Section 8(a)(3) by discharging the three employees, and violated Section 8(a)(1) by

[1] R&S has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel argues in his answering brief that R&S made various statements and arguments in the "preliminary statement" of its brief in support of its exceptions that should be disregarded as noncompliant with Sec. 102.46(b)(1) of the Board's Rules and Regulations. In light of our adoption of the judge's decision, we find it unnecessary to pass on the General Counsel's request.

R&S argues in its answering brief that certain of the General Counsel's cross-exceptions are procedurally deficient under Sec. 102.46(b) and (c) of the Board's Rules and Regulations and should be rejected. We find no procedural deficiency and deny the request.

For the reasons set forth by the judge, we agree with his finding that R&S violated Sec. 8(a)(1), (2), and (3) by recognizing and entering into a collective-bargaining agreement containing a union-security clause with Respondent International Union of Journeymen and Allied Trades, Local 726 (Local 726). Local 726 filed no exceptions to the judge's finding that it violated Sec. 8(b)(1)(A) and (2) by accepting recognition and agreeing to the contract.

[2] In adopting the judge's tax compensation and Social Security reporting remedies, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall modify the judge's recommended Order to conform to the Board's standard remedial language and substitute new notices in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[3] In light of the dismissal of the 8(a)(5) allegations because the RBS-Local 813 contract was an unenforceable members-only agreement, we reject the judge's alternative finding that the contract was unenforceable because the bargaining unit was insufficiently defined. Member Johnson relies on both grounds in dismissing these allegations.

their agents' statements to employees. Finally, as set forth in section 3, we also adopt the 8(a)(3) refusal-to-hire violation.[4]

Background

RBS was engaged in the collection and disposal of residential and commercial waste in New York City and nearby Westchester County, New York. James Rogan owned RBS and operated it out of a truck yard at 1014 Saw Mill River Road in Yonkers, New York. In early 2011, RBS employed a bargaining unit of approximately 25–30 employees, most of whom were truckdrivers; the remainder were helpers who assisted some drivers on residential routes.

Joseph Spiezio is a real estate developer and owner of the Spiezio Organization, a management firm that operates his several other businesses. In January 2011, with RBS experiencing financial difficulties, Spiezio agreed to Rogan's request for an $850,000 loan to RBS.[5] The 6-month loan was financed through Pinnacle Equity Group, a business financing services company also owned by Spiezio. In a letter detailing the terms of the loan, Spiezio specified that he intended to form his own waste company to take over the Westchester operations of RBS if it defaulted on the loan. At the same time, Spiezio and Rogan entered into an agreement whereby Spiezio would act as a consultant for RBS on issues such as retaining counsel for labor related matters, negotiating contracts and meeting with Local 813, implementing company policies, and referring bankers for operating accounts and payroll services.

In February, Spiezio filed articles of organization for R&S, his new waste collection company, with the State of New York. On March 1, he filed an R&S operating agreement and applied for a waste hauling license with the Westchester County Solid Waste Commission. On March 7, Spiezio and Rogan opened a commercial bank account for R&S at Key Bank in Westchester County and, on March 29, opened two commercial accounts for RBS at the same bank. The signature card for the R&S account listed Spiezio as the managing member and Rogan as a member; the signature cards for the RBS accounts listed Rogan as president and Spiezio as an authorized signer.

James Troy was Local 813's business agent who, until 2011, had always dealt with Rogan or Michael Vetrano, the RBS general manager, on labor issues at RBS. In early March, Vetrano told Troy that "going forward he would have to take up labor relations matters with Spiezio." Later that month, Howard Kassman, the RBS comptroller, moved his office from the RBS office trailer on Saw Mill River Road to Spiezio's offices at the Spiezio Organization.

On June 30, Spiezio received his R&S operating license from the Westchester Solid Waste Commission. The next day, Spiezio declared the Pinnacle loan to RBS in default and signed a vendor agreement with Rogan that provided for RBS to perform waste removal services for R&S. On July 26, Vetrano wrote RBS customers on R&S letterhead that R&S would service their accounts effective immediately. On July 31, certain assets of RBS that served as security for the loan-customer lists, trucks, dumpsters, and other equipment-were surrendered to R&S through Pinnacle in full satisfaction of RBS's debt.

R&S commenced operations on August 1, servicing most of RBS's former customers. Spiezio hired Vetrano on August 1 to assist in operating R&S. Its work force consisted mainly of former RBS bargaining unit drivers and helpers who were not Local 813 members, and whom Spiezio hired immediately after their separation from RBS during the last week of July.[6] The R&S workforce also included some current RBS drivers who were Local 813 members, including Wayne Revell, Joseph Smith, and Michael Roeke.[7]

In a September 29 letter to Rogan (and copied to Spiezio), Local 813 demanded that Rogan cease "undermin[ing] the Union's collective bargaining rights [by] subcontracting, transferring, assigning and/or conveying work covered by your collective bargaining agreement with the Union." On October 1, Liguori telephoned Roeke and told him that he had to resign from Local 813 because RBS "wasn't going to be in the Union no more." When Roeke refused to resign his union membership, he was terminated from RBS and not offered a job at R&S. On October 4, Vetrano told Smith there was no more work for him, and told Revell that "things [are] going to be changing, [and] we can no longer employ

[4] R&S excepts to the judge's finding that it was also a joint employer with RBS. We grant the exception, as there was no joint employer allegation in the complaint and the General Counsel disavows such an allegation in his answering brief.

[5] All dates are in 2011, unless otherwise indicated.

[6] As former employees, these non-Local 813 members were in the unit covered by the collective-bargaining agreement between RBS and Local 813. However, because it was a members-only contract, the non-Local 813 unit employees did not receive the wages and benefits set forth in the contract.

[7] Roeke had worked for many years at Industrial Recycling, a small area waste company that was owned by Peter Liguori and signatory to a contract with Local 813. Liguori terminated his business on July 20. Roeke was hired by RBS, and Liguori was hired by Spiezio at R&S and transferred his customers to R&S.

The General Counsel correctly notes in his cross-exceptions that, contrary to the judge's findings, Liguori was never employed at RBS and did not transfer his customers to RBS before moving them to R&S. These factual errors do not affect any issues in the case.

Union drivers." Vetrano further advised Revell that "they're going to bring in another union" and gave him a withdrawal card for Local 813, an R&S employment application, and a job offer at R&S. Revell signed both and began work at R&S a few days later. Two weeks later, R&S voluntarily recognized a different union, Local 726, as the representative of the drivers.

The Judge's Decision

As discussed above, the judge found that RBS and R&S were a single employer. He limited that finding to the period from either February, when Spezio began forming R&S, or alternatively August 1, when R&S began operations, until October 4, when the judge found that a "complete separation" occurred between RBS and R&S. The judge found that the "trigger for [the] 'complete separation' came about in early October as a result of [Local 813's] demand, on September 29, 2011, that Rogan Brothers cease doing any work for R&S." He found that, as a single employer, the Respondents violated Section 8(a)(3) by discharging Revell, Smith, and Roeke, and that after October 4, R&S separately violated Section 8(a)(3) by refusing to hire Roeke because he would not resign his membership in Local 813. Based on his finding that Vetrano and Liguori were agents of the single employer Respondents, the judge also found that Liguori's statement to Roeke and Vetrano's statement to Revell violated Section 8(a)(1).

We affirm all these violations. In affirming the judge's single-employer finding, we apply the Board's traditional test, as set forth below.[8]

Analysis

1. Single-employer status

Single employer status is characterized by the absence of an arm's-length relationship among seemingly independent companies. *Bolivar-Tees, Inc.*, 349 NLRB 720 (2007). In determining whether separate entities constitute a single employer, the Board examines the following four factors: (1) common ownership or financial control; (2) interrelation of operations; (3) common control of labor relations; and (4) common management. Id., *RBE Electronics of S.D.*, 320 NLRB 80, 80 (1995); *Spurlino Materials, LLC*, 357 NLRB No. 126, slip op. at 6 (2011); *Grane Healthcare Co.*, 357 NLRB No. 123, slip op. at 30 (2011), and cases cited. All four factors need not be present and no one factor is controlling, although the Board considers common control of labor relations a "significant indication of single employer status," *Bolivar-Tees, Inc.*, supra, 349 NLRB at 720.

We find, as discussed below, that all four of the Board's criteria are present here. Specifically, we find that RBS and R&S became a single employer on or shortly after March 1. We further find that this relationship continued until the companies separated on October 4, when all RBS employees were removed from the R&S work force, including discharged drivers Revell, Smith, and Roeke.[9]

Common ownership or financial control. There is no dispute that Rogan owned RBS. Rogan, together with Spiezio, also owned R&S. According to Spiezio's March

[8] The General Counsel stated at the beginning of the hearing that he was not alleging that the Respondents were a single employer, notwithstanding that the complaint's case caption indicated otherwise. During a 2-month adjournment, however, and before resting his case, the General Counsel filed a motion to amend the complaint to allege single-employer status. R&S filed an opposition. The judge granted the motion when the hearing resumed. In its exceptions, R&S asserts that the amendment was "erroneously permitted over its due process objections." We affirm the judge's ruling.

"A judge has wide discretion to grant or deny motions to amend complaints under Section 102.17 of the Board's Rules and Regulations." *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 2 (2011). In determining whether that discretion has been properly exercised, the Board evaluates (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated. *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1171–1172 (2006) (posthearing amendment denied); *CAB Associates*, 340 NLRB 1391, 1397–1398 (2003) (mid-hearing amendment granted). The first and third factors support our conclusion that the judge did not abuse his discretion in granting the motion to amend. Contrary to R&S' assertion, it learned early during the adjournment that the General Counsel intended to seek the single-employer amendment to the complaint and therefore cannot claim surprise. Nor is there merit to R&S' argument that it was prejudiced by the amendment. It had the opportunity to fully litigate the matter, and did so, after the amendment was granted. *CAB*, supra at 1398. See also *Amalgamated Transit Local 1498 (Jefferson Partners)*, 360 NLRB No. 96, slip op. at 2 fn. 7 (2014) (mid-hearing complaint amendment properly granted, as issue "was fully litigated from that point forward").

[9] To the extent that R&S relies on affidavits obtained from Rogan, Vetrano, and Liguori in support of its exceptions, we reject the affidavits. The General Counsel subpoenaed the three to testify, but they refused to comply. In such circumstances the Board may impose sanctions for subpoena noncompliance, including prohibiting the noncomplying party from relying on evidence encompassed by the subpoena, and drawing an adverse inference against the noncomplying party. See generally *ADF, Inc.*, 355 NLRB 351 (2010), incorporating by reference reasons set forth in 355 NLRB 81, 84–85 (2010); *McAllister Towing & Transport Co.*, 341 NLRB 394, 396, 416–417 (2004); *Louisiana Cement Co.*, 241 NLRB 536, 537 fn. 2 (1979) (Board adopted the judge's ruling precluding the respondent from calling company officials as witnesses after they refused to comply with the General Counsel's subpoenas). Contrary to R&S, such sanctions may be imposed even when, as here, the General Counsel did not seek enforcement of the subpoenas. *Midland National Life Insurance Co.*, 244 NLRB 3, 6 (1979), citing *The Little Rock Downtowner, Inc.*, 145 NLRB 1286, 1311 fn. 69 (1964). Nor, contrary to the contention of R&S, can an adverse inference be drawn against the General Counsel for failing to enforce the subpoenas of the three witnesses, who would not have been favorably disposed toward the General Counsel. See *Dodge of Naperville*, 357 NLRB No. 183, slip op. at 11 fn. 6 (2012).

1 application with the Westchester County Solid Waste Commission for R&S' waste hauling license, and Spiezio's subsequent testimony before the Commission, Spiezio and Rogan were principal owners, directors and managers of R&S, with each owning 50 percent of the company. Where, as here, one individual owns 100 percent of one entity and 50 percent of another entity, common ownership is established. See *Bolivar-Tees*, supra at 720; *Naperville Ready Mix, Inc.*, 329 NLRB 174, 179 (1999), enfd. 242 F.3d 744 (7th Cir. 2001).

While not disputing this principle, the judge found no common ownership, surmising—based on Spiezio's testimony—that Rogan and Spiezio filed as co-owners on the license application only to "facilitate the acquisition of the license and . . . not [to] represent the actual ownership of R&S." We reject this finding. The Board has held in similar circumstances that documentary evidence clearly preponderates over testimonial evidence. *Denart Coal Co.*, 315 NLRB 850, 851–852 (1994), enfd. sub nom. *Vance v. NLRB*, 71 F.3d 486,492 (4th Cir. 1995)(crediting documentary evidence of common ownership over witness testimony that she was sole owner); see also *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57, slip op. at 3–4 (2011), enfd. 498 Fed.Appx. 45 (D.C. Cir. 2012) (reversing judge's credibility findings primarily because testimony was contradicted by documentary evidence). Here, Rogan and Spiezio's sworn attestation on the license application that they were the principal owners of R&S is incontestable proof of co-ownership that refutes Spiezio's testimonial evidence, including his statement at the Commission hearing that he "would be the sole owner" of R&S. Contrary to the judge, that statement indicated Spiezio's future intent rather than the state of ownership throughout the period relevant here.

In any event, the Board has found single-employer status even in the absence of common ownership, when one individual exercises common financial control of multiple entities. See *Hydrolines, Inc.*, 305 NLRB 416, 418 (1991). The judge found such control here, noting that "R&S and Rogan Brothers . . . acted in a manner that made Joseph Spiezio the person who was in complete control of the financial and business operations of Rogan Brothers." We agree.[10] As discussed above, Spiezio established commercial bank accounts for RBS at the Key Bank that authorized him to withdraw funds and write checks. He paid monthly debts owed to RBS' vendors and creditors with checks drawn on those accounts or, at his discretion, from the proceeds of the Pinnacle loan to RBS. Spiezio testified that he refused to allow loan proceeds to pay some RBS bills presented to him by Rogan, telling him that payment should made as "part of your cash flow" from RBS. While performing these financial duties for RBS, Spiezio was concurrently conducting the business operations of R&S.

In sum, because we find that RBS and R&S were commonly owned by Rogan and Spiezio, and that Spiezio financially controlled both entities, the first factor of single-employer status is established.

Interrelation of operations. Satisfaction of this factor requires evidence of functional integration between two companies, which often includes evidence of shared facilities, equipment, and personnel. See, e.g., *Dodge of Naperville, Inc.*, supra, slip op. at 18 (2012). Here, the judge found that when R&S took over the waste collection operations of RBS on August 1, some of the "people who actually did this work were drivers on the Rogan Brothers payroll . . . [who] continued to work on their same trucks and do their same routes." Other employees were former RBS drivers and helpers who had been terminated the previous week and immediately rehired by Spiezio for R&S. Both groups of employees continued to report to work after August 1 at the same RBS truck yard at 1014 Saw Mill River Road.[11]

Kassman's role in both companies further demonstrates the interrelatedness of their operations. Kassman was the RBS comptroller, but beginning in March, he moved from his RBS office at the truck yard on Saw Mill Road to the Spiezio Organization office complex, where R&S' operations were housed, and worked in a "shared suite" next to Spiezio. Kassman transferred RBS' financial records, computer equipment, and software to this location and continued to serve as its comptroller. In July, while still employed by RBS, Kassman became an authorized signatory on an R&S bank account. See *Pathology Institute*, 320 NLRB 1050, 1060–1061 (1996) (authorization to draw checks on accounts of two entities cited as one of several factors proving interrelated operations), enfd. 116 F.3d 482 (9th Cir. 1997). Also in July, Kassman filed an R&S application for payroll registration with the New York State Department of Labor, identifying himself as the "controller" of R&S with an R&S email address.[12] Although Kassman was not hired as the R&S comptroller until November, he performed that function for R&S and RBS concurrently from July

[10] However, we do not rely on footnote 31 of the judge's decision in our analysis.

[11] R&S asserts that the employees reported to a different truck yard at 1016 Saw Mill River Road. Kassman and Spiezio testified, however, that the 1014–1016 address was the same truck yard.

[12] The terms "controller" and "comptroller" are interchangeable and are defined in Merriam-Webster's Collegiate Dictionary (10th ed. 1999) as the "chief accounting officer of a business enterprise."

through October 4. In this dual role, he issued RBS checks to repay the Pinnacle loan and to satisfy debts owed to R&S and the Local 813 Trust Fund, prepared the payroll for both RBS and R&S employees, and worked closely with Spiezio by providing him with the RBS financial records necessary to oversee the monetary operations of RBS. See *Emcor Group, Inc.,* 330 NLRB 849, 849 fn. 1 (2000) (bookkeeper's performance of payroll functions cited as a factor in finding two companies had interrelated operations), and *Spurlino Materials*, supra, 357 NLRB No, 126, slip op at 7 (one company controller's performance of all accounting work for second company cited as factor in finding interrelated operations).

The foregoing evidence demonstrates the absence of an arm's-length relationship between the two companies and supports the finding of interrelated operations.

Common control of labor relations. In assessing this factor, the Board does not require evidence of "micromanagement of each entity's labor relations by the same individual it is only necessary to conclude that there had been an ability by one entity to exercise 'clout' over labor relations of others." *Pathology Institute*, 320 NLRB at 1064. Accord: *AG Communications Systems Corp.*, 350 NLRB 168, 171 fn. 5 (2007), and cases cited there. As the judge found and the events described below illustrate, Spiezio exercised such clout when he "took control over [RBS's] labor relations; relegating to himself the role of negotiating with [Local 813]. ."

Beginning in March, soon after Vetrano instructed business agent Troy to henceforth "take up labor matters with Spiezio," Spiezio and Troy commenced discussions of an unfair labor practice charge that Local 813 had filed against RBS. Notwithstanding that the parties had already settled the charge in an informal agreement that the Board's Regional Director had approved,[13] Spiezio sought Troy's agreement to withdraw the charge and resolve it through the grievance-arbitration procedure of the RBS-Local 813 contract. Spiezio warned Troy, after several months of negotiations, that RBS would file a charge against Local 813 if Troy continued to refuse this approach. Spiezio filed the 8(b)(1)(B) charge against Local 813 in June, and advised Troy that the latter's recalcitrance "will not be tolerated and will give Rogan things to consider moving forward with [L]ocal 813."

During the same period, Spiezio also handled collective-bargaining matters with Troy. In April, Spiezio requested that Troy bargain about overtime eligibility and distributed a memo to employees stating that, effective June 1, they would not be paid for work in excess of 40 hours per week. Troy responded that the memo violated the contract but agreed to discuss the issue. On May 25, not having heard from Troy, Spiezio emailed Troy urging him to "reply to our overtime matter which is significant to our company ."

Troy, however, insisted on negotiating a simmering dispute over RBS' application of the contractual wages and benefits to only 8 of approximately 35 unit employees. Troy reminded Spiezio in a May 25 email that the agreement with RBS provided for 10 unit drivers to be covered by the contract, and he asked whether "any progress [had] been made to sign 2 additional drivers[.]" Spiezio replied on June 6 that "we have complied to the best of our ability and our contractual obligation," prompting Troy to file a grievance on July 19 alleging that RBS violated the contract by failing to include 10 drivers in the bargaining unit. On July 20 and August 2 Spiezio offered to discuss the grievance with Troy and finalize a successor RBS-Local 813 contract. Troy and Spiezio also exchanged proposals in August for a contract to cover R&S employees.

Spiezio's role in these collective-bargaining disputes amply demonstrates common control of labor relations. He was the sole representative for RBS in dealing with Local 813 over the significant labor disputes including overtime, contract coverage, and withdrawal of the unfair labor practice. Spiezio's clout was at least equivalent to that demonstrated in other cases where the Board has found common control of labor relations. See, e.g., *Taft Coal Sales & Associates*, 360 NLRB No. 19, slip op. at 5 (2014), enfd. 586 Fed.Appx. 525 (11th Cir. 2014) (officials of Walter Energy and Walter Materials met with union about decision to close a Taft Coal mine, offered Taft's laid-off employees positions at Walter Energy, and threatened to discharge Taft supervisor for committing potential unfair labor practices); *Masland Industries*, 311 NLRB 184, 186–187 (1993) (parent company's vice president for human resources conducted labor relations of subsidiary company, including negotiating union contracts, despite having no official position at subsidiary).

In addition to his role as the labor relations representative for RBS in matters involving Local 813, Spiezio figured prominently in the unfair labor practices committed by the Respondents. After Spiezio began operating R&S on August 1 with a work force of former and current employees of RBS, including Local 813 members Revell, Smith, and Roeke, Spiezio decided, with Rogan's acquiescence, to discharge Revell, Smith, and Roeke, after receiving Local 813's September 29 letter demanding that R&S cease performing RBS bargaining unit work.

[13] See *Rogan Bros. Sanitation*, 357 NLRB No. 137 (2011).

The Board has found that the participation by an official of one company in the unlawful discharge of employees of another company owned or managed by the same individual supports a finding of common control of labor relations.[14] Spiezio's pivotal role in the discharge of the three RBS employees underscores the extent of his control of the labor relations of RBS and R&S.

R&S argues that there can be no finding of common control of labor relations before August 1 because it had no employees until then, nor after August 1 because Spiezio was then largely inactive as RBS' labor relations representative. We reject both arguments. The relevant time period here for determining single-employer status was March 1 to October 4, when R&S was an incorporated entity with an operating agreement in effect and Spiezio was its co-owner and principal management official for employment issues. During this period, Rogan designated Spiezio as RBS' contact for labor relations issues, including negotiations for a successor contract, overtime matters, and the contractual grievance regarding unit scope. Although these issues arose before the August 1 hiring of an R&S work force, Spiezio's role at RBS continued unchanged after that date, while he also attempted to negotiate an R&S–Local 813 contract with Troy. In early August, Spiezio hired an R&S work force that consisted of former RBS employees who were terminated from RBS during the last week in July. He also used RBS employees Revell, Smith, and Roeke to perform work for R&S, until directing their discharge after receiving Local 813's letter of September 29 letter protesting the diversion of work from the bargaining unit. We conclude, therefore, that Spiezio controlled the labor affairs of both RBS and R&S, notwithstanding the absence of an R&S work force for a portion of the relevant time period. See, e.g., *Hydrolines, Inc.*, 305 NLRB 416, 418 (1991) (common control of labor relations shown between TNT and Hydrolines, despite TNT's having no labor force, where Hydrolines' employees performed TNT's work and chief executive officer of both companies dealt with union bargaining demands).[15]

In sum, we find that Spiezio's control over significant employment matters at RBS, including by participating directly in the unfair labor practices committed against the RBS employees, while simultaneously exercising total control over all employment matters at R&S, amply establishes common control of labor relations.

Common management. The record shows that Spiezio and Vetrano managed both companies. As the judge found, Spiezio "became increasingly involved in the business affairs of [RBS] as the de facto manager of the company," and eventually "it was Spiezio, and not James Rogan [who] was running or attempting to run the business of [RBS]." In addition to handling labor relations for RBS, and performing the main management functions for R&S, Spiezio set up bank accounts with Key Bank to transact RBS business, used loan proceeds from the Pinnacle loan to make payments to RBS's creditors and to businesses that provided services to RBS, and dealt directly with Local 813's benefit funds department regarding delinquent contributions owed by RBS.[16] Spiezio also made the "quintessential managerial decision" to shut down RBS's Westchester operations by declaring the Pinnacle loan to RBS in default and designating which physical assets, i.e., trucks and equipment, would remain RBS property and which would be transferred to

[14] *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1182 (2006) (common control of labor relations found where individual who retained authority to control labor relations at one entity similarly controlled labor relations of another entity, as evidenced by his discharge of the latter's production crew employees); *Lebanite Corp.* 346 NLRB 748,759 (2006) (president of two companies handled decisions of one company in actions found to be unfair labor practices); *Masland*, supra, 311 NLRB at 186 (official of parent company participated in unlawful discharges of subsidiary's employees); and *Royal Typewriter Co.*, 209 NLRB 1006, 1010–1011 (1974)("extensive participation by officials of Litton in the conduct alleged here to constitute unfair labor practices" committed by Royal supported finding of common control of labor relations).

[15] Contrary to R&S' contention, it is irrelevant that Rogan never exercised any control over the labor relations of R&S, because a "single employer analysis is not an exercise in symmetry [and a]n 'entity can belong to the single employer by giving as well as receiving directions about labor policy.'" *Pathology Institute*, supra, 320 NLRB at 1064, citing *NLRB v. International Measurement & Control*, 978 F.2d 334, 340–341 (7th Cir. 1992).

R&S further argues that even if RBS and R&S were a single employer, the relationship lasted for only 3 months and "Board law holds that a single employer finding cannot exist where there is [such a] short-term presence of single employer elements.' We disagree. As discussed, the single-employer relationship here existed for 7 months, longer than the April-August time period in which the Board found single employer status in *AG Communications Systems*, supra, 350 NLRB at 168–171. In any event, we find that the cases cited by R&S, *Kenton Transfer Co.*, 298 NLRB 487, 487 (1990), and *Blue & White Cabs*, 291 NLRB 1047, 1047–1049 (1988), do not support the legal proposition that it asserts. Moreover, *Blue & White* involved alter ego, not single-employer, status.

[16] *Spurlino Materials*, supra, 357 NLRB No. 126, slip op. at 7 (common management shown where same individual set up lines of credit with financial institutions, authorized cash advances and payments between the two companies to pay their debts, and directed their accounting procedures); *Grane*, supra, 357 NLRB No. 123, slip op. at 31 (common management found where consultants to one company authorized to pay bills of the other").

R&S.[17] Moreover, as the judge found, Spiezio hired as R&S's work force nonunion RBS drivers and helpers, who were laid off from RBS with Rogan's acquiescence and transferred to R&S to service mainly the same customers.

RBS' general manager, Vetrano, was hired by Spiezio on August 1 for R&S. While still employed at RBS, Vetrano informed customers on R&S letterhead that he was "affiliated with R&S who will be servicing your account immediately" and that they should contact him at his R&S email address if they had any questions. See id. at 19 (evidence of common management included instructions by official of one company that applicants with questions about jobs at second company should be sent to his email address). At R&S, Vetrano assigned R&S unit work to RBS employees Revell and Smith, discharged both of them at Speizio's direction, and rehired Revell as an R&S employee. *Soule Glass & Glazing Co.*, 246 NLRB 792, 795 (1979), enfd. 652 F.2d 1055, 1076 (1st Cir. 1981) ("flow of common management personnel from one corporation to the other" is evidence of common management); *AG Communication Systems*, supra, 350 NLRB at 170 (same). As the judge found, Spiezio hired Vetrano to "assist him in running the day to day operations of [R&S] because Spiezio simply didn't know how to do this himself." Spiezio paid Vetrano the same salary that he earned at RBS because his "decades long experience in the industry would be a great value" to the new business.

Conclusion. We find that all four factors of the single employer test support the judge's finding that RBS and R&S were a single employer from March 1, when R&S was established by filing an operating agreement, until the end of the first week of October, when Spiezio directed the discharge of RBS drivers Revell, Smith, and Roeke, thereby ending the employment of the remaining RBS employees performing work for R&S. As a single employer, RBS and R&S are jointly and severally liable for the unlawful discharges of these employees and, as discussed below, are similarly liable for the 8(a)(1) violations committed by their agents. *RBE Electronics*, supra, 320 NLRB at 81.

2. The 8(a)(1) violations

In agreement with the judge, we find that the Respondents violated Section 8(a)(1) by informing Revell and Roeke that they were being discharged because of their membership in Local 813. R&S argues in its exceptions that neither Vetrano nor Liguori was its agent and that their statements to Revell and Roeke, respectively, cannot be imputed to it. We find no merit in the exceptions.

Applying common-law principles, the Board may find that an individual is the agent of an employer based on either actual or apparent authority to act for the employer. *Pratt (Corrugated Logistics), LLC*, 360 NLRB No. 48, slip op. at 1 (2014). The apparent agency "test is whether, under all the circumstances, employees 'would reasonably believe that the [alleged agent] was reflecting company policy and speaking and acting for management.'" Id. (citations omitted). The Board has found agency when the alleged agent is "held out as a conduit for transmitting information [from management] to other employees." Id. (citations omitted). See also *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998).

Here, Spiezio admitted in his affidavit that Vetrano served as a conduit between him and the drivers. Vetrano clearly acted in this capacity on October 4 when, as an R&S manager, he unlawfully threatened RBS employee Revell that he would be discharged if he did not resign his union membership and that a different union was being brought in to represent employees at R&S. As the judge found, Rogan reinforced Vetrano's remarks later the same day by telling Revell that "[t]here's nothing he could do. His hands were tied [and] he had to lay the rest of the 813 guys, including me, off."

Consistent with Spiezio's admission, Revell testified that after August 1 when Vetrano was hired by R&S, Vetrano continued to work out of the same RBS trailer office at the truck yard, continued to meet and "discuss things with front-end drivers like he used to do" as the general manager at RBS, and dealt with applicants seeking jobs at R&S. Indeed, Vetrano promised Revell a job at R&S, conditioned on resigning his union membership, and assured him that "nothing would change" regarding the work he did or his pay. Revell accepted the offer and executed a membership withdrawal form that Vetrano provided. Under these circumstances, including that events unfolded exactly as Vetrano had forewarned, we conclude that Revell would reasonably believe that Vetrano was an authoritative spokesman for both RBS and R&S. Accordingly, his unlawful statement is properly attributed to the Respondents.

Liguori's phone call to Roeke on October 1, in which Liguori threatened that Roeke "had to resign from the [Union] because [RBS] wasn't going to be in the Union no more," is likewise attributable to the Respondents on an agency basis. As discussed above, Liguori was hired at R&S on August 1, after he sold his waste disposal company to Spiezio. Roeke was a member of Local 813 who worked as a driver for Liguori's company until the

[17] See *Bolivar Tees*, supra, 349 NLRB at 721 (common management of four-company single employer established based on official's authority to shut down two companies).

company ceased operating and then was hired in the same capacity by RBS, where he continued for a time to receive work assignments from Ligouri. Roeke testified that when he asked Liguori why he, rather than Rogan, was calling with the demand that he resign his union membership, Liguori replied, "Because they told me to call you." From this evidence, we find that Roeke would reasonably understand that Liguori spoke on behalf of the Respondents in threatening Roeke regarding his continued employment. Roeke's understanding was borne out when he was discharged for refusing to resign from Local 813 as Liguori had demanded. We find, therefore, that because Liguori was the agent of the Respondents, his threat of discharge violated Section 8(a)(1).

3. Refusal to hire Roeke

R&S also excepts to the judge's finding that it violated Section 8(a)(3) and (1) by refusing to hire Roeke after his discharge by RBS, arguing that he never filed an application. We find no merit in this argument. The Board has found that the failure to file a job application is not a defense to a refusal-to-hire allegation where it would have been futile to apply. *Planned Building Services*, 347 NLRB 670, 716–717 (2006); *Norman King Electric*, 334 NLRB 154, 160–161 (2001). Such futility is evident here, as the judge found that Roeke "understood that in order to obtain the job, he would have to resign from [Local 813]." R&S does not dispute this finding, and even admits in its answering brief that "[i]t's common sense: if you want to work at R&S then withdraw from [Local 813] ." Roeke testified, however, that he did not want to resign his union membership and for that reason did not apply to R&S. In these circumstances, we find that his failure to apply is not a valid defense and that by refusing to hire Roeke, R&S violated Section 8(a)(3) and (1).[18]

ORDER

The National Labor Relations Board orders that the Respondents, Rogan Brothers Sanitation, Inc. and R&S Waste Management Services, LLC, their officers, agents, successors and assigns, and the Respondent, International Union of Journeymen and Allied Trades, Local 726, its officers, agents and representatives, shall take the following action.

A. Respondent Rogan Brothers Sanitation Inc., Yonkers, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging employees because of their membership in or activities on behalf of International Brotherhood of Teamsters, Local 813 or any other labor organization.

(b) Threatening employees with discharge because they are members of or represented by International Brotherhood of Teamsters, Local 813 or any other labor organization.

(c) Soliciting employees to resign their membership in International Brotherhood of Teamsters, Local 813.

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

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

(a) Within 14 days from the date of this Order, offer Wayne Revell, Joseph Smith, and Michael Roeke full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Wayne Revell, Joseph Smith, and Michael Roeke whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Wayne Revell, Joseph Smith, and Michael Roeke for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify Wayne Revell, Joseph Smith, and Michael Roeke in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in Yonkers, New York, copies of the at-

[18] Member Johnson finds that because R&S was a single employer with RBS and is therefore liable to make whole Roeke for his unlawful discharge from RBS, it is unnecessary to pass on the refusal-to-hire violation.

tached notice marked "Appendix A."[19] Copies of the notices, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 2 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.

B. Respondent R&S Waste Management Services, LLC, Yonkers, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging employees because of their membership in or activities on behalf of International Brotherhood of Teamsters, Local 813 or any other labor organization.

(b) Threatening employees with discharge because they are members of or represented by International Brotherhood of Teamsters, Local 813 or any other labor organization.

(c) Soliciting employees to resign their membership in International Brotherhood of Teamsters, Local 813.

(d) Refusing to hire employees unless they resign their membership in International Brotherhood of Teamsters, Local 813.

(e) Recognizing or entering into a collective-bargaining agreement with International Union of Journeymen and Allied Trades, Local 726 as the exclusive collective-bargaining representative of its employees unless and until it is certified by the Board as the exclusive collective-bargaining representative of those employees.

(f) Maintaining or giving any effect to the collective-bargaining agreement with Local 726 entered into on November 1, 2011, or any renewal, extension, or modification thereof unless and until Local 726 is certified by the Board as the collective-bargaining representative of such employees; however, nothing in this Order shall require any changes to terms and conditions of employment that may have been established pursuant to the collective-bargaining agreement.

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

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

(a) Within 14 days from the date of this Order, offer Wayne Revell, Joseph Smith, and Michael Roeke reinstatement to the jobs that they previously performed for Rogan Brothers Sanitation Inc., or if those jobs do not exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed if they had been hired by R&S.

(b) Make Wayne Revell, Joseph Smith, and Michael Roeke whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Wayne Revell, Joseph Smith, and Michael Roeke for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Withdraw and withhold recognition from Local 726 as the collective-bargaining representative of its employees unless and until it has been certified by the Board as the collective-bargaining representative of those employees.

(f) Jointly and severally with Local 726, reimburse with interest all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the union-security clause and dues-checkoff clause of the November 1, 2011 collective-bargaining agreement. However, reimbursement does not extend to those employees who

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.'

voluntarily joined and became members of Local 726 prior to November 1, 2011.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facilities in Yonkers, New York, copies of the attached notice marked "Appendix B."[20] Copies of the notices, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2011.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 2 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.

C. The Respondent, International Union of Journeymen and Allied Trades, Local 726, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Acting as the collective-bargaining representative of the employees of R&S Waste Services, LLC, unless and until it is certified by the Board as the collective-bargaining representative of those employees.

(b) Maintaining or giving any force or effect to the November 1, 2011 collective-bargaining agreement with R&S Waste Services, LLC, unless and until it is certified by the Board as the collective-bargaining representative of such employees.

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

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

(a) Jointly and severally with R&S Waste Services, LLC, reimburse with interest all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the union-security clause and dues-checkoff clause of the November 1, 2011 collective-bargaining agreement. However, reimbursement does not extend to those employees who voluntarily joined and became members of Local 726 prior to November 1, 2011.

(b) Within 14 days after service by the Region, post at its offices and meeting halls, copies of the attached notice marked "Appendix C."[21] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Local 726's authorized representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if Local 726 customarily communicates with its members by such means. Reasonable steps shall be taken by Local 726 to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent R&S has gone out of business or closed the facility involved in these proceedings, Local 726 shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by R&S at any time since October 1, 2011.

(c) Within 14 days after service by the Region, deliver to the Regional Director for Region 2 signed copies of the notice in sufficient number for posting by R&S Waste Services, LLC, at its Yonkers, New York facility, if it wishes, all places where notices to employees are customarily posted.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[21] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Local 726 has taken to comply.

Dated, Washington, D.C. April 8, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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 discharge you because of your membership in or activities on behalf of International Brotherhood of Teamsters, Local 813 or any other labor organization.

WE WILL NOT threaten you with discharge because you are a member of or represented by International Brotherhood of Teamsters, Local 813 or any other labor organization.

WE WILL NOT solicit you to resign your membership in International Brotherhood of Teamsters, Local 813.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL within 14 days from the date of this Order, offer Wayne Revell, Joseph Smith, and Michael Roeke full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Wayne Revell, Joseph Smith, and Michael Roeke whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL compensate Wayne Revell, Joseph Smith, and Michael Roeke for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Wayne Revell, Joseph Smith, and Michael Roeke, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

ROGAN BROTHERS SANITATION, INC.

The Board's decision can be found at www.nlrb.gov/case/2-CA-065928 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

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

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Choose not to engage in any of these protected activities.

WE WILL NOT discharge you because of your membership in or activities on behalf of International Brotherhood of Teamsters, Local 813 or any other labor organization.

WE WILL NOT threaten you with discharge because you are a member of or represented by International Brotherhood of Teamsters, Local 813 or any other labor organization.

WE WILL NOT solicit you to resign your membership in International Brotherhood of Teamsters, Local 813.

WE WILL NOT refuse to hire you unless you resign your membership in International Brotherhood of Teamsters, Local 813.

WE WILL NOT recognize or enter into a collective-bargaining agreement with International Union of Journeymen and Allied Trades, Local 726 as the exclusive collective-bargaining representative of our employees, unless and until it is certified as your exclusive collective–bargaining representative by the Board.

WE WILL NOT maintain or give effect to the November 1, 2011 contract with Local 726, or to any renewal, extension, or modification thereof, unless and until Local 726 is certified by the Board as the collective-bargaining representative by our employees; but we are not required to make changes in wages or other terms and conditions of employment that may have been established pursuant to the contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL within 14 days from the date of this Order, offer employment to Wayne Revell, Joseph Smith, and Michael Roeke in the same jobs that they held while employed by Rogan Brothers Sanitation, Inc. or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Wayne Revell, Joseph Smith, and Michael Roeke whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any interim earnings, plus interest.

WE WILL compensate Wayne Revell, Joseph Smith, and Michael Roeke for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Wayne Revell, Joseph Smith, and Michael Roeke, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL withdraw and withhold all recognition from Local 726 as the collective-bargaining representative of our unit employees, unless and until it has been certified by the Board.

WE WILL, jointly and severally with Local 726, reimburse, with interest, all our present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the union-security clause and dues checkoff clause in the November 1, 2011 contract. However, reimbursement will not extend to those employees who voluntarily joined Local 726 prior to November 1, 2011.

R&S WASTE SERVICES, LLC

The Board's decision can be found at www.nlrb.gov/case/2–CA–065928 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington D.C. 20570, or by calling (202) 273-1940.

APPENDIX C

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 act as the collective-bargaining representative of the employees of R&S Waste Services, LLC, unless and until we are certified by the Board as the collective-bargaining representative of such employees.

WE WILL NOT maintain or give any force or effect to the November 1, 2011 contract with the above-named employer, or to any renewal, extension or modification of the contract.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL, jointly and severally with R&S Waste Services, LLC, reimburse, with interest, all present and former employees of R&S Waste Services, LLC for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the union-security clause and dues checkoff clause in the November 1 contract. However, reimbursement will not extend to those employees who voluntarily joined Local 726 before November 1, 2011.

INTERNATIONAL UNION OF JOURNEYMEN AND ALLIED TRADES, LOCAL 726

The Board's decision can be found at www.nlrb.gov/case/02-CA-065928 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Allen M. Rose, Esq., Colleen M. Fleming, Esq., and *Michael J. Bilik, Esq.,* for the General Counsel.
Michael J. Mauro, Esq., for R&S Waste Services, LLC.
Gary Rothman, Esq., for Local 726.
Jane Lauer Barker, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard these consolidated cases in New York City on various days in August and October 2012 and January 2013.[1] The charges and amended charges in Cases 2–CA–065928, 2–CA–065930, and 2–CA–66512 were filed against the Respondent Employers on September 29 and 30, October 3 and 11, and November 22, 2011. The charge in Case 2–CB–069408 was filed against Local 726 on November 22, 2011. The consolidated complaint was issued on May 31, 2012, and alleged as follows:

1. That Rogan Brothers Sanitation Inc., located in Yonkers, New York, has been engaged the business of waste removal for businesses and private residences.

2. That R&S Waste LLC is Limited Liability Corporation located in Yonkers, New York, and has been engaged in commercial waste hauling since its formation.

3. That on or about February 17, 2011, R&S was established by Rogan as a disguised continuation of Rogan for the purposes of evading its obligations under the National Labor Relations Act.

4. That on or about August 1, 2011, R&S assumed the assets of Rogan and continued to operate Rogan's business in basically an unchanged form.

5. That since about October 27, 2011, R&S has employed as a majority of its work force, in an appropriate unit, employees who previously had been employed by Rogan.

6. That R&S and Rogan, having identical business purposes, management, operations, customers, and supervisors, constitute a single employer, and/or alter ego.

7. That alternatively, R&S has been a successor to Rogan having an obligation to recognize and bargain with Teamsters, Local 813 which was the recognized collective-bargaining representative of certain of Rogan's employees.

8. That the appropriate bargaining unit consists of all chauffeurs helpers, mechanics and welders at the Employer's Yonkers yard and who service southern Westchester County.

9. That between September 23 and 29, 2011, agents of R&S such as Michael Vetrano and Peter Ligouri, rendered assistance to Local 726 by soliciting authorization cards from the employees of R&S on behalf of that union.

10. That on September 29, 2011, Local 813, by letter, requested R&S to meet and bargain on behalf of the above-described unit; a request that was refused.

11. That on or about September 29, 2011, Local 813 requested certain information from R&S that was not provided.

12. That from October 1 to 4, 2011, the Respondent [Rogan/R&S], for discriminatory reasons, refused to hire Michael Roake, Wayne Revell, Joseph Smith, and Richard Zerbo. The complaint does, however, state that the Respondent did hire Wayne Revell and Richard Zerbo on October 11, 2011.[2]

13. That notwithstanding the existence of an extant collective-bargaining agreement between Local 813 and Rogan, the Respondent,[3] without notice to or offering to bargain, failed and/or refused to continue in effect the terms of that contract including its obligation to remit union dues and to make payments to the Insurance Trust Fund, the Pension Fund, and the

[1] The hearing in this case unfortunately was drawn out by a series of unforeseen circumstances. The hearing was postponed after the first day because the son of Joseph Spiezio had a medical situation that required the presence of his father. Later, the hearing was postponed because a witness subpoenaed by the General Counsel refused to honor the subpoena, thereby requiring the General Counsel to seek enforcement in the United States District Court. Then, when we were ready to resume, Hurricane Sandy came along and forced the closure of the New York Regional Office for more than a week.

[2] In the brief, General Counsel withdrew the allegations regarding Richard Zerbo.

[3] In the context of the complaint, the term Respondent is used by the General Counsel to refer to both Rogan Brothers Sanitation Inc. and R&S Waste Services LLC on a theory that R&S is an alter ego of Rogan Brothers Sanitation. For the sake of clarity and for the remainder of this decision, I will generally refer to Rogan Brothers Sanitation as Rogan Brothers except where the name James Rogan is referenced. Also, I will refer to R&S Waste Services LLC as R&S.

Severance Fund.[4]

14. That on or about October 17, 2011, Respondent R&S, recognized Local 726 and entered into a collective-bargaining agreement with that union covering the employees in the unit that had been represented by Local 813. It is alleged that the Respondent employer and Respondent Local 726 entered in a contract notwithstanding the fact that Local 726 did not represent a majority of the employees in the recognized unit and that the Employer did so at a time that it had an obligation to recognize Local 813. The complaint also alleges that the Employer violated Section 8(a)(1) and (3) of the Act and the Local 726 violated Section 8(b)(2) of the Act by maintaining and enforcing a union-security clause requiring employees to join Local 726 after 90 days of employment.

I note that Joseph Spiezio, on behalf of R&S, filed an answer to the complaint, appeared at this hearing with counsel and gave testimony.

However, James Rogan on behalf of Rogan Brothers Sanitation Inc. did not appear either personally or by counsel at the hearing. Moreover, he did not file a typical answer to the complaint. In this regard, James Rogan sent a letter to the Regional Director dated June 11, 2012, stating inter alia;

> Dear Ms. Fernbach:
>
> I am writing in regards to the charges your organization filed against my company. Unfortunately I am not able to retain counsel for these charges but I want this letter on record for my company denying the allegations against Rogan Brothers.
>
> My present CBA has expired and the union, local 813, never asked Rogan Brothers to negotiate a new agreement with my organization even though we demanded one for the covered work we do still have. I don't know why 813 won't sit down to discuss a new contract since I've asked 813 to do so.
>
> I am also not aware the NLRB has jurisdiction of my company any longer based upon the fact that the work we do has changed. Your website says I have to have more than $500,000 in business but my company doesn't. I've attached an affidavit from my accountant.
>
> I do feel that the charges above are unwarranted and unsupported against my company and it has caused every great problems for me since R&S Waste Services, LLC is filing a lawsuit against me for indemnification of all the money they have expended in defending this matter. Ultimately my company denies all of the allegations in the complaint that the NLRB has issued against my company with respect to any wrongdoing that is alleged. I ask that it be rescinded.
>
> Local 813 knew all about everything I was doing and allowed me to sub work out and have covered work done by other unions and non-union workers. 813 is using the NLRB to do its bidding; that is wrong in this economy to attack companies like that who are providing jobs when so few are around. I hear the president talk about all the jobs he is creating and making it easier for companies to operate; the lawsuit by the NLRB tells a different story.
>
> When I was having financial issues with Local 813 long before all of this and have had previous matters by your Agency and if we were capable and financially able to defend ourselves we would without doubt am able to argue these matters and sustain a positive result.

I also note that at the outset of this hearing, in August 2012, the General Counsel stated that they were not alleging that Rogan Brothers and R&S were single employers despite the caption. At that time, it was asserted that the theory was either that R&S was an alter ego of Rogan Brothers, or if that didn't work, a Burns successor to Rogan Brothers. Nevertheless several months later, and not long before the General Counsel rested, they moved to amend the complaint to now allege that the two companies were in fact single employers. For better or worse, I granted that motion.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following[5]

FINDINGS AND CONCLUSIONS

I. JURISDICTION

In two prior cases, the Board asserted jurisdiction over Rogan Brothers Sanitation Inc., by way of default judgments issued in 2010 and 2011. (Cases 355 NLRB 182 and 357 NLRB No. 137). In both cases, Rogan Brothers either failed to respond to a complaint or entered into a settlement whereby it agreed that it was subject to the Board's jurisdiction. As the present case represents, to some degree, a continuation of those earlier cases, I conclude that the Board is justified in retaining jurisdiction over this employer. I therefore conclude that Rogan Brothers is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In the case of R&S Waste Services, LLC., that respondent admits and I find that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

I also conclude that the two unions involved in this case, International Union of Journeymen and Allied Trades, Local 726 and International Brotherhood of Teamsters, Local 813, are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Relationship between Rogan Brothers Sanitation and Local 813, IBT

The complaint alleges that the appropriate bargaining unit consists of all "chauffeurs, helpers, mechanics and welders at the Employer's Yonkers yard and servicing southern Westchester County." As will be shown below, this unit description is neither consistent with the written unit descriptions contained in successive contracts between Local 813 and Rogan Brothers or with the actual facts on the ground.

[4] The General Counsel amended the complaint to delete an allegation regarding the remittance of union dues.

[5] For the most part, I have based my findings of fact on the documentary evidence. Accordingly, where appropriate, I have designated the exhibit number in the decision itself; albeit there were many other exhibits not highlighted which were relevant to this decision.

Since James Rogan, the owner of Rogan Brothers Sanitation, Inc., refused to appear at this hearing and did not respond to a subpoena requiring his testimony and the production of records, the history of his business operations had to be obtained from a variety of sources. These included past Board decisions, affidavits he gave to the Regional Office during the investigation of this case, the testimony of James Troy, Local 813's representative, and the testimony of various employees who worked for him.

As of 2011 and until August 2012, Rogan Brothers was a business that collected waste from residential and commercial customers in Westchester and Bronx counties.[6] It mostly operated out of rented yard located at Saw Mill River Road in Yonkers, New York. It also had a dump located close by on Saw Mill River Road and a third facility consisting of a transfer station located in Bedford, New York. Most of its trucks were located at the Saw Mill River Road yard and this is where most of the Company's truckdrivers and other employees reported to work each day. Since Rogan did not own the property, the company's assets, for the most part, were trucks and garbage containers. As I understand it, there are basically four types of trucks that were utilized by Rogan Brothers; (a) back-end loader garbage trucks, (b) front-end loader garbage trucks, (c) roll-off trucks and (d) tractor trailers. Back-end loaders are the traditional garbage trucks that one sees in the neighborhood. They typically take garbage to a transfer station. Front-end loaders are trucks that have mechanical arms in front which are used to pick up relatively small garbage containers and deliver them to a transfer station. Most often this would involve materials such as paper and plastics that can be recycled. Roll-off trucks are used to transport larger containers to and from customer locations and are often used for construction debris. Tractor trailers are typically used to take garbage from transfer stations to out of state garbage disposal sites.

It seems that Rogan Brothers, via acquisitions, had an explosive period of growth from 2001 through 2010. It also appears that the number of people it employed over this period of time grew from a smaller indeterminate number of employees to a much larger, but still somewhat indeterminate number by 2011. As will be shown below, Local 813 has, over the course of time, represented some, but not all of the drivers and other employees of Rogan who were engaged in the waste disposal business.

In *Rogan Bros. Sanitation, Inc.*, 355 NLRB 182, the Board issued a Default Judgment based on the Company's failure to file an answer to a complaint that was issued on December 30, 2009. That complaint was based on a charge in Case 2–CA–039528, which was filed by Local 813 on October 9, 2009. In substance, the Board made the following findings:

1. That James Rogan was the company's president and that Michael Vetrano was its general manager.

2. That since about December 1, 2001, Local 813 has been the bargaining representative and has been party to a series of collective-bargaining agreements, the last being effective from December 1, 2005, through November 30, 2008, for the following unit of employees:

> All chauffeurs, helpers, mechanics and welders employed by Respondent but excluding all employees not eligible for membership in the Union in accordance with provisions of the Labor management Relations Act of 1947, as amended.

3. That since about August 27, 2009, the Respondent had failed and refused to meet and bargain with the Union as the exclusive bargaining representative of the unit.

This decision, although describing a unit, did not indicate how many employees of Rogan Brothers were in that unit.[7]

General Counsel Exhibit 39A is a collective-bargaining agreement between Local 813 and Rogan Brothers for the period from December 1, 2005, through November 30, 2008. The recognition clause reads:

> The employer recognizes the Union as the sole and exclusive bargaining representative of all Chauffeurs, Helpers, Mechanics and Welders of the Employer except those employees not eligible for membership in the Union in accordance with the provisions of the Labor management Relations Act of 1947, as amended, with respect to wages, hours and other working conditions. The area of work includes, but not by way of limitation, loading and/or removing garbage, rubbish, cinders, ashes, waste materials, building debris and similar products.

The 2005–2008 contract contains a standard union-security clause requiring membership in Local 813 after 30 days of employment.[8] Although the description of the unit is a bit more descriptive, it essentially is the same as the unit set forth in the Board decision cited above. That Board decision did not really establish how many unit employees were employed by Rogan Brothers during this 3-year period of time. Nevertheless, from the testimony of many people, it seems that despite their inclusion in the written contract unit, Local 813 has never represented or attempted to represent any helpers, mechanics or welders even though such classifications of employees have been employed by Rogan Brothers. That is, Local 813 had never attempted to have these people join the Union either voluntarily or via the union-security clause and they were never paid the wages and benefits set forth in this or any subsequent contract. The evidence is that at any given time, there were at least four helpers, one or two welders, and one mechanic.

General Counsel Exhibit 39B is a memorandum of agreement between Local 813 and Rogan Brothers dated March 5, 2010. This essentially is a modification of General Counsel Exhibit 39A, to run from December 1, 2008, through November 30, 2010. In part, it provides for a wage freeze in the first 2 years and a wage increase in the third. It also provides for increased contributions to the three funds. There was, in this document, no alteration of the bargaining unit description.

[6] There was some evidence that James Rogan also owned and/or operated at least two other companies that operated within the garbage industry. One was Finne Brothers Refuse Systems Inc. and the other was called ARJR.

[7] As described below, Rogan Brothers was involved in second case that led to another Board decision involving events that took place in 2010.

[8] The contract contains a dues-checkoff provision and provisions for the remittance, on behalf of covered employees, of contributions to a health insurance fund, a pension fund, and a severance fund.

General Counsel Exhibit 39C is a memorandum of agreement dated January 18, 2011, that extends the collective-bargaining agreement until November 30, 2011. With respect to the bargaining unit, this memorandum modified the previous unit descriptions and defines the unit as:

> [T]hose employees performing bargaining unit work who are domiciled in Yonkers, which shall cover no fewer than 10 chauffeurs, who shall have their own separate seniority list. Temporary changes in the domicile of chauffeurs shall not be deemed to modify this Agreement."

According to Troy, the intent of this memorandum agreement was twofold. Firstly, to limit the agreement to employees working out of the Saw Mill River, Yonkers location and therefore to exclude any of Rogan Brothers' employees who worked at its Bedford, New York location. Secondly, to set a minimum number of at least 10 employees that would be covered by the contract.

There are a number of anomalies present here. The unit description in the 2011 agreement is different from the complaint's description of an appropriate unit and is also different from the unit descriptions in the prior Board decisions. The complaint's unit description includes helpers, mechanics and welders, whereas the 2011 agreement includes only chauffeurs. Whereas the 2011 agreement limits the bargaining unit to chauffeurs located in Yonkers, the original contract covers employees who are employed by Rogan Brothers without geographical limitation. Whereas the complaint describes the bargaining unit as limited to employees performing work only within Southern Westchester County, there is no such limitation in any of the contracts or in any of the prior Board decisions. Finally, whereas the original contract's unit description seemingly limits the unit to employees who are eligible for union membership, no such limitation is contained in the complaint's description of the bargaining unit.[9]

There are other problems as well. For one thing, the evidence shows that as of January 2011, Rogan Brothers, at its Yonkers facility, employed at least 25 to 30 employees involved in handling garbage, of which no more than eight were members of Local 813 or who were paid wages and benefits in accordance with the Local 813 contract.[10]

To further complicate matters, the evidence shows that as of January 2011, and for some years before, Rogan Brothers had collective- bargaining agreements with two other unions covering truckdrivers, some of whom were also stationed at the Yonkers location. One contract was with Local 456, IBT and the other was with Local 282, IBT. Although not entirely clear, it appears that the contract with Local 456 probably covered those truckdrivers who may have picked up garbage containers at unionized construction sites. It also appears that the Local 282 contract may have been applied to some of the roll-off drivers working out of the Yonkers facility[11] as well as some of the over-the-road tractor trailer drivers who were stationed at the Bedford transfer facility.[12]

Also, as of January 2011, Rogan Brothers, at the Yonkers site, employed additional truckdrivers who operated garbage trucks, front-end loaders and roll-off trucks who were not represented by any union. That is, these drivers were never asked to join Local 813 or any other union, or were never required to join Local 813 or any other union pursuant to a contractual union-security clause. These nonunion truckdrivers did not pay union dues and were not paid union wage rates or benefits.

In this regard, I note that Wayne Revell, a driver testified that in 2010 or early 2011, he was given a batch of union membership cards by union agent Troy and was told to distribute them to the "worthy guys;" which he understood to mean the good drivers. As a consequence, he solicited membership from only a few of the Rogan Brothers drivers and decided to not ask other drivers if they wished to be union members. Revell testified that for years, he was aware that there was one group of drivers who were members of Local 813 and another group that were not.

As noted above, although the bargaining unit described in the complaint purports to include helpers, mechanics, and welders, there were, as of January 2011, about four or five helpers and one mechanic located at Yonkers and perhaps two welders (located in Bedford), none of whom had ever been asked to join Local 813 and none of whom had ever been paid the wages or benefits set forth in any of the Local 813 contracts. As far as I can see, Local 813 and Rogan Brothers had always treated these types of employees as being outside the contractual unit, despite the language of the contracts.

It therefore appears that as of January 2011, and probably before, and continuing through August 2011, that the Local 813 collective-bargaining agreement was applied to, at most eight truckdrivers who were employed at the Yonkers location and who were the employees who were members of that Union. A majority of the other nonoffice employees working at this location were either not represented by any union or were represented by Local 456 IBT or possibly Local 282, IBT.

It is noted that during the entire period of time that Local 813 had contracts with Rogan Brothers, it never officially appointed a shop steward. Nevertheless, in or around 2008, Troy persuaded an out of work member named Charles Morel to apply for a job at Rogan Brothers. And when Morel was hired in November 2008, he agreed to be Troy's eyes and ears at the shop. I note too that Troy visited the facility from time to time without

[9] I must say that I am puzzled by this exclusionary language. I have never seen a collective-bargaining agreement that excludes from coverage those employees who are not eligible for union membership. Does this mean that the contract is designed to cover only those employees who are union members?

[10] Wayne Revell, a roll-off driver who worked for Rogan Brothers for 10 years and who was a Local 813 member paid under the Local 813 contract, testified that at one time, Jimmy Rogan employed over 50 people and that there had to be at least 25 to 30 drivers and helpers who worked at the Yonkers facility. Revell testified that of this number there were about eight who were covered by the Local 813 contract.

[11] Wayne Revell testified that during the time that he worked at Rogan Brothers, there were at least two or three other roll-off drivers who were not in Local 813 and that some were represented by Local 282 IBT.

[12] All of the contracts that Rogan had with these three unions commenced well in the past. There was no evidence as to how recognition came about or whether any of Rogan's employees ever voluntarily selected any of these unions to represent them.

impediment and spoke to its employees when he saw them outside the facility. I also note that in 2010, Local 813's trust funds sent an auditor to Rogan Brothers to inspect its books and records to ascertain whether Rogan was making the proper fund contributions. Although Troy credibly testified that the company never notified the Union when it hired new employees and that employees were afraid of joining, it cannot be said that Local 813 was completely in the dark and in no position to determine who and when people were employed by Rogan. And since the collective-bargaining agreement contained an arbitration clause, it cannot be said that Local 813 lacked the legal means to enforce the contract and compel new employees to become union members pursuant to the contracts union-security provisions.

In the meantime, Local 813, sometime in the summer of 2010, solicited three drivers of Rogan Brothers to join the Union. These were Joseph Smith, Anthony Mercado, and Daniel Mattei. They all were discharged on July 20, 2010, and Local 813 filed a charge and an amended charge in Case 2–CA–40028 relating to their discharges. On January 28, 2011, Rogan Brothers, by Michael Vetrano executed an informal settlement agreement. Thereafter, on February 28, the Company by Howard Kassman its controller asked the Region to rescind the settlement and allow it to go to a hearing. As the settlement contained default language, the Regional Director refused and moved for a default judgment. On December 9, 2011, at 357 NLRB No. 137, the Board entered a summary judgment concluding that: (a) the Respondent discriminatorily discharged the three employees; (b) that on or about June 20, 2012, it instructed employees not to join Local 813; (c) that on or about October 12, 2010, it threatened employees with reprisals; and (d) that the Respondent by Bret Rogan, threatened an employee with physical violence because the employee joined the Union. The order, which was enforced by the Court of Appeals on March 22, 2011, required, inter alia, that Rogan Brothers reinstate the three drivers and make them whole.

Once again and perhaps because that case was concluded by way of summary judgment, there were no findings as to whom or how many employees of Rogan Brothers were covered by the Local 813 contract bargaining unit. All we know is that in the spring 2010, the Union signed up three drivers and sought to have them included in the unit, whereupon the Employer discharged them.

It also appears that 2009 and 2010 were litigious and costly years for Rogan Brothers in a number of other non Board litigations.

On March 10, 2009, the trustees of Local 282's benefit funds filed a complaint and summons demanding that Rogan Brothers produce records, permit an audit and make payments for delinquent fund contributions on behalf of an undefined number of employees. This ultimately resulted in a stipulation and consent order dated December 8, 2011, whereby James Rogan, on behalf of Rogan Brothers, agreed to pay the sum of $500,000. This was for delinquencies for the period from May 4, 2007, through August 20, 2011.

On November 18, 2009, the Trust fund office of Local 813 made a demand for contributions on behalf of Michael Lamorte and Michael Gianfransico. The letter states inter alia: "It appears that the charges for these two employees are valid as their checkoff cards were located in our files and they reflect the applicable starting date of employment for the both of them." Thereafter, on February 19, 2010, Rogan Brothers entered into a settlement with the Trust funds whereby it entered a confession of judgment and agreed to pay $100,000. This settlement was signed by Howard Kassman on behalf of Rogan Brothers. (Kassman had recently been hired as the Controller.)

On February 2, 2010, the Trustees of Local 456 funds filed a complaint and summons alleging that Rogan Brothers was in default in making contributions to its funds as required by its collective-bargaining agreement with Rogan Brothers. It sought relief in the amount of a minimum of $78,249.42 plus interest at the rate of 10 percent, plus liquidated damages.

As noted above, on May 11, 2010, the Board in Case 2–CA–39528 entered a default judgment against Rogan Brothers because it failed to file an answer to the complaint that was issued in December 2009.

On July 14, 2010, a judgment was entered against Rogan Brothers and Finne Brothers Refuse Systems Inc., in an action brought in Westchester County by Wecare Transportation LLC. This was an action to recover money owed for refuse hauling services provided by the Plaintiff over a period from February through May 31, 2009. The judgment was in the amount of $253,584.

The record also shows that Rogan Brothers was in substantial arrears for tax obligations.

This record indicates to me that towards the end of 2010, Rogan Brothers was at the end of its financial rope. It had numerous unpaid taxes, outstanding debts, and legal judgments that had to be met.

Enter Joseph Spiezio.

B. The Relationship Between James Rogan and Joseph Spiezio and Their Respective Companies

The record shows that Joseph Spiezio is a businessman who has specialized in acquiring abandoned or distressed properties.[13] He is the sole owner of an entity called the Spiezio Organization that is located on Mamaroneck Avenue in Harrison, New York. He also is the sole owner of numerous other companies organized as Limited Liability Companies, otherwise called LLCs. These include Pinnacle Equity Group, a company which is registered in New Orleans and through which Spiezio made a loan of $850,000 to James Rogan in relation to the operation of Rogan Brothers Sanitation, Inc. He is also the owner of R&S Waste Services, LLC which will be described later on.

The evidence suggests that one way that Spiezio has acquired various real estate holdings is by making high interest private loans to various companies or individuals when such loans were not available through conventional banking sources, and then through the terms of secured loan agreements, taking possession of the property and assets, if the loan cannot be repaid. From all appearances, Spiezio has done quite well over a 30-year period of real estate transactions and I imagine that he has become quite wealthy. Before 2011, he has never been engaged in the waste disposal business.

[13] He has a JD degree, but has never practiced law.

The record shows that Spiezio had made a previous loan to Rogan Brothers back in 2005, which was repaid.

Sometime in late 2010, James Rogan and Joseph Spiezio spoke about the possibility of the latter making a loan to Rogan Brothers.

On January 1, 2011, Spiezio sent a letter to James Rogan that stated, inter alia;

> I am sending this letter that I ask you to acknowledge before we move forward and structure loans and work on a consulting agreement.
>
> The loan will be used for your Rogan Brothers Sanitation Inc. only and not shared by the multiple internal operations of that company. The debts will be secured by a loan and security agreements covering all of the commercial sanitation customers, contracts and containers, compactors, accounts receivable and vehicles
>
> I also understand that the trucks are very old and have liens on them but we will file UCC filings [14] on all and we will require a security agreement because of the financial situation your company is in.
>
> My goal is to retain a law firm to handle your labor issues, obtain interim financing which was previously turned down by conventional lenders because of your tax issues and lastly to try to suggest some business controls.
>
> I know we discussed your other operations but I will not be able to help you with ARJR Trucking Corp, Finne Brothers or your Rogan Brothers Sanitation, Inc., accounts in NYC. I know you run trailers and roll-off containers in the 5 boroughs, but for me to secure myself, it will take too long filing a license requirement with Business Integrity.
>
> As further security I must obtain a Class A hauler license from Solid Waste [15] in the event of your default. It is agreed that you will assist in any way legally possible. I will form a company and I will be the sole member and if you are able to pay me in full on or before July 31, 2011, then I will resign my interest upon full payment and the entity and license is all yours. I find this field interesting to me and in light of my previous 31 years in real estate and investing.
>
> If I am forced to go into the sanitation business due to your default to my entity please note that all of my consulting monthly fees, interest and principle will be combined and if I obtain my license then I will operate the Sanitation as complete satisfaction of the debt owed.
>
> In closing, I am confident that this will be a great alternative and if we are not able to resolve some of your issues, then I am comfortable with the collateral and confident it will work out for my organization.
>
> As you know I am doing this based upon our previous loan history and that is why I have given you an option in the event of default.

General Counsel Exhibit 3 is a consulting agreement dated January 1, 2011, that was executed by James Rogan and Joseph Spiezio. The agreement states that it is between Rogan Brothers Sanitation Inc. and the Spiezio Organization LLC. It states that the consultant (Joseph Spiezio), will consult, subject to approval of James Rogan on the following: (1) retain counsel for labor related matters; (2) retain a CPA for tax issues; (3) negotiate contracts; (4) review internal controls; (5) put company policies in place; (6) meet on CBA with Locals 456, 282 and 813; (7) retain IT personnel to review software; (8) set up systems for operations of business; (9) review land at Bedford for operations and transfer station; (10) refer to bankers for operating accounts and payroll services; (11) find funding sources. The agreement provides that. Spiezio may have his other related entities provide funding to the company. Also, the agreement provides that Rogan Brothers will provide compensation and reimbursement for travel and other reasonable business expenses incurred by Spiezio. Finally, the agreement provides that Spiezio will be paid $20,000 per month.

General Counsel Exhibit 4 is a Security Agreement dated January 3, 2011, that was filed with the Westchester County clerk. It is between Rogan Brothers as debtor and Pinnacle Equity Group, LLC as the secured party. This is for loan of $850,000 by Pinnacle secured by collateral. It is signed by James Rogan and notarized by Howard Kassman. Attached is Schedule A which lists items used as collateral. This includes all commercial routes, all customer lists, 450 roll off dumpsters, 35 compactors, 800 garbage containers, computers, office furniture, and 19 vehicles which were listed by VIN numbers.

General Counsel Exhibit 5 is a promissory note dated January 3, 2011, between Rogan Brothers and Pinnacle. This describes the loan to Rogan Brothers from Pinnacle in the amount of $850,000 at 12 percent per annum, payable in $50,000 quarterly installments from April 1 until August 1, 2011, with the right of prepayment without penalty. It states that the loan is secured by the Security Agreement which is General Counsel Exhibit 4.

General Counsel Exhibit 6 is a demand note dated January 3, 2011, between Rogan Brothers and Pinnacle regarding the loan.

General Counsel Exhibit 7 is the filing with the Office of the Westchester County Clerk of a document listing the property used as the security for the loan from Pinnacle to Rogan Brothers (i.e., from Joseph Spiezio to James Rogan). The indicated filing date is May 25, 2011.

On January 18, 2011, James Rogan executed a document with Local 813 extending the collective-bargaining agreement to November 30, 2011. As noted above, this document modified the description of the bargaining unit and called for the unit to include a minimum of 10 chauffeurs. It is not clear to me if this agreement was executed by Rogan with the knowledge or consent of Spiezio. Nevertheless, the evidence is that subsequently, there were many conversations between union representative Troy and Joseph Spiezio where Troy insisted that the company put 10 drivers into the Union and Spiezio demurred on the grounds that it was not economically viable to do so. In fact, the company never got around to paying the wage rates or

[14] Referring to the Uniform Commercial Code.

[15] This refers to the Westchester County Solid Waste Commission. In order to operate a garbage business in Westchester, one needs to obtain a license from this commission.

contractual benefits for 10 drivers.

On January 24, 2011, a settlement agreement was executed between the Trustees of Local 813's funds and Rogan Brothers Sanitation. This required the payment of $203,425 plus interest and required an immediate payment of $50,000 with installments thereafter. The record indicates that the initial $50,000 payment was made out of the funds loaned by Spiezio.

On January 28, 2011, Michael Vetrano executed on behalf of Rogan Brothers, a settlement in Board Case 2–CA–040028. This has already been described and to remind the reader, it involved the discharge of three employees (Joseph Smith, Anthony Mercado, and Daniel Mattei) who signed authorization cards for Local 813 in July 2010. Although Rogan Brothers attempted to have the settlement revoked, it ultimately was enforced.

Sometime in January or early February 2011, Spiezio took steps to create an entity called R&S Waste Service, Inc. The purpose of establishing this entity was to have a business entity created and licensed that could operate all or a part of the Rogan Brothers business in the event that Spiezio's loan to Rogan was not repaid.

On February 17, 2011, Articles of Organization for R&S were filed by Joseph Spiezio with New York State, Department of State under Section 203 of the Limited Liability Company Law. As required by State law, this was followed by publication of its existence over a 6-week period starting on March 18, 2011.

By letter dated February 26, 2011, Spiezio wrote to James Rogan as follows:

> In accordance with the settlement agreement with Local 813, it is imperative a payment is made no later than tomorrow in the amount of $50,000. [16] A payment will be wired tomorrow to cover this to allow your organization to maintain its CBA in accordance with your executed agreement.
>
> It appears that your organization is current and I have begun a dialogue with your representative James Troy and he is fully understanding in the economics of the agreement and the issues you face.
>
> He explained that he was also aware that you ran only a few union men and most of Rogan Brothers Sanitation, Inc. were non-union in your garbage business and roll off was all non union.

General Counsel Exhibit 38 is a document executed by Spiezio dated March 1, 2011, which is entitled, "Operating Agreement of R&S Waste Services, LLC." It states that the sole principle is Joseph Spiezio. It lists the office location as 500 Mamaroneck Ave., which is the same address as the Spiezio Organization. It states that the purposes "are to operate a waste company."

General Counsel Exhibit 13 is a letter from Spiezio to James Rogan that is dated March 2, 2011. It states:

> It is imperative we discuss at length many of the issues facing Rogan Brothers
>
> It is clear to me and also the lawyers and accountants that some serious discoveries have been made that would truly force me to take a position for security and disposition thereof.
>
> I will be making application to solid waste commission to be prepared in the event of a default or an event of some of your legal issues affecting my position.

General Counsel Exhibit 111 is an application for a license for R&S that was filed with the Westchester County Solid Waste Commission either on March 1 or sometime later in March 2011. Unlike General Counsel Exhibit 38, this document lists Joseph Spiezio and James Rogan as the principle owners, directors and managers of R&S. It states that Spiezio and Rogan each have a 50-percent beneficial interest in the applicant. It also states that James Rogan has an interest in ARJR, Finne Brothers, and Saw Mill Recovery. This document is signed by Spiezio and Rogan as the principles of R&S. It also states that it was notarized by Howard Kassman on March 1, 2011.[17]

In relation to this license application, Spiezio gave testimony to Bruce Berger, the executive director of the Westchester County Solid Waste Commission on June 13, 2011. In part, the transcript shows the following:

> Q. I have your application here and I've read through it. I've read through your history. Let's just start from the beginning. You are going into or you propose to go into business with Jim Rogan currently of Rogan Brothers and ARJR. How did you get into an agreement with Mr. Rogan to go into business?
>
> A. Jim and I were personal friends and I being in the real estate business had done business with Jim over the years and I always felt the need to expand my operations into various operational businesses besides my real estate holdings and Jim had suggested that he would like to participate in that role with me. So I said OK, I wasn't going to get involved with his existing entity, but I was going to develop my own entity with his guidance and his limited abilities that I would lean on him for learning the business basically.
>
> Q. I know that the application said it's going to be a 50/50 partnership. But it sounds to me like ultimately you want to go on your own? You want to learn the business from Jim, is that right?
>
> A. Yes, we'll have different divisions of the business. I'm looking more towards the waste energy type of business, but I wanted to get into it and develop a feel for it at first before I make any decision to make any moves otherwise.
>
> Q. So waste energy? You mean you want to expand to other types of types across the field?

[16] This refers to the settlement with the trustees of Local 813 regarding fund payments and not the Board settlement regarding the discharge of the three employees.

[17] I am a bit confused by the dating. GC Exh. 13 is a letter dated March 2, 2011, that indicates that Spiezio is going to make an application to the Waste Commission. Yet GC Exh. 111, the actual filing, is notarized by Kassman on March 1, 2011.

A. Correct.

Q. What do you envision?

A. Well, I think that the economy dictates many factors in business. And I'm watching over the years how private went public industry and I've looked at it in different development areas that I presently am in, in Louisiana and Florida and I'm watched how the larger companies have gotten into the business. And they've gotten into the business based on waste and landfill and transfer stations and I think that there needs a component, if you're in the MSW business, you need a better way of disposing of that and I think that that's something I'm going to bring to the table.

Q. I know that you been involved in real estate for years and years.

A. Thirty one years.

Q. Right and in Westchester County and I presume other areas?

A. Westchester, Florida, Pennsylvania, Louisiana.

Q. Is that why you're looking to expand outside of real estate right now?

A. Well no. I still think real estate [is] a great business and I still continue to develop presently but my acquisitions are limited to existing structures that you know any business that has, isn't right, that's a good business, it just needs a good captain at the wheel. I've taken over properties that have been derelict and abandoned. That the person's lost but there's an ulterior motive behind those, those demising stories. It's usually that people buy real estate should understand it's an investment, it's not a full time employment off of one building. You then rate the building for nothing and that's what you have, so what you do is, you set up enough of a property that's going to afford your life style and then the others are actual investments that you pay down your mortgages, build your equity and then you have a successful operation.

Returning to our time line, the evidence shows that in or about February 2011, Spiezio began to take charge of the Rogan Brothers operations. He arranged for Rogan Brothers to discharge its accountants and legal counsel and arranged for substitutes. He began the process of changing the banks that Rogan Brothers used to banks where Spiezio had an existing relationship. Spiezio met with and began to negotiate with James Troy in relation to the existing Local 813 contract in an effort to obtain concessions and to deal with the debts owed to the Local 813 trust funds and to the other Teamster union funds. Additionally, he was trying to persuade Troy to arbitrate the discharge of the three employees that were the subject of the previously described unfair labor practice. In short, the evidence points to the conclusion that from this point on, it was Spiezio, and not James Rogan that was running or attempting to run the business of Rogan Brothers. The evidence shows that it was Spiezio who was dealing with the employment and labor relations policies for Rogan Brothers. The evidence also shows that Spiezio had, by this time, created R&S for the purpose of taking over all or part of Rogan's business in the event that Rogan could not repay the loan. Finally, the evidence shows that by March 2011 at the latest, it was becoming increasingly evident that Rogan would not be able to repay the loan.

On March 7, 2011, two bank accounts in the name of R&S were opened at Key Bank.[18] Listing Spiezio as the company's manager, the signature cards for these accounts were signed by Joseph Spiezio and James Rogan. Later, the authorized signatures for these two accounts were changed to eliminate James Rogan.

On May 25, 2011, there was an exchange of emails between Union Representative Troy and Spiezio. Troy's email states: "Has any progress made to sign 2 additional drivers? We have an agreement for 10."[19] Spiezio responded:

> Working on it, need to resolve new agreements soon if we are staying with 813 in Yonkers barn. As stated many times, RBS [Rogan Brothers Sanitation] has worked diligently to maintain a relationship with 813, probably harder than any other local or out of State company. RBS will continue to strive to make things work with 813, but there comes a point that causes a fracture and we are nearing that. Jim, with your help and understanding, 813 will be with RBS for a long time. We need certain things resolved and one is the arbitration that needs to happen so that we can be completed with these 3 people that charges were filed on RBS. Counsel also must reply to our overtime matter which is significant to our company as well as other companies in the industry."[20]

With respect to this issue, the record shows that there were a number of written and oral communications between Troy and Spiezio in which Troy demanded that the company comply with the agreement to put two more men into the union/unit. For example, in an email dated May 25, 2011, from Troy to Spiezio he wrote; "Has any progress been made to sign 2 additional drivers? We have an agreement for 10." Spiezio's response was; "Working on it. Not enough work and others are out in Bedford." Also, on June 6 Troy wrote; "I have been patiently waiting for you to fulfill your contractual obligation to staff 10 drivers in Local 813."

On March 29, two accounts for Rogan Brothers were opened at Key Bank. The signature cards show both James Rogan and Joseph Spiezio as being authorized to do business in these accounts.

In March 2011, there was an issue about Rogan Brothers making one of the monthly payments that had been agreed to in

[18] GC Exh. 71 was for general business purposes and the other, GC Exh. 72 was for payroll.

[19] In the spring of 2011, the eight employees of Rogan Brothers who were members of Local 813 and who were paid in accordance with the Local 813 contract were truckdrivers John Hofweber, Richard Hoke, Michael LaMort, Charles Morell, Joseph Smith, Michael Santini, Richard Zerbo, and dispatcher, Christopher Dolce. I note that on March 11, 2011, Local 813 and Rogan Brothers signed an agreement whereby the Company agreed to pay back union dues owed for Santini and Morell, coupled with an agreement that both employees would be covered by the Company's health insurance plan instead of the Union's plan.

[20] This email exchange came about after Troy met with Spiezio. The overtime reference relates to Spiezio's demand that the overtime provisions of the Local 813 contract be modified so that overtime payments to the Local 813 truckdrivers be reduced.

the trust fund settlement. This generated a series of emails between Spiezio and Dominick Giglio who is employed by Local 813's trust funds. Basically, these emails are in the nature of; "where are the checks" with the response; "they are in the mail." In one of these emails dated March 31, 2011, Spiezio wrote:

> I am trying to get things in order, but these pressures will end soon, especially when we go non union.

Also in March, Howard Kassman, Rogan Brother's controller moved his office up to 500 Mamaroneck Ave., so he could work next to Spiezio.

By letter dated June 1, 2011, Spiezio wrote to James Rogan as follows:

> It is very clear that based upon the We Care Trucking Default, the pending State Sales Tax Liabilities and the Union benefit issues we must discuss the fact that these items are clearly a trigger to a default of your loan.
> In May I filed the UCC and will be assigning this debt over to R&S Waste Services, LLC on or before July 31, 2011.
>
> When I first discussed forming an entity to take control in the event of a default, I felt the easiest way to help support the customer base would be to form an entity that had letters that the customers would not give rise to any issues. In proceeding that way it will stand for SAFE and RELIABLE.[21]
> I agree that once your litigation is settled and you work out your other issues in the coming years, you will be successful.
> I would ask that you help me in any way shape or form and I will need you to waive if asked any conflict since I brought the law firm and accounting firm to your organization and they would be best to work for me as well during and if a transition were to take place.
>
> I feel based upon our past professional relationship that goes back to 2006, this should not be an issue.

As noted above, on June 13, 2011, Spiezio testified before the Westchester Solid Waste Commission in support of his license application for R&S. The license was issued to R&S on June 30.

On July 1, 2011, Spiezio wrote to James Rogan as follows:

> Please be advised that Pinnacle. is hereby declaring your loan in default.
>
> I am available to meet and discuss a fair and equitable resolution of this matter in hopes that it will not require any Court intervention.
>
> It is my intention to have this entire loan assigned over to R&S . . which has been approved by the Solid Waste Commission.

General Counsel Exhibit 118 is a memorandum assigning the collateral from Pinnacle to R&S. It states inter alia:

> R&S . will be responsible for all of the customer accounts effective August 1, 2011.
>
> R&S . . shall be liable to register any assigned truck and satisfy any open liens as more fully described in the agreement between the parties.
> R&S . . shall refer any customers that inadvertently seek services that are not part of the assignment must contact Pinnacle Equity . . or direct the calls to Rogan Brothers Sanitation Inc. The assignment only consists of Westchester County, Putnam and Duchess and does not include the New York Metropolitan area.

In a document dated July 1, 2011, Spiezio and Rogan entered into an agreement whereby Rogan Brothers would to perform some garbage pickup work for R&S under the following terms:

1. R&S Waste Services LLC will contract with Rogan Brothers Sanitation Inc. to perform refuse removal from time to time at R&S Waste Services, LLC discretion.
2. R&S Waste Services, LLC will compensate Rogan Brothers Sanitation Inc. by paying Rogan Brothers Sanitation Inc. costs plus 10%
3. Rogan Brothers Sanitation Inc. will submit weekly invoices to R&S Waste Services, LLC for payment of the services it performed.
4. Rogan Brothers Sanitation Inc. is free to decline to perform any contract for services proposed by R&S Waste Services, LLC.
5. R&S Waste Services, LLC. Is under no obligation to utilize Rogan Brothers Sanitation Inc. and is free to contract for refuse removal with any entity.

On July 12, 2011, Spiezio sent an email to Union Representative Troy that stated:

> I want to thank you for your time today and meeting with me at my office to discuss my new company R&S Waste Services and the fact that we may entertain a CBA with you and you're local. We also discussed the open issues as authorized by me pertaining to Rogan Sanitation. I requested that NLRB charges filed by you be withdrawn, the arbitration withdrawn and that we then sit and discuss a possible new contract. To confirm, we left off that you would discuss with your counsel and call me back tomorrow.

On July 15, 2011, Troy sent an email to Spiezio stating that the Union would not withdraw its charges with NLRB. In response, Spiezio wrote; "Very sad day for local 813 but expected. Rogan will be available to always make itself available if you ever have a change of heart and want to adhere to the CBA. This is not proper and will not be tolerated and will give Rogan things to consider moving forward with local 813."

On July 19, Troy sent another email to Spiezio attaching a grievance which asserted; "[T]he employer is covering fewer than 10 chauffeurs working and domiciled in Yonkers, NY. The employer is currently covering 8 chauffeurs. Violation of MOA signed on 1/18/11."

On July 20, Peter Liguori, the owner of a small waste company called Industrial Recycling, notified Local 813 that he was going out of business and that he, along with his one employee, Michael Roake, were going to work at Rogan Brothers. Industrial Recycling had a contract with Local 813 and Liguori stated

[21] In cross-examination, the General Counsel suggested that R&S stood for Rogan and Spiezio. This was denied.

that Roake intended to keep his membership in Local 813, but that he (Liguori) wanted to freeze his membership "at this time."

On July 26, 2011, R&S sent letters to various customers of Rogan Brothers over the signatures of Michael J. Vetrano and Frank Vetrano. This letter read:

> I am writing to introduce my new affiliation with R&S who will be servicing your account effective immediately.
> The quality of the service provided will only increase and I will remain responsible for your account as well.
> This change will allow us to better serve your needs in all of your waste handling are recycling needs.
> Our number for dispatch and our mailing address will remain the same;
> R&S Waste Service, LLD
> PO Box 736
> Yonkers, New York 10710
> 914-410-9080 Dispatch Phone
> 914-410 9083 Dispatch Fax
> All Corporate information and billing questions will be directed to our main office;
> R&S Waste Services LLC
> 500 Mamaroneck Avenue, suite 320
> Harrison, New York
> 914 705 4588 Ext 1863
> 914 206 4597 Fax
> liana@rswasteservices.com
>
> If you have any questions, please call me on my cell 914 804 8483 or email at mikeev@rswasteservices.com

On July 31, 2011, Spiezio on Pinnacle letterhead, sent the following letter to James Rogan:

> Please be advised that this office has accepted your surrender of the collateral in the security agreement and identified in Schedule A.
>
> It is accepted as full satisfaction of your debt due this office. We will prepare and file formal documents and remove the UCC filing as well.
> We ask that you continue to work with us over the next few months since it is new to me, but this was our only way to proceed in order to keep you in business.
>
> I know it was not the way things were planned and appreciated you working to make an amicable resolution of matters without protracted litigation which would have caused your company to be forced out of business.
>
> R&S will be the direct beneficiary of Pinnacle and your execution of the titles and other collateral is greatly appreciated.
>
> This letter is sent to memorialize the matter between the respective parties and will continue to obtain information from you to make this as smooth as possible.

General Counsel Exhibit 18 is a document dated July 31, 2011, and is called; "Surrender of Collateral in Satisfaction of Debt." It is signed by Joseph Spiezio and James Rogan. General Counsel Exhibits 19 and 20 are related documents showing the completion of the transfer of collateral from Rogan Brothers, through Pinnacle, to R&S.

The complaint alleges that on or about August 1, 2011, R&S assumed the assets of Rogan Brothers and on that date, "continued to operate the business of Rogan Brothers in basically unchanged form."

In my opinion, the complaint's characterization somewhat simplifies the transactions that occurred. However, the date of August 1, 2011, was used by all sides to set a time when there was a change. Whether or not the change was so abrupt is another matter.

According to Spiezio, after it became clear that the loan was not going to be repaid, he sat down with James Rogan so that the two of them could divide up the assets; some going to R&S and some being retained either directly by Rogan Brothers or by ARJR, another company owned by James Rogan. Spiezio testified that he took over a couple of packer trucks, a roll-off truck, and a front-end loader from Rogan as well as some containers. He testified that much of Rogan's equipment that he did not take over was dilapidated and encumbered by liens. According to Spiezio, he obtained the Rogan customer lists with the intention of contacting those Rogan customers operating in Westchester County with the assistance of Frank Vetrano.

From this record, it seems to me that this division of the spoils probably took place sometime in late July 2011 and before the official transition date of August 1, 2011. As part of the transition process and in order to secure contracts with Rogan customers, Spiezio hired Michael Vetrano to assist him in contacting these customers. He also hired Peter Liguori, who even though he terminated his own business before becoming employed by Rogan Brothers, had his own set of customers in New York City which he brought over first to Rogan Brothers and then to R&S. (Spiezio testified that Liguori continued to service and deal with his former customers.)

The record indicates that after the transfer of assets from Rogan Brothers to Pinnacle to R&S on August 1, 2011, James Rogan, either through Rogan Brothers, ARJR, or other entities, continued to be involved in the waste business, but on a reduced scale.

With respect to Mike Vetrano, who had been a supervisor at Rogan Brothers, Spiezio, who had no prior experience in the waste business, testified that he hired Vetrano to assist in the transition because of his years of being in the business. He testified that Vetrano was hired for a short period of time and that he could not hire, fire, discipline or direct employees. Nevertheless, the evidence convinces me that that Spiezio had to rely on Vetrano to manage this new business as Spiezio had no real experience in the operational aspect of the business apart from his brief time from around February 2011.

Based on this record, I conclude that after R&S began operating under its own name on August 1, 2011, a substantial percentage of its customers were the same customers who had previously done business with Rogan Brothers. In this regard, I note that R&S refused to turn over documents showing the names of its customers from August 1 to December 30, 2011. Moreover, it failed to provide this information even after I granted it the opportunity to show these documents to me in

camera. Based on this refusal to comply with the subpoena coupled with other evidence showing that R&S successfully solicited Rogan customers, I conclude that during this period of time, more than a majority of R&S customers had been customers of Rogan Brothers.

I also note that during the period from August 1 to early October 2011, Rogan Brothers collected garbage for R&S accounts and received payments from R&S. The people who actually did this work were drivers on the Rogan Brothers payroll such as Wayne Revell and Joseph Smith. These individuals continued to work on their same trucks and doing their same routes. This stopped in early October after Local 813, on September 29, 2011, sent a letter to James Rogan demanding that he cease subcontracting work to R&S. Almost immediately thereafter R&S hired Richard Hoke, John Hofweber, and Richard Zerbo, all of who were Rogan Brothers drivers. Joseph Smith, another Rogan driver, was terminated by Rogan Brothers on October 3 and was not hired by R&S. There will be more to say about these individuals later on in this decision.

Based on this record, I conclude that in or about late July 2011, not only did Joseph Spiezio and James Rogan sit down and decide what physical assets of Rogan Brothers would be taken over by R&S, but which supervisors would go to R&S, which accounts would go to R&S, which Rogan Brother employees would be hired by R&S and which accounts would be held by R&S but be serviced by Rogan Brothers employees for which that company would receive payments from R&S.

I received into evidence payroll records of R&S as General Counsel Exhibit 112. These were biweekly records for the week ending August 13 through November 18, 2011. In conjunction with these payroll records I heard testimony from various witnesses including Spiezio as to their job duties and their prior work history; whether employed by Rogan Brothers or not.

As of the biweekly period ending August 13, the following named persons were on the payroll records of R&S. To the extent known and based on witness testimony, their job functions are also listed.

Name	Pay rate at R&S	Category	Rogan Employee?
Peter Liguori	$3000 biweekly salary	Disputed	Yes [22]
Tareq Rabadi	$2000 biweekly salary	Sales	
Lianna Spiezio.	$1800 biweekly salary	Spiezio's daughter [23]	
Frank Vetrano	$2000 biweekly salary	Sales	Yes
Michael Vetrano	$4402 biweekly salary	Disputed	Yes Supervisor
Christopher Dolce	$3077 biweekly salary.	Dispatcher	Yes [24]
Miguel Ducasse	$26 per hour	Driver	Yes
Vidal Avila	$15 per hour	Driver	Yes
Gustavo Cardenas	$ 21 per hour	Driver	Yes
Raymond Ibelli	$15 per hour	Driver	Yes
Daniel Lavoie	$15 per hour	Driver	Yes
James Moore	$10 per hour	Helper	No
Marcello Otiniano	$26 per hour	Driver	Yes
Wilfredo Palacios	$26 per hour	Driver	Yes
Carlos Salinas	$10 per hour	Helper	Yes
Emanuel Tejada	$23 per hour	Driver	Yes
Sergio Torres	$10 per hour	Helper	Yes
Donald Feeney	$26 per hour	Driver	Yes
Peter James Glynn	$26 per hour	Driver	Yes
Mark Messina	$26 per hour	Driver	Yes
Fausto Varrone	$26 per hour	Driver	Yes
Nathaniel Whitney	$26 per hour	Driver	Yes

[22] As noted above, Peter Liguori had his own business which had a contract with Local 813. He went to work for Rogan Brothers in July and then was hired by Spiezio for R&S. Liguori's employee, Michael Roeke continued to work on Rogan Brother's payroll until October 2011.

[23] She worked in the office of both companies.

[24] Dolce was employed by Rogan Brothers as a dispatcher.

Of this group, only Christopher Dolce, who had been a dispatcher at Rogan Brothers, was a member of Local 813 and was paid wages and benefits in accordance with the contract.

During the biweekly period ending August 27, 2011, Joseph DeSilva was put on the R&S payroll. He was a former driver for Rogan Brothers who was paid $21 per hour and presumably was paid the same amount when he went on the R&S payroll. (Spiezio testified that all of the employees, except for Michael Vetrano, were paid the same as when they worked for Rogan Brothers.)

During the biweekly period ending September 10 and 24, the R&S payroll records stayed the same.

During the biweekly period ending October 7, 2011, the R&S payroll records show the addition of Richard Hoke, John Hofweber and Richard Zerbo. These three individuals were drivers who had continued to work for Rogan Brothers after August 1, 2011. They and Christopher Dolce were members of Local 813 and had been paid the wage and benefits of that Union's contract when they were employed by Rogan Brothers. My strong impression is that Hoke, Hofweber, and Zerbo, and perhaps DeSilva, while still on Rogan's payroll, had been driving trucks on accounts that had been taken over by R&S and for which R&S was paying Rogan Brothers. As noted above, this stopped after the Union complained by letter dated September 29, 2011.

During the biweekly period ending October 21, 2011, seven people were added to the R&S payroll. Of these, Terese Dicarmine was a salaried employee who worked in the office. Of the remaining group, Freddy Maldonado, Juan Martinez, and Wayne Ravell had previously worked for Rogan Brothers. The others did not. They were Jason McNamara, Dominick Pellegrino, and Eugene Gallo. In this group of new hires, Ravell had worked for Liguori before coming to Rogan Brothers in July 2011. Although, he had been a longtime member of Local 813, it is not at all clear (at least to me), that when he was employed by Rogan Brothers during July, August, and September, if he was paid wages and benefits in accordance with Rogan's contract with Local 813.

During the biweekly period ending November 4, 2011, Howard Kassman was officially put on the R&S payroll. Between August 1 and November 4, Kassman was paid as a consultant to R&S and performed controller functions for this company. The payroll records for this period also shows that some employees left.

Returning to the month of August 2011. On August 23, 2011, Union Representative Troy sent an email to Spiezio that stated:

> Did you receive requested moa document? I'm curious about the rumors. You have not disclosed who the employees are or the names of your companies other than R&S. I am requesting that information for the next meeting."

On August 24, Spiezio responded by stating inter alia:

> Our past experience when I was a consultant to Rogan Brothers Sanitation Inc., on his operations is clearly different than my company.
>
> In order to remove myself from withdrawal liability, the 401K is clearly the only alternative and that was really a compelling a factor. We would not even consider it without.
>
> I do believe after our discussion we will be able to make a proposal that will work for all and still allow Rogan Brothers Sanitation Inc., an opportunity to do that work that is clearly different than the work that my company wishes to carry on.
>
> In closing, I ask that we try to always keep in mind if our company is not able to make a profit then the working man is hurt and that is our mutual goal."

On August 30, 2011, Spiezio sent another email to Troy. This, essentially consists of a list of proposals and states, inter alia:

> In accordance with our meeting to go over various terms and rates etc., I propose the following subject to counsel review which was sent with this email.
>
> We are coming up with a contribution for health in line for what we presently pay for the men which is $87.50 per week for family plan by each employee.
>
> The retirement will be into the 401K plan and we will only contribute on a scale of years with us as we presently do.
>
> We also have a 6 month waiting period for this and we will only put in 25% what the employee puts in, again based upon a scale that will actually reward those that are with the company the longest.
>
> Our trucks are equipped with tablets for routing and therefore are GPS enabled along with cameras to aid the employee in inclement weather as well as selection of dump and most importantly to protect the driver when a customer states they missed a pick-up when actually the cans were blocked and it affords the man to snap a picture and send to the file and dispatcher. We also have a reduction in insurance premium.
>
> Severance pay again must be done on a scale like the 401k plan.
>
> We would ask that any grievance that must be arbitrated then the grievance will be submitted to the American Arbitration Association.
>
> These are simple items which directly impact the employee and employer and the union will obtain enrollment participation in the 401k plan and severance pay.
>
> This would include only drivers and not helpers at this point for the first 3 years for the contract.
>
> We anticipate that we will have 16 new members.

On September 2, 2011, Troy sent an email to Spiezio wherein he made a contract proposal for R&S based on the Rogan Brothers contract. Troy proposed a contract that would run from September 1, 2011, to August 30, 2012, and would include the helpers. In response to Spiezio's proposals, Troy indicated that the Union agreed to have arbitration cases decided by an arbitrator coming from the AAA. He also agreed to the GPS proposal.

Spiezio immediately responded that he would not agree to any contract that had a defined benefit pension plan instead of a 401(k) plan.

On September 19, 2011, Local 813, by Denise Trovato, sent a bill for dues payments owed to the Union by Rogan Brothers. She is a bookkeeper in the dues department. The bill is for John Hofweber, Richard Hoke, Michael Lamorte, Charles Morell, Wayne Revell, Michael Roake, Michael Santini, Joseph Smith, and Richard Zerbo. All of these people were drivers who had been employed by Rogan Brothers.

On September 22, Spiezio sent an email to Troy stating that he had advised Rogan to pay the money and that the check had been sent.

On September 29, 2011, the Union's attorney sent two letters

to Rogan Brothers; one demanding that no more work be subcontracted to R&S, and the other requesting certain information.

Thereafter, on by letter dated October 3, 2011, Spiezio responded to the Union by stating in an email:

> Please be advised that this office will not accept any letters addressed to Rogan Brothers Sanitation, Inc.
>
> You're fully aware of the address that mail has been sent to Rogan in the past and expect the same for the future. There has never been a change of address to my company headquarters.
>
> Try to refrain from this effective immediately and please note that all correspondence sent c/o my company will be sent back and or refused.

C. The Alleged Unlawful Discharges of Revell, Smith, and Roake

The General Counsel alleges that these three employees were discharged in early October 2011 because of their membership or activities on behalf of Local 813. And based on the uncontradicted testimony described below, I conclude that their discharges by Rogan Brothers violated Section 8(a)(1) and (3) of the Act. The other issues are a bit more difficult.

It is the General Counsel's contention that R&S is liable for their discharges and is responsible for offering them reinstatement and backpay because at the time of their discharges, R&S was either a single employer or alter ego of Rogan Brothers. (Revell did go to work for R&S on October 11.) R&S's alleged legal liability is also based on the theory that R&S refused to offer these people employment because of their union membership or in at least one case (Roake), because he refused to resign from Local 813.

As previously noted, on September 29, 2011, the Union sent a letter to Rogan Brothers objecting to it contracting out any work to R&S. The record indicates that as a result of this letter, Rogan ceased performing work it had been doing on R&S accounts that had previously been contracted with Rogan Brothers. This probably had some affect on the employment situation of certain employees who were at that time on the Rogan Brothers payroll. For one thing, a group of Rogan Brothers drivers were hired during the biweekly period ending October 7, 2011, including Richard Hoke, John Hofweber, and Richard Zerbo, each of whom were members of Local 813 and each of whom had been paid wages and benefits as per the Local 813 contract when they were employed by Rogan Brothers. It is reasonable to assume that they were hired by R&S because they drove the trucks servicing the accounts that had been taken over by R&S but had been performed, until the end of September, by Rogan Brothers.

Wayne Revell had been a long time driver for Rogan Brothers who continued to work for that company after the formal asset transfer that occurred on August 1, 2011. He was among the employees of Rogan Brothers who was a member of Local 813 and for whom wages and benefits were paid in accordance with the terms of the contract.

On October 4, 2011, according to Revell, he had a conversation with Michael Vetrano who told him that because things were changing, "we" can no longer employ 813 drivers. Revell testified that Vetrano stated that; "his hands were tied; that he had to lay off all 813 drivers." He further testified that Vetrano said that he felt sorry about it and that he didn't want to see Revell go. According to Revell, Vetrano said that they're going to bring in another Union and told him that he would have to fill out another application. Revell states that he asked Vetrano for some time to think about it because he had so many years in the Union and didn't want to jump ship.

Revell testified that shortly thereafter, he had a conversation with James Rogan who said that he had to lay off the rest of the 813 guys and that Revell should give him some time to try to straighten everything out. About 2 days later, Revell again spoke to Vetrano who tried to convince him to stay and told him that although being employed by R&S, he would do the same work at the same pay and at the same facility. During that conversation, Revell agreed and he filled out an employment application for R&S. He also filed out another form given to him by Vetrano stating his withdrawal of membership in Local 813.

On or about October 8, 2011, Revell resumed working at the same facility doing the same work at the same rate of pay, except on the payroll of R&S instead of Rogan Brothers. At most, Revell lost about 3 or 4 days of work while he was deciding whether he should go onto the R&S payroll.

Joseph Smith was also a fairly long term employee of Rogan Brothers who, as noted above, had been one of the discriminatees in a prior unfair labor practice case who had been discharged and then reinstated. He too was a member of Local 813 and was paid wages and benefits in accordance with the collective-bargaining agreement. During the period after August 1, 2011, Smith continued to be employed by Rogan Brothers. It is not clear to me if he worked on accounts that had been taken over by R&S. He probably did.

On October 4, 2011, Smith was told by Vetrano that there was no work for him. Smith states that he then waited in the yard for James Rogan who also told him that there was no more work for him and that he could apply for work at R&S. Smith testified that did not seek employment at R&S because of his bad previous experience with Rogan Brothers.

Michael Roake had been a member of Local 813 for years, many of which were spent as an employee of Peter Liguori. In this regard, it seems that Liguori had a two-man business consisting of himself and Roake, both of whom were covered by a separate contract with Local 813. Both of these men went to work for Rogan Brothers in July 2011 when Liguori terminated his business and effectively transferring his clients to Rogan Brothers. It is clear to me that Liguori thereafter went to work for Spiezio and that he took his customers to R&S after he went on its payroll.

Before starting to work at Rogan Brothers in July 2011, Roake signed a Local 813 authorization card given to him by Troy. It is, however, not at all clear to me if Rogan Brothers ever actually agreed that Roake should be in the contract unit and receive the contract's benefits.

In any event, on October 1, 2011, Liguori called Roake and told him that he had to resign from Local 813, because Rogan Brothers wasn't going to be in the Union anymore. Unlike employees Revell and Smith, Roake was not asked to stay on at R&S, or invited to fill out an application for R&S. Roake testified that he did not apply at R&S because he didn't want to leave Local 813.

D. Recognition by R&S of Local 726

The evidence shows that on or about September 23, 2011, Peter Liguori made a phone call to Christopher Kuehne, a business representative of Local 726. Liguori identified himself as

a driver and said that he was interested in organizing the drivers and helpers of R&S. Thereafter, Liguori solicited employees of R&S to sign authorization cards for Local 726. These were delivered to Kuehne on or about September 29. As noted above, Liguori had previously been the owner of his own business before moving first to Rogan Brothers and then R&S. At R&S, he and Vetrano were hired to run the day-to-day operations because they had experience in this industry and Spiezio did not. Therefore, from an employees' vantage point, it is reasonable to conclude that Liguori spoke and acted as an agent of R&S.

On October 3, 2011, Kuehne and counsel for R&S visited the NLRB's office in Manhattan where Local 726 filed a representation petition in Case 02–RC–065897. The unit for which an election was requested consisted of 26 employees and both parties requested that the Board run a consent election. The Region refused however, citing the outstanding unfair labor practice charges that were pending involving claims by Local 813 that the company was obligated to bargain with that labor organization.

On October 17, 2011, Spiezio on behalf of R&S and Kuehne on behalf of Local 726 executed a recognition agreement on behalf of "all full-time and part-time drivers and helpers and related employees," excluding "all other employees, confidential employees, guards, watchmen and supervisors as defined by Section 2(11) of the Act." On the same day, they presented to arbitrator Eugene Coughlin a group of 19 authorization cards. Of these cards, 17 were signed by drivers or helpers. Cards were also signed by Liguori and Vetrano. After reviewing the cards, the arbitrator certified that Local 726 represented a majority of the workers in the unit described above.

Thereafter, a 3-year contract was executed between Local 726 and R&S, effective from November 1, 2011, through October 31, 2014. The agreement contains, at article 2, a standard union-security clause requiring, as a condition or continued employment, union membership after 90 days of employment. Additionally, the contract contains a checkoff provision requiring the employer to remit union dues on behalf of employees who sign a dues-checkoff authorization.

The record shows that from November 25, 2011, through March 30, 2012, R&S has remitted a total of $4967 to Local 726. (Rounded to the nearest dollar.)

As noted above, the General Counsel contends that the recognition of Local 726 and the execution of a contract with the union is illegal for two reasons. First, because as either a single employer, alter ego, or successor to Rogan Brothers, R&S was obligated to continue to recognize and bargain with Local 813. And second, that the authorization cards solicited by Vetrano and Liguori were invalid because of their managerial positions and that therefore, Local 726 never actually represented an uncoerced majority of the employees in the unit for which recognition was granted.[25]

III. ANALYSIS

A. How Do We Define the Relationship Between Rogan Brothers and R&S

At the very outset of this hearing, the General Counsel moved to amend the caption of this case to remove the description of Rogan Brothers and R&S Waste Disposal as a single employer. The General Counsel specifically stated that it was not the intention to allege that the two companies constituted a single employer. At the time, I asked if the General Counsel was alleging, as part of its alter ego theory, that the two companies had common ownership. When the General Counsel conceded that they did not, I asked if was legally possible to find two enterprises to be alter egos in the absence of common ownership or in the absence of a finding that the second enterprise was owned by a relative or relatives of the first. The General Counsel assured me that it indeed was possible and cited *Citywide Services Corp.*, 317 NLRB 861 (1995). (That and other cases will be discussed below.) The point here is that at the opening of this hearing and after having previously obtained affidavits, records and documents from James Rogan and Joseph Spiezio, the General Counsel acknowledged that there was no common ownership between the two companies. (I cannot say with any degree of assurance that the Respondents may or may not have been fully cooperative, forthcoming or accurate in their presentation of evidence during the investigation).

After some months in trial, the General Counsel amended the allegations so that it now contends either that; (a) R&S is a single employer with Rogan Brothers; (b) that R&S is the alter ego of Rogan Brothers; or (c) that R&S is a successor to Rogan Brothers. It is the General Counsel's theory that if any of these theories fly, then R&S (a) is responsible for the discharges of Revell, Smith, and Roake that occurred in early October 2011; (b) that R&S is obligated to continue to recognize and bargain with Local 813 (and to provide requested information and avoid making unilateral changes); and (c) that R&S cannot legally recognize and enter into a contract with another Union at a time that it has a legal obligation to bargain with Local 813.

The term "single employer" is often used in cases involved multiemployer bargaining units. In that context, the Board may be required to determine if a "single employer" is part of a multiemployer bargaining unit by virtue of its assent to be part of such a unit. Often, but not exclusively, those types of cases may involve the question of whether and when the single employer can legally withdraw from multiemployer bargaining and bargain directly with a union for the employer's own set of employees. See for example *Jaflo, Inc.*, 327 NLRB 88 (1998). This is not the situation that is involved in the present case.

The term "single employer" has also been used to describe a completely different situation; where two apparently separate entities operate as an integrated enterprise in such a way that "for all purposes, there is in fact only a single employer." *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982). In these types of cases, there may also be a finding that the two nominally separate entities are also alter egos. See *Engineering Contractors, Inc.*, 357 NLRB No. 127 (2011).

In this second category of cases, the principal factors which the Board and the courts consider in determining whether the integration is sufficient for single-employer status are the extent of:

(1) Interrelation of operations
(2) Centralized control of labor relations
(3) Common management
(4) Common ownership or financial control.[26]

[25] Local 813 did not obtain any authorization cards from employees of R&S.

[26] See also *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255 (1965); *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800, 802 (1976); *Centurion Auto Transport*, 329 NLRB 394 (1999); *Denart Coal Co.*, 315 NLRB 350 (1994);

The most critical of these factors is centralized control over labor relations. Common ownership, while normally necessary, is not determinative in the absence of such a centralized policy. *Western Union Corp.*, 224 NLRB 274, 276 (1976); *Alabama Metal Products*, 280 NLRB 1090, 1095 (1986).

Situations where the Board has considered whether two companies constituted a single employer would, for example, include cases involving parent/subsidiary corporations, such as *NLRB v. International Measurement & Control*, 578 F.2d 334, 340 (7th Cir. 1992), and *EMCOR Group*, 330 NLRB 849 (2000). There are also situations involving multiple related companies with some degree of common ownership and management (*Centurion Auto Transport, Inc.*, supra.)

In *NLRB v. Lihli Fashions*, 80 F.3d 745 (2d Cir. 1996), the court concluded that two newly created corporations were single employers with two defunct corporations that had defaulted on certain liabilities. In that case, the evidence showed that the same individual (Lihli Hsu) was in ultimate control of the businesses; that the supervisory and employee complement of the old and new companies were substantially the same; and that the clothes were manufactured at the same facility using the same methods and means. The court however, disagreed with the Board's conclusion (317 NLRB 163), that the newly created companies were alter egos of the old. Basically, the court, although finding that they constituted a single employer, refused to find that they were alter egos because there was insufficient evidence of an intent to defraud. The court stated:

> Nothing in the record is inconsistent with the conclusion that Lihli, Inc. was established in a legitimate attempt to market and sell products that had previously been marketed and sold by another company.
>
> CONCLUSION
>
> In summary, we find that there is insubstantial evidence to support the NLRB's conclusion that Lihili, Inc. is the alter ego of LFC/King Ku. We find, however, that the NLRB's finding that Liyan and Lhili, Inc. constitute a single employer and we affirm on this issue. We note, however, that while Lihli, Inc. is not bound by the collective-bargaining agreement, Lihli, Inc.—as a single employer with Liyan—may nonetheless be held liable for any of Liyan's obligations under the collective-bargaining agreement.

Also in this category are "double breasting" cases where owners, often in the construction industry, may set up two separate corporations; one employing union labor for union projects and the other employing non-union labor for nonunion projects. For example, in *Engineering Contractors, Inc.*, supra, the Board held that the two commonly owned and controlled corporations, engaged as contractors in the construction industry, constituted a single employer and were also alter egos.

The term "joint employer" has on occasion, been used interchangeably with the term "single employer." However, unlike cases involving single employer issues, cases dealing the joint employer issues involve situations where there are in fact, two independent entities that do not share common ownership, but who in the context of a particular economic activity, do act together.

In *NLRB v. Browning-Ferris Industries*, above at 1124, the facts were that Browning-Ferris operated a refuse transfer station and contracted with independent truckers, referred to as "brokers," to furnish all tractors and drivers to haul BFI's trailers between the transfer station and the landfill area. Notwithstanding this arrangement, *Browning-Ferris* exercised substantial control over the drivers of these companies and the Board, with Court approval, held that they were joint employers and that *Browning-Ferris* was liable for the unfair labor practices. The court stated:

> In contrast, the "joint employer" concept does not depend upon the existence of a single integrated enterprise and therefore the above-mentioned four factor standard is inapposite. Rather, a finding that companies are "joint employers" assumes in the first instance that companies are "what they appear to be"–independent legal entities that have merely "historically chosen to handle jointly important aspects of their employer-employee relationship."[27]

An example of a case where a joint employer relationship was found is *D&S Leasing Inc.*, 299 NLRB 658 (1990), where company B supplied the personnel to company A, but the day-to-day supervision of this work force was directed and controlled by the management of company A. Another example is *Continental Winding Co.*, 305 NLRB 122, 123 (1991), where one employer hired employees supplied to another and the latter company exercised sole authority to assign, schedule, and supervise the workplace conditions, and the performance of work by the employees.

The issue of whether one company is a joint employer with another often arises when one of the two enterprises provides labor services for the other; typically in a subcontracting relationship. See, for example, *Martiki Coal Corp.*, 315 NLRB 476, 478 (1994) (miners); *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 753 fn. 113 (1993) (janitors); *Flav-O-Rich, Inc.*, 309 NLRB 262, 264–265 (1992) (laborers); *G. Wes Ltd. Co.*, 309 NLRB 225, 226 (1992) (asbestos workers); *Southern California Gas Co.*, 302 NLRB 456, 461–462 (1991) (porters).[28]

The Board's use of the term "alter ego" has also been used in various contexts and at times, has been used interchangeably with the definition of "single employer."[29] In some cases two companies have been held to be single employers and alter egos. In other cases, the companies have been held to be single employers but not alter egos. I am not aware of any case where two companies have been held to be alter egos but where a

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Blumenfeld Theatres Circuit, 240 NLRB 206, 215 (1979); *Hydrolines, Inc.*, 305 NLRB 416 (1991), and *Alexander Bistrikzky*, 323 NLRB 524 (1997).

[27] See also *Checker Cab Co. v. NLRB*, 367 F.2d 692, 698 (6th Cir. 1966).

[28] See also *Frostco Super Save Stores*, 138 NLRB 125 (1962); *Laerco Transportation & Warehouse*, 269 NLRB 324 (1984); *TLI, Inc.*, 271 NLRB 798 (1984); *O'Sullivan, Muckle, Kron Mortuary*, 246 NLRB 164 (1980); *Lee Hospital*, 300 NLRB 947 (1990). *Rawson Contractors*, 302 NLRB 782 (1991). See also *G. Wes Ltd. Co.*, supra, and *Capitol EMI Music*, 311 NLRB 997 (1993); *Flatbush Manor Care*, 313 NLRB 591 (1993); *Brookdale Hospital Medical Center*, 313 NLRB 592 (1993); and *Executive Cleaning Services*, 315 NLRB 227 (1994).

[29] The term "alter ego" has also been used to describe situations where individual stockholder have been held personally liable for the debts or obligations of a corporation in circumstances where it is in the public interest to "pierce the corporate veil." That use of the phrase "alter ego" is not relevant to this case.

finding has been made that they were not a single employer.

Alter ego findings most often occur in unfair labor practice cases and have been applied to situations in which the Board finds that what purports to be two separate employers are in fact one employer and where the contract signatory employer is either not honoring its bargaining obligations and/or there is a question of who should pay what is owed by a signatory employer or an employer who has committed unfair labor practices. Two enterprises will be found to be alter egos where they "have substantially identical management, business purpose, operation, equipment, customers and supervision as well as ownership." *Denzel S. Alkire,* 259 NLRB 1323, 1324 (1982); *Advance Electric,* 268 NLRB 1001, 1002 (1984). In each of these cases, the Board noted that it is relevant to consider whether the alleged alter ego was created for the purpose of evading bargaining responsibilities. See also *Crawford Door Sales Co.,* 226 NLRB 1144 (1976). In *Perma Coating, Inc.,* 293 NLRB 803 (1989), the Board held that no one factor is a prerequisite to finding an alter ego.

Some courts, including the Second Circuit, have concluded that an alter ego can only be established, even if all other factors are present, if it has been shown that the new entity was created for the purpose of evading the original enterprise's legal obligations. (Similar in concept to a fraudulent conveyance.) See *Lihli v NLRB*, supra, where the Court affirmed the Board on the issue of single employer but reversed on the alter ego issue. In that case, the Court held that in order to find one employer to be the alter ego of another (for purposes of derivative liability), there had to be evidence showing intent to defraud. On the other hand, some decisions have concluded that while a motive to avoid bargaining can help establish alter ego status, it is not a requirement to finding a violation or liability by the new entity because it is important to protect the interests of the employees, regardless of the employer's motive in making the corporate changes. See for, e.g., *Allcoast Transfer*, 271 NLRB 1374 (1984), enfd. 780 F.2d 576 (6th Cir. 1986); *Johnstown Corp.*, 313 NLRB 170 (1993), enfd. in part 41 F.3d 141 (3d Cir. 1994); *CEK Industrial Mechanical Contractors,* 295 NLRB 635 (1989).

In one case, the Board, as a consequence of court action, withdrew an earlier comment made in *Gartner-Harf Co.,* 308 NLRB 531 (1992), to the effect that alter ego is merely a subset of single employer. The Board noted that the two concepts are related, but separate. *Johnstown Corp.,* 322 NLRB 818 (1997). In the court case referenced by the Board, now Justice Alito concluded that the two theories were distinct.

The term "successor" is another concept that refers to yet another type of situation. This term is typically used to describe a situation where one company purchases or takes over the operation of a predecessor company that had an existing collective-bargaining relationship with a union. In these situations there is no need to establish common ownership between the two entities prior to the takeover and no need to establish that the two separate companies had any prior relationship. The issue is whether, because of the nature of the takeover, the successor company incurs a legal obligation to bargain with a union because of the nature of the takeover from the predecessor company.

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court upheld Board law that a mere change in ownership in the employing entity is not such an "unusual circumstance" as to relieve the new employer of an obligation to bargain with the union that represented its predecessor's employees. The criteria upon which it upheld the bargaining obligation were that the bargaining unit remained unchanged and a majority of the employees hired by the new employer had been represented by a recently certified bargaining agent. The Supreme Court noted that there would not be a successorship if, without unlawful discrimination, a majority of the new work force did not consist of the employees of the former employer or if the bargaining unit were no longer appropriate. The Court found that the successor employer was obligated to bargain with the incumbent union, but it had no obligation to adopt the contract, unless it had agreed to do so as a matter of contract. The Court noted that a new employer is ordinarily free to set initial terms and conditions of employment. In contrast, if it were "perfectly clear" that the employer planned to retain enough former employees to constitute a majority of the new work force, a successor would have an obligation to consult with the union as to the initial terms and conditions of employment.

In *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27 (1987), the Court held that a successorship determination depends upon the totality of the circumstances. It focused on whether the new company has substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations. The factors relevant to the continuity between the old and new entities are: (1) whether there is continuity of the work force, as shown by a majority of predecessor employees being in the new work force; (2) whether there is continuity in the employing industry; (3) whether the bargaining unit remains intact and appropriate; and (4) the impact of a hiatus in operations. It also approved the extension of the successorship doctrine beyond unions that had recently been certified to unions that enjoy a rebuttable presumption of majority status beyond the certification year. Until the new employer's bargaining obligation attaches, the new employer may set initial terms of employment. After that, it has a duty to bargain with the union.

In *Fall River Dyeing*, the Supreme Court concluded that because a union's demand for recognition from the new employer is continuing, the successor has an obligation to recognize the union if a majority is ultimately hired in a substantial and representative complement of the appropriate unit. It approved the Board's test for finding a substantial and representative complement based on: (1) whether the job classifications designated for the operation are occupied or substantially occupied; (2) whether the operation is in normal or substantially normal production; (3) the size of the complement on the date of normal production; (4) the time expected to elapse before a substantially larger complement would be at work; and (5) the relative certainty of the employer's expected expansion.

In the present case, even if I were to conclude that R&S was not an alter ego of Rogan Brothers and that it was neither a single or joint employer at a relevant period of time, there would still be certain legal consequences and obligations owed to Local 813 by R&S if it is concluded that R&S is a successor to Rogan Brothers as that term is defined in *Burns* and *Fall River Dyeing.*

We should now return to the question of whether it is necessary for the General Counsel to prove common ownership, or at least common family ownership, when asserting that two companies are alter egos or single employers. As noted above, common ownership is not relevant in joint employer cases and

is totally irrelevant in successorship cases.

For example, when a father, in an effort to evade legal and bargaining obligations of his defunct company, transferred the asserts to his son's newly formed company, the two entities were construed as having common ownership and being alter egos and a single employer. *Cofab, Inc.*, 322 NLRB 162, 163 (1996). In that case, the Board stated:

> It is well established that where members of the same family are the owners of two nominally distinct entities, which are otherwise substantially the same, ownership and control of both of the entities is considered substantially identical.

Similarly, in *Genessee Family Restaurant,* 322 NLRB 219 (1996), the Board found that the employer, facing an organizing drive, closed its restaurant and opened under a new name and corporate structure. In finding that the two corporations were alter egos, it was concluded that the transaction was a sham designed to avoid dealing with the union. It was determined that the two entities had common management and common supervision. Insofar as common ownership, the judge noted that although the second restaurant was owned by different persons, they were family members of the owner of the first restaurant, which under Board law is equivalent to common ownership.

In the opening statements, the General Counsel, citing *Citywide Services Corp.*, 317 NLRB 861 (1999), assured me that the Board can conclude that two companies can be alter egos, even in the absence of common ownership. In that case, the prior company was called Citywide and the successor company was called Hudson. Citywide was owned and operated by a person named Richmond and the evidence showed that in order to avoid paying money owed to Local 32B/J, Richmond ostensibly went out of business, and through his wife, funded the start of Hudson, a company ostensibly owned by the a man named Giacoia, who was the former vice president of Citywide. There was evidence that Richmond continued to be involved in Hudson's affairs after claiming that he had left the business. The judge stated:

> It must be reemphasized that Hudson was formed 5 months before Citywide closed, and began operating 2 months before Citywide closed. Hudson was formed with capital from the Richman family, the sole investor. That transaction was not an arm's-length business arrangement which could be expected from two separate entities. The loan of $60,000 was not evidenced by a writing, and it was repaid in cash in small amounts delivered to Richman.
>
> It may be said that management remained substantially identical. Richman took an active role in the formation of Hudson, participating in ensuring that a friendly union was obtained, and in directing the removal of equipment and supplies from Citywide to Hudson, and in selecting the 'best'' workers for Hudson. Giacoia sought advice from Richman concerning whether Rivas should continue in Hudson's employ.
>
> The business purpose and operation of the two companies was identical: they were both involved in the commercial cleaning of offices. Hudson used much of the same equipment and supplies which it initially obtained from Citywide. Hudson's customers were obtained from Citywide in the startup phase, and were solicited by Citywide's sales representatives, who became employed by Hudson. The supervisors, too, transferred from Citywide to Hudson. They supervised employees who also transferred from Citywide and who performed the same work, with the same equipment, for the same customers, when employed at Hudson.
>
> Citywide paid Hudson's first payroll, making such wage payments to employees who were transferred from Citywide to another company and then to Hudson's payroll. Citywide also paid for the purchase of a fax machine, air conditioners, and the installation of a computer program.
>
> Large amounts of supplies and equipment were moved from Citywide to Hudson without compensation. Supplies left on jobsites by Citywide were, despite industry practice, not retrieved by that company, but were taken by Hudson, also without compensation. Citywide's accounts were permitted to be solicited by its employees for Hudson, while still on Citywide's payroll, and no compensation was made for those accounts, although Citywide had received payment for other accounts assigned to other cleaning companies.
>
> It also appears that Hudson was formed so that Citywide could avoid its obligation to Local 32B. Citywide owed enormous sums of money to the Local 32B funds and simply stopped making payments to those funds. It is clear that Richman devised a plan to continue operation through Hudson with a new, more acceptable union, and make it appear that Citywide was closing its operations. This is supported by the testimony of Rivas that, beginning in early April 1991, Giacoia told him to replace the Local 32B members who were working on Citywide's jobs with nonunion workers. The Local 32B employees were either laid off or had their hours reduced. He stated that at the time he left Citywide in October, 90 percent of the jobs were being serviced by nonunion workers.
>
> I accordingly find and conclude that Hudson was merely a disguised continuance of Citywide, and that the closing of Citywide and the opening and operation of Hudson was motivated by a desire to avoid dealing with Local 32B and in an effort by Citywide to avoid its obligations to Local 32B. I therefore find that Hudson is an alter ego of Citywide. [Citations omitted.]

Fugazy Continental Corp., 265 NLRB 1301 (1982), is another case where the Board found that two companies were alter egos notwithstanding the lack of formal common ownership. The facts of that case are too long to describe here but it is clear from the Board's comprehensive decision that the evidence there, similar to the evidence in *Citywide*, revealed that the second company was, in effect, a sham enterprise, set up by the original owner for the purpose of evading legal obligations to the union. Indeed, as the owner of the second company was only there as a figurehead to disguise the continued equitable interest of the original owner, it should be concluded that there was, in fact, common ownership; being that there was, in reality, only one owner.

In a case called *Goldin-Feldsman, Inc.*, 295 NLRB 359 (1989), there was an issue regarding whether two companies, alleged to be alter egos, had common ownership. In this case, a Board majority (Johansen dissenting) found that there was in fact common ownership where the owner of a defunct company

exercised financial control over the new company. The majority stated (id. at fn. 3):

> In particular we note that Fred Goldin exercised fairly extensive financial control over the future of Goldin-Karabelas. Thus, had it not been for Fred Goldin's assistance in obtaining loans for Goldin-Karabelas and his willingness to accept late payments on the outstanding loan that Goldin-Karabelas ostensibly owed to Goldin-Feldsman during the period in question, it appears that the Company would have had severe difficulties continuing in business. In this case, we note that Fred Goldin continued to exercise considerable financial control over Goldin-Karabelas and that, in fact, it's very livelihood was dependent on Fred Goldin's ability and willingness to negotiate with the bank and provide financial guarantees that allowed the bank to extend Goldin-Karabelas' line of credit. Under these circumstances, we believe the finding of common ownership is warranted.

In *Hawk of Connecticut, Inc.*, 319 NLRB 1213 (1995), the Board found that an alter ego existed where the owner, Nicholas Cappiello, established an ostensibly new company owned by a relative, Nancy Cappiello, but where Nicholas remained as a secret partner or owner of the second. In that case, the administrative law judge, with Board affirmance, concluded that the new company was set up in order to avoid its collective-bargaining obligations and that it was the alter ego of the original company.

Il Progresso Italo Americano Publishing Co., 299 NLRB 270 (1990), involved a convoluted web of corporate relationships in which the evidence showed that in order to avoid executing a fully agreed upon collective- bargaining agreement, the employing entity closed its existing operations, reopened the same business elsewhere and refused to hire the former employees for discriminatory reasons. And when it came down to the question of whether company B was de facto owned by company A, the Board noted that although the evidence did not establish that a company called SPA owned AMM, the facts showed that SPA "maintained substantial control over AMM." In determining that the companies were alter egos, the Board noted:

> [W]e note first that DeLuca was put in overall charge of AMM by the chairman of SPA, Lupoi, and by Dell'olio, Lupo's legal associate and counsel to SPA. Second, DeLuca testified that SPA was the sole source of AMM's income. Third, Lupoi transferred the composing work previously performed by AMM to USA and concomitantly transferred AMM's composing room supervisor and several employees to USA. Fourth, AMM existed in essence to provide editorial services for SPA. The appointment by SPA's chairman of DeLuca as head of AMM, AMM's total financial dependence on SPA, and SPA's unilateral transfer to its wholly owned subsidiary of a portion of AMM's operation clearly establish that AMM "virtually exists at the sufferance" of SPA. [Footnote omitted.]

In *McAllister Bros., Inc.*, 278 NLRB 601 (1986), the Board adopted the ALJ's findings that a company called Outreach Marine Corporation was an alter ego of *McAllister Bros., Inc.* despite the fact that there were no common shareholders. In that case, the evidence established that the owner of *McAllister* essentially set up Outreach in an effort to evade its collective-bargaining obligations to the Seafarers International Union in the port of Baltimore. Thus, the shareholders of Outreach invested none of their money in a company in which all of the capital was provided by McAllister and its bank. Outreached obtained all of its work from McAllister, at rates fixed by McAllister and was precluded by McAllister from doing any other work without McAllister's approval. McAllister required Outreach to conform to its detailed standards of operations and McAllister could unilaterally take action to put Outreach out of business by forcing it to resell its boats to McAllister. In short, the ALJ concluded that the shareholders of Outreach had no real control over the business that they ostensibly owned and that McAllister, to further its own business purpose of operating in Baltimore without a union, "effectively controls the operations of Outreach."

In *E.L.C. Electric, Inc.*, 359 NLRB No. 20 (2012), the Board adopted the ALJ's findings that *E.L.C.* and a company called MERC were a single employer and that MERC was an alter ego of E.L.C. In concluding that there was an alter ego relationship, the ALJ noted that Calvert, the owner of E.L.C., was not a direct owner of MEMC which was owned by his personal friend, Passman. However, he concluded that Calvert provided substantial assistance to Passman to the degree that MEMC would not be able to survive as a business without such assistance. For example, Calvert allowed Passman to use ELC's trucks without charge; many of their agreements were never reduced to writing; Passman never paid Calvert the interest on loans totaling $157,500; and that despite being his tenant, Calvert did not seek to collect rent from Passman. The ALJ concluded that the "only logical explanation for Calvert's generosity toward Passman and MERC must be that it was part and parcel of his strategy to avoid financial liability for the ULP's that he committed as ELC's owner." In effect, this decision is consistent with other case law holding that an alter ego relationship can be established if the new entity is merely a disguised continuance and has been established with an intention to defraud.[30]

Based on the record as a whole and given my understanding of the legal precedent cited above, I make the following findings;

1. In my opinion, Spiezio and his company R&S, is not an alter ego of Rogan Brothers. For many years, both he and James Rogan have operated within separate corporate entities and have engaged in separate business activities. Rogan was involved in the waste disposal business and Spiezio was involved in the real estate business. When James Rogan could no longer pay the bills owed by his company (Rogan Brothers), he obtained a sizeable loan to keep his business afloat, at least for a while. In consideration, Spiezio, via his enterprises, made a loan to Rogan on terms that called for an above market interest rate with the condition that if Rogan Brothers failed, Spiezio would take over much or all of its assets, including customer lists and set up a company to engage in this business. In a way, Spiezio might be described as a "vulture capitalist," who ac-

[30] See also *All Kind Quilting, Inc.*, 266 NLRB 1186 fn. 4, 1194 (1983), where the Board found an alter ego relationship even though there was no evidence of actual common ownership. In that case, the evidence showed highly interrelated business operations between two nominally separate corporations. The ALJ concluded that the evidence also showed that the first company "retained all of the rights, title and interest in the quilting business, that it alone has assumed the risks and derived the benefits from the quilting business" and that "North Side is "merely the disguised continuance of the old employer."

quires failing enterprises by making high interest loans which, if not repaid, result in his acquisition of the borrower's business. And in this regard, I want to assure the reader that my use of the term "vulture capitalist" is not meant pejoratively. In nature, vultures, and their scavenging allies amongst the insects, bacteria and fungi, perform the necessary task of cleaning up and recycling the mess left by the dead and dying. Without them, the planet would be uninhabitable.

In my opinion, the evidence does not show that R&S and Rogan Brothers shared common ownership. Notwithstanding the assertion in R&S's license application that James Rogan and Joseph Spiezio were co-owners, I believe that this assertion was inserted in order to facilitate the acquisition of the license and did not represent the actual ownership of R&S. Indeed, when he testified before the person who was authorized to issue the license, Spiezio made it clear that he would be the sole owner.

Nor do I conclude that R&S was set up as a sham enterprise or as a disguised continuance of Rogan Brothers in order to allow James Rogan to continue to profit while his creditors were left holding the bag. If anything, the facts go in the opposite direction. Spiezio was not a tool used by James Rogan to continue to operate his business while evading his creditors. On the contrary, it is my opinion that Spiezio took advantage Rogan's distress so that in the event of a defaulted loan, he could pick over the bones of the business and take the choice pieces for himself.

2. In my opinion, Rogan Brothers and R&S operated as joint employers or as a single employer from around February to October 4, 2011. Thus, although Joseph Spiezio was never a equity owner of Rogan Brothers and his company (R&S), did not share common ownership, the evidence shows that after making the loan, Spiezio, by virtue of the secured collateral agreement, had a substantial potential interest in that company's real and intangible assets.[31] Spiezio became increasingly involved in the business affairs of Rogan Brothers as the de facto manager of the company. He arranged for Rogan Brothers to get rid of its current attorneys and accountants and arranged for new people to do this work. Spiezio arranged for Rogan Brothers to open new bank accounts where Spiezio could withdraw money and write checks. He started to deal with Rogan Brothers' creditors and most significantly, he took control over its labor relations; relegating to himself the role of negotiating with the various labor unions that had contracts with Rogan Brothers. Additionally, anticipating that Rogan Brothers might fail despite the loan, Spiezio set up a new company, R&S, that would be licensed and capable of taking over much or all of Rogan Brothers' waste disposal business.

In my opinion, until at least August 1, 2011, R&S and Rogan Brothers, if not exactly fitting the legal definition of a single employer, acted in a manner that made Joseph Spiezio the person who was in complete control of the financial and business operations of Rogan Brothers. As such, I would conclude that he and his company became a joint employer with James Rogan and Rogan Brothers Sanitation Inc. Under perhaps a somewhat expansionary definition of "single employer," I would also conclude that for a period of time, Rogan Brothers and R&S constituted a single employer.

As Rogan Brothers continued to perform, with employees on its own payroll, carting services for customers who had been taken over by R&S after August 1, 2011 (when R&S took legal title to some but not all of Rogan Brother's assets), there was a continuing relationship between these two companies which ostensibly separated from each other on or about that date. To the extent that the record can demonstrate a date when there was a complete separation, this would seem to be on or about October 4, 2011, after Rogan Brothers received the letter from Local 813 objecting to its contracting work to R&S. It seems that this lead to the discharge by R&S of those drivers performing that work and the hiring of at least some of those drivers by R&S during the first weeks of October.

3. I would also conclude that R&S, did not become a successor to Rogan Brothers at any time after it commenced operations as a separate enterprise in early August 2011.

As of the biweekly period ending August 13, 2011, R&S employed 16 individuals plus one dispatcher who indisputably worked as drivers or helpers. (For a total of 17.) Of this group, 16 had previously worked at Rogan Brothers as drivers or helpers as did the dispatcher, Christopher Dolce. While this would normally be sufficient to evidence sucessorship under *Fall River Dyeing,* the problem in this case is that except for Dolce, none of these drivers or helpers were, when employed by Rogan Brothers, members of Local 813 and none, except for Dolce were paid the wages or benefits contained in the Local 813 contract with Rogan Brothers.

During the biweekly period ending October 7, 2011, and probably because Local 813 demanded that Rogan Brothers cease doing business with R&S, the latter hired three of the drivers of Rogan Brothers who had been let go by that company. These were Richard Hoke, John Hofweber, and Richard Zerbo. These three had been drivers for Rogan Brothers, were members of Local 813 and had been paid contract wages and benefits. So by this time, there were approximately 19 drivers and helpers plus one dispatcher of whom only four had previously been members of Local 813 or who received wages and benefits under its collective-bargaining agreement.

During the biweekly period ending October 21, 2011, seven new people were hired, including six drivers and helpers. Of these, three had not worked at Rogan Brothers and three had (Freddy Maldonado, Juan Martinez, and Wayne Revell.) And of this group only Revell had been a member of Local 813. (As noted above, Revell had been a former employee of Liguori before being employed by Rogan Brothers.)

The Supreme Court's rationale in *NLRB v. Burns Security Services,* 406 U.S. 272 (1972), for finding that a successor incurs an obligation to recognize and bargain with a predecessor's labor representative, is that despite the transfer, there should be a continuity of representation if there is continuity of the enterprise and a majority of the successor's work force, in an appropriate unit, consists of the represented employees of the predecessor.

In the present case, it seems that a majority of R&S work force who were hired as drivers and helpers, had previously been employed by Rogan Brothers before August 1, 2011. But

[31] In American law, we make a distinction between ownership (equity) and debt. When one person or entity lends money to another and obtains collateral for the loan, we do not think of the lender as being a co-owner of the real, personal or intangible property of the borrower. Thus, the borrower retains present ownership even if the lender, at an indeterminate future date, may take possession of the borrower's property. To my understanding, this is somewhat different from what may take place in Islamic law where interest is not allowed and the lender may take an ownership interest in the property for which the loan is being made. See Islamic Banking article in Wikipedia.

the majority of those people had not in fact, been represented by Local 813. Most of the drivers and helpers hired by R&S between the biweekly period ending August 7 and the biweekly period ending October 21, even those who had worked for Rogan, had never been members of Local 813 or had been paid wages and benefits in accordance with the Local 813 contract. It therefore is my opinion, that there was no continuity of representation when these R&S employees, even those who had previously been employed by Rogan, went from Rogan to R&S. I therefore do not conclude that R&S is a successor within the meaning of *Burns* or *Fall River Dyeing.*

The upshot is that if R&S is not an alter ego of Rogan Brothers, then it was not bound to recognize or bargain with Local 813 and was not bound to honor the collective-bargaining agreement between Local 813 that was due to expire on November 30, 2011.

By the same token, if R&S is not a *Burns* successor, it is not obligated to either honor the Rogan/Local 813 contract or obligated to recognize and bargain with Local 813.

On the other hand, if R&S and Rogan Brothers were at least for a time, a single or joint employer, then R&S would ordinarily be liable for contract obligations and other obligations incurred and owing by Rogan Brothers until such time that R&S terminated its relationship with Rogan Brothers.[32] That probably occurred either on or about August 1, 2011, or no later than October 4, 2011.

B. How do we Define the Relationship Between Local 813 and Rogan Brothers?

I have already described in great detail, the multiple contracts and previous Board decisions in which the bargaining unit has been described in a variety of inconsistent ways. To summarize; the unit description in the 2011 agreement is different from the complaint's description of an appropriate unit and is also different from the unit descriptions in the prior Board decisions. The complaint's unit description includes helpers, mechanics and welders, whereas the 2011 agreement includes only chauffeurs. Whereas the 2011 agreement limits the bargaining unit to chauffeurs located in Yonkers, the original contract covers employees who are employed by Rogan Brothers without geographical limitation. Whereas the complaint describes the bargaining unit as limited to employees performing work only within Southern Westchester County, there is no such limitation in any of the contracts or in any of the prior Board decisions. Finally, whereas the original contract's unit description limits the unit to employees who are eligible for union membership, no such limitation is contained in the complaint's description of the bargaining unit.

I have also concluded that as of January 2011, and probably for many years before, and continuing through August 1, 2011, the Local 813 collective-bargaining agreement with Rogan Brothers was applied to, at most eight truckdrivers who were employed at the Yonkers location and who were members of that union. A large majority of the other nonoffice employees, including helpers, mechanics and welders working at this location for Rogan Brothers were either not represented by any union or were represented by two other unions; Local 456 IBT or possibly Local 282, IBT.

In my opinion, Local 813 cannot argue that it was not aware of this situation and was therefore duped by the employer. While it never officially appointed a shop steward, as was its right under contract, Troy in 2008, persuaded an out of work member, Charles Morel, to apply for a job at Rogan Brothers who when hired, agreed to be Troy's eyes and ears at the shop. The evidence shows that Troy visited the facility from time to time without impediment and spoke to employees when he saw them outside the facility. Additionally, in 2010, Local 813's trust funds sent an auditor to inspect the company's records to ascertain whether Rogan Brothers was making the proper fund contributions. Although Troy testified that Rogan Brothers did not notify the union when it hired new employees and that employees were afraid of joining, it cannot be said that Local 813 was in no position to determine who and when people were employed by Rogan Brothers. And since the collective-bargaining agreement contained an arbitration clause, it cannot be said that Local 813 lacked the legal means to enforce the contract and compel new employees to become union members pursuant to the contract's union-security provisions.

Further, although Local 813 has taken actions to enforce its contracts with Rogan Brothers, it seems to me that it has done so only with respect to those of Rogan's employees who happened to join the union. Thus, to the extent that Local 813's benefit funds took legal action to collect contractually required payments, they did so only on behalf of the small number of employees who had joined Local 813. For example, on November 18, 2009, the trust fund office made a demand for contributions on behalf of Michael Lamorte and Michael Gianfransico, stating: "It appears that the charges for these two employees are valid as their checkoff cards were located in our files and they reflect the applicable starting date of employment for the both of them."

Counsel for R&S and Local 726, contend that over the history of bargaining between Local 813 and Rogan Brothers, the unit has been inappropriate and that the contracts have been de facto members only contracts. As such, it is argued that under Board cases such as *Manufacturing Woodworkers Assn.*, 194 NLRB 1122, 1123 (1972), and *Arthur Sarnow Candy Co.*, 306 NLRB 213 (1992), an 8(a)(5) refusal to bargain allegation cannot stand. For example, in *Don Mendenhall, Inc.*, 194 NLRB 1109 (1972), the evidence established that when the contract was reached, the union's representatives explicitly disclaimed any desire to represent the nonunion people then working for Mendenhall but asked that two of those working "be put" in the union and that the company hire two members of the union. The evidence showed that after the contract was executed, the company paid health and welfare benefits only for those employees who were union members. Moreover, the record did not show that the union attempted to enforce the union-security clause with respect to the nonunion employees or that it afforded them any representation as the collective-bargaining agent. Thus, in *Mendenhall*, although the contract unit description did not state that it was a members only contract, the parol evidence adduced regarding its execution, clearly established that the intent of the parties was to apply the contract only to union members.

Unfortunately, these kinds of cases are not that easy to decide because most agreements do not come with a label that

[32] Since my obligation is only to determine liabilities under the National Labor Relations Act for unfair labor practices, I have no authority to comment on, or make conclusions as to the extent to which R&S might be liable for taxes owed by Rogan Brothers or for other moneys owed by Rogan Brothers to its other creditors for non-ulp liabilities that might have accrued during the time that R&S and Rogan Brothers were joint or single employers.

says this is a "members only contract." And unlike *Mendenhall*, supra, parol evidence (even assuming that it is received into evidence), regarding the intention of the parties is not often clear and unambiguous. Fortunately, there are only a few cases dealing with this rare phenomenon. Both sides seem to have found them all and they all have different fact patterns.

It is well established that where a union has either been certified or lawfully recognized, there is a presumption of continuing majority status which cannot be rebutted during the term of a collective-bargaining agreement. *Pioneer Inn,* 228 NLRB 1263 (1977), *Colson Equipment*, 257 NLRB 78 (1981). There are, however, exceptions.

In *Manufacturing Woodworkers Assn.*, above at 1123–1124, the Board held that a members only contract could not be enforced through Section 8(a)(5) of the Act. It stated:

> Although the Painters' contracts have, since at least 1962, contained specific provisions calling for exclusive recognition and coverage, the record discloses that these contracts have never been so applied. Rather, based on the apparent understanding of the parties and their actions, it seems 'clear that Painters has been treated as the bargaining representative only of its own members in a variable group of association shops employing such members. In the past the Board has held that a history of collective bargaining on a "members only" basis does not provide an adequate basis for representation nor the appropriateness of a bargaining unit such as the statute contemplates. The Board has traditionally refused to give weight to such a bargaining history, or to require its continuance, and we will not do so here.

In *McDonald's Drive-In Restaurant,* 204 NLRB 299 (1973), the administrative law judge's conclusion that there was no bona fide collective-bargaining relationship at all, much less a members only contract, was adopted by the Board. The ALJ stated (id. at 309):

> [I]t is undisputed that the Union neither administered the contract nor serviced the employees. As a result, not only were the employees deprived of contractual benefits pertaining to such matters as wage rates, health and welfare fund contributions, but they were subjected to working conditions unilaterally imposed by the Respondent without any protest from the Union. Moreover . it was not until the closing days of the contract that the Union undertook to submit several employees grievances to the company. In addition to the Union's indifference to employee interests, it did not serve its own much better. Although the contract contained union-security provisions, it did not bother to enforce them. Apparently, the Union was content with the few employees the Respondent periodically signed up for the Union and with the initiation fees and dues the Respondent deducted from the wages of these employees. It was only near the end of the contract term that the Union took more affirmative steps to enlist the Respondent's assistance to force the employees to join.

In *Makins Hats, LTD,* 332 NLRB 19 (2000), the Board concluded that the Respondent did not violate Section 8(a)(5) when it withdrew from a multiemployer bargaining association and withdrew its recognition of the union. The Board stated:

> We disagree with the judge's conclusion that the Respondent manifested an intent to be bound by group bargaining after its individual 1980 agreement expired, but in doing so we rely on his finding that the Respondent had never followed the Association agreements except on a "members-only" basis. We find it unnecessary to decide whether, in the absence of that evidence, the Respondent's conduct should be deemed to manifest such an intent.
>
> Having determined that the evidence fails to show that the Respondent was part of the multiemployer Association for bargaining purposes, we must then decide whether the Respondent, as an individual employer, nonetheless violated Section 8(a)(5) by withdrawing recognition from the Union and repudiating the Union-Association agreement. We find that it did not. It is clear from the evidence summarized in the fact statement above, that the Respondent at all relevant times applied the contract terms on a members-only basis and that the Union must reasonably have been aware of this fact. The Board will not issue a bargaining order under those circumstances. See *Arthur Sarnow Candy Co.*, 306 NLRB 213 (1992); *Goski Trucking Corp.*, 325 NLRB 1032 (1998).

In support of its position, the General Counsel cites *Brower's Moving & Storage,* 297 NLRB 207 (1989). In that case, the Board overruled the administrative law judge, who relying on *Ace-Doran Hauling & Rigging Co.*, 171 NLRB 645 (1968), and *McDonald's Drive-In Restaurant,* supra, dismissed the 8(a)(5) allegations. In that case a union was recognized in 1951 in a unit which, on its face, was appropriate. Although there were successive contracts, the most recent being from April 1, 1986, to March 31, 1989, there were never any negotiations and the company agreed to be bound to association contracts despite the fact that it was not a member. Over the years, the company failed to honor the wage, holiday, vacation, union-security and other provisions of the successive contracts, albeit there was evidence that the Union, at various times, sought to enforce contractual provisions. No affirmative defense was made that the union was aware of these lapses. After 1954, no union representative visited the shop, no grievances were filed and no shop steward was appointed. The facts also showed that fund contributions were made for the company's family members. The Board stated (id. at 208):

> As the judge noted, it is well-established in Board law that an incumbent union generally enjoys a presumption of continued majority status during the term of a collective-bargaining agreement. In *Ace-Doran Hauling & Rigging Co.*, supra, the Board found a narrow exception to that general rule when two factors undermined the validity of the contract and the presumption of majority status. First, the Board found that the unit was not defined with sufficient clarity "to warrant a finding that the contracts are ones to which a presumption of majority status can attach." Second, the Board found that both parties' practice under the agreements showed that the parties did not intend them to be effective collective-bargaining agreements, but merely arrangements to check off dues and to procure benefits for union members only. Similarly, in *Bender Ship Repair Co.*, supra, the Board found a "patent ambiguity" in the contractual unit definition and that the union acquiesced in the application of the contract to only a few favored employees. In *McDonald's Drive-In Restaurant*, supra, the Board adopted the judge's find that the unit purported to be covered by the contract was ambigu-

ous and that the union never bothered to enforce its contract.

The aforementioned cases are distinguishable because the collective-bargaining agreement in this case suffers from no such infirmities. It clearly specifies the unit, and the judge specifically found it was not a "members only" contract. In addition, the Union had clearly taken affirmative steps to enforce its contract over the years

While no steward was appointed and no grievance filed, the Respondent admitted it never told its unit employees they were represented by the Union or that there was an applicable contract. Therefore, the employees were denied the knowledge necessary to seek assistance from the Union. And, as discussed earlier, the Union was also denied knowledge concerning the unit employees when it asked for it.

Thus, we find that there is no evidence that the Union ever acquiesced in a repudiation of substantial portions of the contract or that the Union and the Respondent ever had an arrangement or understanding that would negate an intent to enter into a valid collective-bargaining relationship.

There are several things to be said about *Brower's*. The first thing that comes to mind is that the Board specifically adopted the judge's conclusion that the contract was not one that was applied only to union members; albeit it was in a constant state of breach. In Brower's and unlike the present case, the company essentially hid from its employees the fact that it had a contract with the union and the employees seemed to have been unaware of its existence. And this seems to have been made possible because the union ceased visiting the shop. This is not true in the present case and there is plenty of evidence that the nonunion employees of Rogan Brothers were fully aware that there was a contractual relationship with Local 813. And although the union did not appoint a shop steward, it did have an individual employed at the facility (Morrell) who apart from driving a truck, was appointed by Troy to keep the union apprised of what was going on at the shop. Further, the evidence shows that Troy often visited the shop and talked to the employees in and around the premises. In light of all the circumstances, it seems to me that although Local 813 and Rogan Brothers intended to enter into a valid collective-bargaining agreement, the evidence also shows that over many years, the Union acquiesced in the fact that the contract was applied only to those employees who happened to join Local 813.

A collective-bargaining agreement can also be defective even apart from whether it is a members-only contract. For example in *Bender Ship Repair Co.*, 188 NLRB 615 (1971), the Board overruled the judge's that the employer illegally refused to bargain. The Board stated, inter alia:

Even if, as the Trial Examiner found, this contract was not on its face, or in practice, a contract covering only union members, or only union members in ship repair, we find that it was otherwise defective in creating or perpetuating a true collective-bargaining relationship. We reach this conclusion because the unit defined is ambiguous in scope-purporting to cover a production and maintenance unit while continuing a wage scale limited to boilermaker employees- and because it was applied, as in the case of earlier contracts in evidence, to ignore contract benefits except for a few favored employees. It is not possible on this record to find that it was ever applied to a craft-type unit of boilermakers as a whole, which in March 1967 would have numbered about 125 or to a production and maintenance type unit . , which would then have numbered about 296. Nor is it possible to conclude that, during the latter part of its term, when the Union became vital, the contract was applied on any discernible unit basis. Thus we view the 1967 agreement as failing to define a unit with sufficient clarity to warrant a finding that a presumption of majority should attach to it. In addition it is evident from the practice under this and earlier contracts that the parties had no intention of entering into a real collective-bargaining relationship. Instead, for many years, the Union was willing to exact little in the way of contract enforcement and the Respondents were satisfied to reap the financial benefit of lower costs. [Footnotes omitted.]

I have already discussed the history of the contractual relationship between Local 813 and Rogan Brothers and this shows the changing definitions of the purported bargaining unit. The initial unit description was to include "all chauffeurs, helpers, mechanics and welders but excluding all employees not eligible for membership in the Union." Notwithstanding this definition, the evidence shows that at no time did Local 813 ever represent helpers, mechanics or welders. Thereafter, in a memorandum of agreement dated January 18, 2011, the unit was defined as; "Those employees performing bargaining unit work who are domiciled in Yonkers, which shall cover no fewer than ten chauffeurs, who shall have their own separate seniority list." Among other things Troy testified that this unit description was meant to exclude a group of Rogan Brothers employees who worked in Bedford, New York. Also by describing a separate seniority list for the drivers represented by Local 813, the intent seems to be to exclude those other drivers working for Rogan Brothers at the same Yonkers location who were represented by two other Teamster locals or who were not represented by any union.

In my opinion, the Respondents are correct in their contention that the relationship between Local 813 and Rogan Brothers was tantamount to a contractual relationship for a members' only unit, or at the very least, for an inappropriate unit. Based on this conclusion, the contract between Rogan Brothers and Local 813 is not enforceable by way of Section 8(a)(5) of the Act, although it may be enforceable in a separate court proceeding as to those employees who were members of Local 813 for whom benefit fund contributions were not made during the life of the contracts, subject to whatever statute of limitations would be applicable in a State or Federal court.

As I have concluded that the collective-bargaining agreement between Rogan Brothers and Local 813 cannot be enforced by way of Section 8(a)(5) of the Act, it therefore follows that R&S cannot be liable under Section 8(a)(5) for any refusal to bargain allegations, even if was an alter ego of, single employer or joint employer with, or successor to Rogan Brothers.

C. The October 2011 Discharges and the Alleged 8(A)(1) Statements

I have already concluded that the discharges of Revell, Smith, and Roake by Rogan Brothers in early October 2011, was unlawful because the selection of these employees for discharge was, in my opinion, motivated by their membership in

Local 813. Thus, on October 4, 2011, Michael Vetrano told Wayne Revell that "we" can no longer employ Local 813 drivers; that he had to lay off all drivers who were represented by that Union; and that "they were going to bring in another Union." Ravell further testified that he thereafter spoke to James Rogan who confirmed that he had to "lay off the rest of the 813 guys." All of this testimony was uncontradicted.

The next question is whether R&S can be held liable for these unlawful discharges.

It is the General Counsel's contention that R&S is liable either because (a) it was at the time, a single employer or alter ego of Rogan Brothers or (b) R&S refused to hire these employees because they were members of Local 813.

As to the contention that R&S violated Section 8(a)(3) of the Act by refusing to hire these individuals, it is my opinion that this theory cannot prevail as to Smith and Revell.

In the case of Joseph Smith, he was told by Vetrano that he could apply for a job at R&S and he chose not do so. In the case of Wayne Revell, he too was asked by Vetrano to work at R&S. After a few days, Revell decided to take the job at the same rate of pay that he had received while employed at Rogan Brothers. Revell further testified that when he filled out his employment application at R&S, he was also given a form to sign whereby he announced his resignation from Local 813.

In the case of Michael Roake, he too was asked to work for R&S. But the evidenced shows that when he spoke to Ligouri about this, Roake understood that in order to obtain the job, he would have to resign from Local 813. As a consequence, Roake decided not to work for R&S. As it is my conclusion that because the employer made an unlawful condition for being hired, this is tantamount to an illegal refusal to hire and is therefore violative of Section 8(a)(1) and (3) of the Act.

That leaves for consideration the question of whether R&S can be held liable for the discharges of these three men because it was, at the time of their discharges by Rogan Brothers, a single or joint employer with Rogan Brothers. (I have already concluded that although R&S was not an alter ego of Rogan Brothers, it was for a period of time, a single or joint employer with that company.)

There is no doubt in my mind that from around February 2011, R&S, because of Spiezio's active involvement in the business affairs of Rogan Brothers, was a joint employer and/or single employer with Rogan Brothers. But that conclusion does not mean that R&S continued to be in that relationship ad infinitum.

On August 1, 2011, as a consequence of the loan default, substantial assets were formally transferred from Rogan Brothers to R&S via Speizio's other company that made the loan; Pinnacle Equity Group. This included not only the transfer of trucks and containers, but also the acquisition by R&S of customer accounts formerly held by Rogan Brothers. The record also shows that during the first week of August 2011, there were a substantial number of Rogan Brothers' employees who were hired by R&S including Peter Liguori, Michael Vetrano, and Christopher Dolce who had been a dispatcher at Rogan Brothers.

Notwithstanding the formal transfer of assets on August 1, and the concomitant transfer of many employees, the relationship between R&S and Rogan Brothers continued after that date. This is because persons who remained employees of Rogan Brothers continued to drive routes for previous Rogan Brothers' customers who were now customers of R&S. In this regard, R&S paid Rogan Brothers for providing this service instead of having its own direct employees do this work. Because the relationship continued between these two companies, it is my opinion that during this period of time, they had not yet sufficiently disentangled themselves from each other to make them into separate entities.

In my opinion, the trigger for a complete separation came about as a result of the Union's demand, on September 29, 2011, that Rogan Brothers cease doing any work for R&S.

It is my conclusion that the evidence warrants the inference that immediately after September 29, Spiezio and Rogan agreed to cease their relationship. In my opinion the inference can be drawn that they agreed that Rogan Brothers would lay off those drivers who had been working on customer accounts that were now held by R&S and that R&S would directly hire those employees with the caveat that job offers would only be made on condition that the former union drivers of Rogan Brothers would resign from Local 813. I also think that the evidence shows that the persons designated by both principals to communicate with these employees were Peter Ligouri and Michael Vetrano. As noted above, it was Ligouri who told Roake that he was being let go by Rogan Brothers and that he could apply for a job at R&S. And it was Vetrano who told Revell and Smith that they were being let go by Rogan and could work for R&S.

The R&S payroll records show that during the biweekly period ending October 7, 2011, three former drivers of Rogan Brothers were hired by R&S. These were Richard Hoke, John Hofweber, and Richard Zerbo. And although they did not testify, I think that it is likely that when they were let go by Rogan Brothers and hired by R&S, they too were notified that they would have to resign from Local 813. (GC Exh. 102 contains documents dated October 12 which were signed by these three and purporting to be their resignations from Local 813.)

In this case, I think that the transaction that accomplished the final separation of the two companies from their status as single or joint employers was the discharge of certain employees by Rogan Brothers who happened to be those drivers who were members of and represented by Local 813. (Ravell, Roake, Smith, Hoke, Hofweber, and Zerbo.)

It therefore is my opinion that the discharges of Roake, Ravell and Smith by Rogan Brothers occurred concurrently with the cessation of its joint or single employer relationship with R&S. As such, I conclude that at the time of these discharges, R&S was still a joint or single employer with Rogan Brothers and that it should therefore be held liable for the discharges.

I also conclude that each company violated Section 8(a)(1) of the Act when; (a) Vetrano told Revell that he was being let go because the employer could no longer employ Local 813 drivers and that they were going to bring in another union; and (b) when Liguori told Roake that if he wanted a job at R&S, he would have to resign from Local 813. In either case, it is clear to me that in these transactions, Ligouri and Vetrano were acting as agents for Spiezio and James Rogan.

D. The Allegations Relating to the Recognition of Local 726

The General Counsel alleges that R&S unlawfully assisted International Union of Journeymen and Allied Trades, Local 726, by recognizing and entering into a contract with that union. It is contended, alternatively that this recognition was

tainted either because (a) at the time of recognition, Local 813 was the lawfully designated collective-bargaining representative, with whom the employer was refusing to bargain or (b) Local 726 did not represent an uncoerced majority of the employees in the unit because authorization cards obtained from employees were solicited by supervisors, managers, or agents of the company.

I reject option (a) because I have concluded that R&S was at no time, either an alter ego of Rogan Brothers or a successor to that company as that term is defined in *Fall River Dyeing Corp. v. NLRB* supra. Moreover, as I have concluded that the contractual relationship between Local 813 and Rogan Brothers involved a members only unit, neither it nor R&S can be held accountable for refusing to bargain with Local 813 under Section 8(a)(5) of the Act.

Moreover, while there was evidence to show that Local 813 sought to bargain directly with R&S after August 1, 2011, it did not seek to obtain any authorization cards from those employees. (Presumably, it regarded R&S as simply a continuation of Rogan Brothers and therefore not requiring a new majority showing.)

The evidence shows that in September 2011, Local 726 was contacted by Peter Ligouri who asserted that R&S was a nonunion shop. Thereafter, Christopher Kuehne, a business agent, met with Ligouri and gave him a set of union authorization cards to distribute to employees. The record shows that Ligouri and Michael Vetrano both solicited these cards and that they obtained cards from 17 employees plus themselves that were dated from September 23 to 30.

On October 3, 2011, Local 726 filed a representation petition seeking an election for certain employees of R&S. That petition was dismissed on the grounds that a complaint had been issued asserting that Local 813 was the current legitimate bargaining representative.

On October 11, 2011, Local 726 sent a letter to Spiezio demanding recognition and claiming to represent a majority of his work force.

By prior arrangement, representatives of Local 726 and R&S appeared before arbitrator Eugene Coughlin for a card check on October 17, 2011. On that date, the arbitrator issued an "Award and Certification of Representative," whereby he certified that he had examined the cards, had made a signature comparison and that a majority had signed cards authorizing Local 726 to represent them.

Also on that date, R&S and Local 726 executed a recognition agreement for a unit of "all full time and regular part time drivers and helpers and all related employees; but excluding all other employees, confidential employees, guards, watchmen and supervisors as defined in Section 2(11) of the National Labor Relations Act."

Subsequently, R&S and Local 726 executed a collective-bargaining agreement containing a union-security clause and a dues-checkoff provision.

In my opinion, the authorization cards used by Local 726 cannot be counted to show that it represented an uncoerced majority of the employees in the recognized unit. These cards were solicited by Ligouri and Vetrano, both of whom I construe as being agents of R&S at the time that they were solicited.

In the case of Liguori, although performing driving duties, he had brought his own customers with him when he went to work for R&S and therefore was, in a sense, in a quasi partnership arrangement with Spiezio. (Unlike the other drivers and helpers, who were paid on an hourly basis, Ligouri was paid a biweekly salary of $3000.) In my opinion, he reasonably could be viewed as being aligned with and speaking on behalf of management by those employees from whom he solicited Local 726 cards. As such, it is not all that likely that employees who were solicited by Ligouri, would have exercised a fully free choice.

In the case of Vetrano, he had concededly been a supervisor when he was employed by Rogan Brothers. He was hired by James Spiezio soon after August 1, 2011, to assist him in running the day to day operations of the business because Spiezio simply didn't know how to do this by himself. He received a biweekly salary of $4402, an amount far higher than any of the other employees. (The highest paid drivers, who were paid on an hourly basis, were paid at the rate of $26 per hour). Notwithstanding Spiezio's assertion that Vetrano had no supervisory functions or authority, I can't believe Spiezio's contention that Spiezio was the only person at R&S who had those powers. At the very least, I conclude that Vetrano was an agent of R&S and that he, like Ligouri, would be viewed by the employees as being aligned with and speaking on behalf of management.

Based on the above, I conclude that by recognizing Local 726 as the bargaining representative when that union did not represent an uncoerced majority of the employees in the unit for recognition was granted, and by entering into a collective-bargaining agreement with that union containing a union-security clause, R&S violated Section 8(a)(1), (2), and (3) of the Act. *Duane Reade,* 338 NLRB 943 (2003); *Price Crusher Food Warehouse*, 249 NLRB 433 (1980).

I also conclude that by accepting recognition and entering into a contract containing a union-security clause, in the absence of an uncoerced majority, Local 726 violated Sections 8(b)(1)(A) and 8(b)(2) of the Act.

CONCLUSIONS OF LAW

1. By discharging Wayne Revell, Joseph Smith, and Michael Roake, because of their membership in or activities on behalf of International Brotherhood of Teamsters, Local 813, the Respondents Rogan Brothers Sanitation Inc., and R&S Waste Management Services, LLC violated Section 8(a)(1) and (3) of the Act.

2. By telling an employee that he was being let go because the employer could no longer employ Local 813 drivers and that the employer was going to bring in another union, the Respondents Rogan Brothers Sanitation Inc., and R&S Waste Management Services, LLC violated Section 8(a)(1) of the Act.

3. By soliciting employees to resign their membership in Local 813, the Respondents Rogan Brothers Sanitation Inc., and R&S Waste Management Services, LLC violated Section 8(a)(1) of the Act.

4. By conditioning employment on the resignation of membership in Local 813, R&S refused to hire Michael Roake and thereby violated Section 8(a)(1) and (3) of the Act.

5. By recognizing and entering into a collective-bargaining agreement containing a union-security clause with International Union of Journeymen and Allied Trades, Local 726, at a time when that labor organization did not represent an uncoerced majority of the employees in the recognized unit, R&S violated Section 8(a)(1), 2, and (3) of the Act.

6. By accepting recognition from and entering into a collective-bargaining agreement containing a union security clause with R&S, Local 726 violated Sections 8(b)(1)(A) and 8(b)(2)

of the Act.

7. Except as found herein, the Respondents have not violated the Act in any other manner alleged in the complaint.

8. The violations found to have been committed in this case, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Having concluded that both Rogan Brothers Sanitation Inc. and R&S Waste Disposal Services, LLC were, as joint and/or single employers, responsible for the unlawful discharges of Wayne Revell, Joseph Smith, and Michael Roake, they must each offer them reinstatement (or in the case of R&S, instatement), and jointly and severally make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enfd denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). The Respondents shall also be required to expunge from their respective files any and all references to the unlawful discharges and to notify the employees in writing that this has been done and that the unlawful discharges will not be used against them in any way. The Respondents shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondents shall also compensate these employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

It is recommended that R&S be ordered to withdraw and withhold recognition from Local 726 and to cease and desist from giving force or effect to any collective bargaining agreement covering those employees, unless and until that Union is certified by the Board as the collective-bargaining representative of the employees. However, nothing herein shall be construed to require the employer to vary any wage or other substantive terms or condition of employment that has been established in the performance of the contract.

It is further recommended that Local 726 be ordered to cease and desist from acting as the bargaining representative of the aforesaid employees or giving effect to its contract with R&S unless and until it is certified by the Board as the collective-bargaining representative of the employees.

It is finally recommended that R&S and Local 726 be ordered, jointly and severally, to reimburse all present and former employees who joined Local 726 for all initiation fees, dues, and other moneys which may have been exacted from them together with interest thereon as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[33]

ORDER

A. The Respondent, Rogan Brothers Sanitation Inc., its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging employees because of their membership in or activities on behalf of International Brotherhood of Teamsters, Local 813, or any other labor organization.

(b) Threatening employees with discharge because they are members of or represented by International Brotherhood of Teamsters, Local 813, or any other labor organization.

(c) Soliciting employees to resign their membership in International Brotherhood of Teamsters, Local 813.

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

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

(a) Within 14 days from the date of this Order, offer Wayne Revell, Joseph Smith, and Michael Roake full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the above named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this decision

(c) Reimburse the affected employees an amount equal to the difference in taxes owed upon receipt of a lump sum backpay payment and taxes that would have been owed had there been no discrimination against them.

(d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to the affected employees it will be allocated to the appropriate periods.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against these employees and, within 3 days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in New York copies of the attached notices marked "Appendix A."[34] Copies of the notices, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper

[33] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2011.

B. Respondent R&S Waste Management Services, LLC its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging employees because of their membership in or activities on behalf of International Brotherhood of Teamsters, Local 813, or any other labor organization.

(b) Threatening employees with discharge because they are members of or represented by International Brotherhood of Teamsters, Local 813, or any other labor organization.

(c) Soliciting employees to resign their membership in International Brotherhood of Teamsters, Local 813.

(d) Refusing to hire employees unless they resign their membership in International Brotherhood of Teamsters, Local 813.

(e) Recognizing and entering into a collective-bargaining agreement containing a union-security clause with International Union of Journeymen and Allied Trades, Local 726, at a time when that labor organization did not represent an uncoerced majority of the employees in the recognized unit.

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

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

(a) Within 14 days from the date of this Order, offer employment to Wayne Revell, Joseph Smith and Michael Roake to the jobs that they previously performed for Rogan Brothers Sanitation Inc., or if those jobs do not exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges enjoyed by other employees similarly situated.

(b) Make the above named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision

(c) Reimburse the affected employees an amount equal to the difference in taxes owed upon receipt of a lump sum backpay payment and taxes that would have been owed had there been no discrimination against them.

(d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to the affected employees it will be allocated to the appropriate periods.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against these employees and within three days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in New York, copies of the attached notices marked "Appendix B."[35] Copies of the notices, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2011.

C. Respondent International Union of Journeymen and Allied Trades, Local 726, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Acting as the collective-bargaining representative of the employees of R&S Waste Services, LLC, unless and until it is certified by the Board as the collective-0bargaining representative of such employees.

(b) Maintaining or giving any force or effect to any collective bargaining agreement between it and R&S Waste Services, LLC, until it is certified by the Board as the collective-bargaining representative of such employees.

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

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

(a) Jointly and severally with R&S Waste Services, LLC, reimburse all former and present employees for all initiation fees, dues, and other moneys which may have been exacted from them with interest thereon in the manner provided in the remedy section of this decision.

(b) Within 14 days after service by the Region, post at its offices and meeting halls, copies of the attached notice marked "Appendix C."[36] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent Local 726's authorized representative, shall be posted

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[36] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by it 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 Respondent Local 726 to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent R&S has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, Local 726 shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by R&S at any time since October 1, 2011.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by R&S Waste Services, LLC, at all places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C. June 17, 2013

APPENDIX A

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 discharge employees because of their membership in or activities on behalf of International Brotherhood of Teamsters, Local 813, or any other labor organization.

WE WILL NOT threaten employees with discharge because they are members of or represented by International Brotherhood of Teamsters, Local 813, or any other labor organization.

WE WILL NOT solicit employees to resign their membership in International Brotherhood of Teamsters, Local 813.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer Wayne Revell, Joseph Smith, and Michael Roake full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the above named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this decision

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful actions against these employees and, within 3 days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

ROGAN BROTHERS SANITATION INC.

APPENDIX B

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 discharge employees because of their membership in or activities on behalf of International Brotherhood of Teamsters, Local 813, or any other labor organization.

WE WILL NOT threaten employees with discharge because they are members of or represented by International Brotherhood of Teamsters, Local 813, or any other labor organization.

WE WILL NOT solicit employees to resign their membership in International Brotherhood of Teamsters, Local 813.

WE WILL NOT recognize or enter into collective-bargaining agreements with International Union of Journeymen and Allied Trades, Local 726, and cease giving affect to the union-security and dues-checkoff clauses of those contracts, unless and until that labor organization is certified by the Board as the collective bargaining representative of such employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer employment to Wayne Revell, Joseph Smith, and Michael Roake in the same jobs that they held while employed by Rogan Brothers Sanitation Inc. or, if those jobs do not longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the above named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this decision

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful actions against these employees and within three days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

WE WILL withhold recognition from International Union of Journeymen and Allied Trades, Local 726as the representative of our employees unless and until that Union has been certified by the Board as their exclusive collective-bargaining representative.

WE WILL jointly and severally with International Union of Journeymen and Allied Trades, Local 726 reimburse all former

and present employees for all initiation fees, dues, and other moneys which may have been exacted from them with interest thereon.

R&S WASTE SERVICES, LLC

APPENDIX C

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 act as the collective-bargaining representative of the employees of R&S Waste Services LLC, unless and until we are certified by the Board as the collective bargaining representative of such employees.

WE WILL NOT maintain or give any force or effect to any collective bargaining agreement between us and the above named employer, unless and until we are certified by the Board as the collective bargaining representative of such employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL jointly and severally with the employer, reimburse all former and present employees for all initiation fees, dues, and other moneys which may have been exacted from them with interest thereon in the manner provided in the remedy section of this Decision.

INTERNATIONAL UNION OF JOURNEYMEN AND ALLIED TRADES, LOCAL 726