

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

**GLASS FABRICATORS, INC., AND
GLASS AND METAL SOLUTIONS, INC., ALTER EGOS**

and

CASE 08-CA-174567

**INTERNATIONAL UNION OF PAINTERS & ALLIED
TRADES DISTRICT COUNCIL 6**

**COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF
TO RESPONDENT'S POST-HEARING BRIEF TO
ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

Respondent GMS submitted its Post-hearing Brief (Respondent's Brief)¹ on November 21, 2017. Counsel for the General Counsel respectfully submits his Motion for Leave to File and this attached Reply Brief to Respondent's Post-Hearing Brief (Reply Brief). As further discussed herein, Respondent GMS' Brief misstates the legal elements necessary to establish an alter ego under Board law, cites legal authority with no precedential value, and mischaracterizes witness testimony. Counsel for the General Counsel's Reply Brief will address these issues.

II. RESPONDENT GMS'S POST HEARING BRIEF MISSTATES THE ELEMENTS NECESSARY TO ESTABLISH ALTER EGO STATUS UNDER BOARD LAW

Respondent GMS contends that "many similarities" between two entities is insufficient for finding an alter ego. (Resp. Br. 5-7). Respondent further asserts that [to find an alter ego] "it would be necessary to prove that both companies have substantially identical management, business purpose, operation, equipment, customers, supervision *and* ownership." (Resp. Br. 6, emphasis added). Respondent also inaccurately states that "[i]nstead, the test requires proof that both companies have *substantially identical* management and supervision." (Resp. Br. 11, emphasis in original). Respondent GMS's assertions fail to consider that established Board precedent requires an inquiry into multiple factors, not single factors in isolation. Respondent GMS's claims blur the Board's standard, thus dramatically increasing the burden to prove an alter ego.

As cited in Counsel for the General Counsel's Brief, whether separate employers are alter egos is a fact-intensive inquiry examining whether the entities have "substantially identical

¹ In this Brief, Respondent Glass Fabricators Inc. will be referred to as GFI, Respondent Glass and Metal Solutions will be referred to as GMS and International Union of Painters & Allied Trades District Council 6 will be referred to as the Union. References to the official transcript of this proceeding will be referred to as Tr. ___. General Counsel's exhibits will be referred to as GC ___. Respondent GFI's exhibits will be referred to as R. GFI ___. Respondent GMS' exhibits will be referred to as R. GMS ___. References to Respondent GMS' Brief will be referred to as Resp. Br. ___.

management, business purpose, operation, equipment, customers and supervision,” whether there is common ownership, whether the two businesses use the same building, whether there was a minimal “hiatus” between the closing down of one and the commencement of the other, and whether the “purpose behind the creation of the alleged alter ego” was “to evade responsibilities under the Act.” Continental Radiator Corp., 283 NLRB 234 (1987), quoting Advance Electric, 268 NLRB 1001, 1002 (1984). Accord: MIS, Inc., 289 NLRB 491, 492 (1988).² Although not required to make an alter ego determination, the Board considers whether the new entity was created “to evade another employer’s responsibilities under the Act.” Island Architectural Woodwork, Inc., 364 NLRB No. 73, slip op. at 6-7 (August 12, 2016), citing Fugazy Continental Corp., 265 NLRB 1301 (1982); Johnstown Corp., 313 NLRB 170, 171 (1993); Fallon-Williams, Inc., 336 NLRB 602 (2001). No single factor is determinative, and not all the indicia need to be present for the Board to find alter ego status. Reigel Electric/Central Electrical Services, 342 NLRB 847 (2004); Standard Commercial Cartage, Inc., 330 NLRB 11, 13 (1999).

While the record evidence shows that Respondents GFI and GMS are substantially identical in *all* of the factors to be considered, Board law does not require that all of those factors be present for a finding of alter ego.

III. Respondent GMS’s Brief Cites Legal Authority With No Precedential Value

Respondent GMS’s brief also relies heavily on federal district court decisions, including decisions from New York and Florida.³ The federal district court cases cited by Respondent GMS do not have precedential value, particularly as the Board was not a party in those cases.⁴

² See also Midwest Precision Heating & Cooling, Inc., 341 NLRB 435, 439 (2004), affd. 408 F.3d 450 (8th Cir. 2005); In re Cofab, Inc., 322 NLRB 162 (1996), enfd. sub nom. NLRB v. DA Clothing Co., 159 F.3d 1352 (3rd Cir. 1998).

³ See In re Staying the Arbitration & Vacating a Notice of Intention to Arbitrate Between Armen Digital Graphics, Ltd. & Amalgamated Lithographers of Am., Local One, S.D.N.Y. 96 Civ. 5844 (LBS), 1997 U.S. Dist. LEXIS 11938, at *6, *22 (Aug. 8, 1997) (Resp. Br. 4, 5, 7, 8, 9, 11, 20, 25, 31); Gen. Longshore Workers, Local 1988 v.

Accordingly, Respondent GMS's reliance on those decisions is misplaced, as the cases cited have little to no precedential value. Carrier Corp., 319 NLRB 184, 195 (1995). Counsel for the General Counsel respectfully submits that the Administrative Law Judge should disregard the legal standards set forth in Respondent GMS's brief as the cases were not decided pursuant to Board law.⁵

IV. RESPONDENT GMS's BRIEF MISCHARACTERIZES WITNESS TESTIMONY

A. Patricia Dotson Never Supervised Glass Work for GFI

Several times in its Brief, Respondent GMS mischaracterized record testimony in order to make Patricia Dotson appear to operate as a crew supervisor or foreman of Respondent GFI. Respondent GMS's Brief states that the Controller (Patricia Dotson) was one of several individuals "who were capable of and did run crews." (Resp. Br. 15). Respondent GMS's Brief later and incorrectly identifies Mrs. Dotson as "crew supervisor Patricia Dotson." (Resp. Br. 17).

None of the testimony that Respondent GMS references supports its claim that Mrs. Dotson supervised glass work. In fact, Mrs. Dotson admitted that GFI hired employees from the Union because she lacked the knowledge and the skill set to perform glazing work. (Tr. 179-183). No evidence was produced at hearing to show that Mrs. Dotson was trained as a glazier, performed glazing tasks, or supervised glass work. Respondent GMS's claim that Mrs. Dotson supervised crews of skilled tradesmen is false and should be disregarded.

Pate Stevedore Co., N.D.Fla. CASE No. 91-30292-RV, 1993 U.S. Dist. LEXIS 18638, at *14-15 (Dec. 30, 1993) (Resp. Br. 5, 6, 26, 35)

⁴ While the cited federal court decisions reference Board cases in explaining the alter ego doctrine, Counsel for the General Counsel maintains that only Board precedent should be applied to the instant case.

⁵ Similarly, the Board has found that state court decisions also do not constitute Board law and have little to no precedential value. In re Glendale Associates, Ltd., 335 NLRB 27, 34 (2001).

B. GMS has a Workforce that is Similar in Size to GFI's Workforce

Respondent GMS inaccurately asserts that it “has a significantly smaller workforce than [GFI].” (Resp. Br. 15-16). The record testimony that Respondent GMS cites in support of this contention is vague and unspecific as to the number of employees it employs, and is devoid of any specific reference to a timeframe or date certain.

On this point, the reports that Mrs. Dotson verified, signed and submitted to the Union are the best evidence to establish the size of the workforce at any given point when GFI was operating. (Tr. 459-464; GC 63). The reports clearly reflect that GFI never employed more than eight union employees. Typically, GFI employed around four union employees, which included GFI's co-owner, Mr. Dotson. (GC 63). In 2014, GFI employed nine individuals total, including Mr. and Mrs. Dotson. (GC 6, p 1-10). GFI's insurance declaration page dated April 5, 2013 shows that GFI self-reported a \$120,000 payroll and six employees. (GC 7, p. 235). Accordingly, Respondent GMS's claims that Respondent GMS has a significantly smaller workforce than Respondent GFI is not consistent with the record evidence.

C. Respondent GMS Mischaracterizes the Type of Work that GFI Performed

In its Brief, Respondent GMS inappropriately relies on its counsel's statements on the record regarding the type of work performed by Respondent GFI. Respondent GMS's Brief claims that record testimony supports the conclusion that GFI's glass installation was only “incidental” to fabrication. (Resp. Br. 21). It further claims that certain work was the “mainstay” and “typical” of GFI's business as well GFI's “main profit center.” (Resp. Br. 22-23).

Respondent GMS's transcript references in this regard, identify not witness testimony but inappropriate and leading questions posed by counsel for GMS to a non-adverse witness, Mrs.

Dotson, the spouse of Dale Dotson, the principal owner of Respondent GMS. (Tr. 223, 225-229, 232-233). While Mrs. Dotson responded affirmatively to leading questions posed by counsel, her testimony in response to such inappropriate leading questions lacks credibility. As such, this testimony should be stricken from the record.

Notwithstanding Mrs. Dotson's responses, the weight of the record evidence clearly demonstrates that a large portion of GFI's business was doing the same glass service and storefront installation that GMS currently performs. Anthony Augustine, who was paid about \$60,000 per year, testified that he only performed storefront glass installation, not glass cutting or fabrication (Tr. 26-27, 37, 58). From 2006 until 2014, GFI's work focused on glass installation, primarily mall storefront installation, utilizing half-inch glass. (Tr. 86-87). GFI installed storefront frames, glass and doors in both exterior and interior settings. (Tr. 99-100). GFI also performed service work, including exterior caulking and replacement of glass units. (Tr. 99-100).

On this point, Mr. Dotson admitted that he had difficulty distinguishing work he performed for GFI with work he performed for GMS. (Tr. 286-287). The credible evidence, including Mr. Dotson's inability to differentiate work performed at either entity, shows that Respondents GFI and GMS perform substantially identical work in the glazing industry.

V. CONCLUSION

For the reasons set forth here, and in Counsel for the General Counsel's submitted Brief, Counsel for the General Counsel respectfully urges the ALJ to find that GMS is an alter ego of GFI, and that GFI and GMS have engaged in unfair labor practices as alleged.

Dated at Cleveland, Ohio this 20th day of December, 2017.

Respectfully submitted,

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PROOF OF SERVICE

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A copy of the foregoing Brief of Counsel for the General Counsel was sent on December 20, 2017 to the following individual by regular mail:

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