

No. 18-1242

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**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**v.**

**JON P. WESTRUM d/b/a J. WESTRUM ELECTRIC AND JWE LLC,  
ALTER EGOS AND A SINGLE EMPLOYER**

**Respondents**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **SUMMARY OF THE CASE**

The National Labor Relations Board (“the Board”) seeks enforcement of its Order against Jon P. Westrum d/b/a J. Westrum Electric (“J. Westrum”) and JWE LLC (“JWE”) (collectively, “the Businesses”). The Board found that the Businesses, as alter egos and a single employer bound by collective-bargaining agreements with International Brotherhood of Electrical Workers Local 292 (“the Union”), unlawfully refused to recognize the Union, abide by the agreements, and provide information the Union requested. The Board’s Order requires the Businesses to give their employees what they are entitled to under the agreements.

JWE has not contested the Board’s Order, and only one of J. Westrum’s arguments is properly before the Court. That argument—that the unfair-labor-practice charge that initiated this case was untimely—fails because it is based on testimony the Board reasonably discredited about when the Union learned of the Businesses’ unlawful conduct. J. Westrum fails to show that extraordinary circumstances warrant overturning the Board’s credibility determination. The Court should therefore uphold the Board’s reasonable finding that the Businesses did not meet their burden of proving that the Union had clear and unequivocal notice of their unfair labor practices outside the limitations period.

The Board believes that oral argument is unnecessary, but it asks that it be permitted to participate should the Court decide to hear argument.

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
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**BRIEF FOR  
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**JURISDICTIONAL STATEMENT**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce its Order against Jon P. Westrum d/b/a J. Westrum Electric (“J. Westrum”) and JWE LLC (“JWE”) (collectively, “the Businesses”). The Order requires the Businesses, as alter egos and a single employer, to provide their employees the wages, benefits, and other terms and conditions of employment to which they are entitled under collective-bargaining

agreements Jon Westrum entered into with International Brotherhood of Electrical Workers Local 292 (“the Union”). The Order issued on December 13, 2017, and is reported at 365 NLRB No. 151.<sup>1</sup> The Board filed its application on January 1, 2018. The National Labor Relations Act (“the Act”), imposes no time limit on that filing. 29 U.S.C. § 151 *et seq.*

The Board had subject matter jurisdiction under Section 10(a) of the Act, which authorizes it to prevent unfair labor practices affecting commerce. 29 U.S.C. § 160(a). The Board’s Order is final. The Court has jurisdiction under Section 10(e) of the Act, and venue is proper because the unfair labor practices occurred in Minnesota. 29 U.S.C. § 160(e).

### **STATEMENT OF THE ISSUE**

(a) Whether the Board is entitled to summary enforcement of its Order against JWE.

*Trafford Distrib. Ctr. v. NLRB*, 478 F.3d 172 (3d Cir. 2007)

(b) Whether, regarding J. Westrum, the Board is entitled to summary affirmance of its findings that the Businesses are alter egos and a single employer that violated the Act by failing and refusing to recognize the Union, apply the

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<sup>1</sup> “D&O” refers to the Board’s Decision and Order. “Br.” refers to Jon Westrum’s opening brief. “Tr.” refers to the transcript. “GCX” and “BX” refer to the exhibits of the General Counsel and the Businesses, respectively.

terms of their collective-bargaining agreements with it, and furnish it with information it requested.

*NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075 (8th Cir. 1992)

(c) Whether the Board reasonably found that J. Westrum failed to meet its burden of proving its assertion that the Union's unfair-labor-practice charge was untimely.

*Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258 (8th Cir. 1994)

*Positive Elec. Enters., Inc.*, 345 NLRB 915 (2005)

*Baker Electric*, 317 NLRB 335 (1995), *enforced mem.*, 105 F.3d 647 (4th Cir. 1997)

### **STATEMENT OF THE CASE**

This case arises from the Businesses' failure to abide by collective-bargaining agreements they entered into with the Union. Acting on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Businesses, as alter egos and a single employer, violated Section 8(a)(5) and (1) of the Act by failing to recognize the Union, adhere to binding collective-bargaining agreements, and provide information the Union requested. (D&O 4; GCX 1(b), GCX 1(c).) An administrative law judge held a hearing and issued a decision and recommended order finding that the Businesses were alter egos and a single employer and that they violated the Act as

alleged. (D&O 11-15.) On review, the Board issued a Decision and Order affirming the judge's findings, which were almost all uncontested before the Board, and adopting her recommended order, with minor modifications to the remedial provisions. (D&O 1-4.) The facts and procedural history underlying the Board's Decision and Order are as follows.

## **I. Facts and Procedural History**

### **A. Jon P. Westrum Forms J. Westrum and Signs a Letter of Assent Committing It to the NECA Agreements**

The Union and the Minneapolis chapter of the National Electrical Contractors Association ("NECA") are parties to a multiemployer collective-bargaining agreement ("the NECA Agreement") with over 200 signatory employers. (D&O 5; Tr. 188.) The NECA Agreement applies to employees performing electrical work for signatory employers within the Union's geographical jurisdiction. (GCX 4 pp. 1, 14.)

Jon Westrum is a master electrician who became a member of the Union in 2001. (D&O 5; Tr. 38, 124.) The Union referred him through its hiring hall to work for a union contractor on various jobs over a period of years. (D&O 5; Tr. 38-39, 151-53, 266.) In 2008, he formed an electrical contracting business, J. Westrum Electric, as a sole proprietorship. (D&O 5; Tr. 41-42, GCX 5.)

In 2012, the Union discovered that Jon Westrum was performing nonunion work, which the NECA Agreement prohibited. (D&O 5 & n.5; Tr. 117, 201, 266-

67, 270, GCX 46 p. 2.) Union Business Representative John Kripotos suggested that Jon Westrum sign J. Westrum up as a union contractor, which he did in June 2012 by signing a one-page Letter of Assent. (D&O 5; Tr. 117-18, 200-01, GCX 40.) The Letter of Assent authorized NECA as J. Westrum's collective-bargaining representative and bound J. Westrum to the NECA Agreement. (D&O 5; GCX 40.)

The Letter of Assent, by its terms, remained in effect and continued to bind J. Westrum to subsequent collective-bargaining agreements unless J. Westrum terminated it by written notice to NECA and the Union at least 150 days before the anniversary date of the collective-bargaining agreement in effect. (D&O 5; GCX 40.) J. Westrum never provided written notice of termination to NECA or the Union. (D&O 12; Tr. 223-24, 248-49, 260-61.)

After Jon Westrum signed the Letter of Assent, the Union referred him to J. Westrum through its hiring hall. (D&O 5; GCX 41.) J. Westrum never sought other employee referrals or notified the Union that it was doing work. (D&O 10; Tr. 156.) Nonetheless, between April 2013 and January 2015, J. Westrum employed six people to perform electrical work. (D&O 7; Tr. 110-11, GCX 39.) Beginning in April 2013, J. Westrum also employed Jon Westrum's nephew, Alex Westrum, to perform bookkeeping. (D&O 5-6; Tr. 59, GCX 39.)

**B. Jon Westrum Establishes JWE LLC and Transfers the Business of J. Westrum to the New Entity**

In November 2014, Alex Westrum filed paperwork to form JWE, an electrical contracting business, as a limited liability company. (D&O 6; GCX 22.) JWE began operations in January 2015, hiring all six individuals who had worked for J. Westrum. (D&O 7; Tr. 388-89, GCX 39.) JWE performed commercial and residential electrical work, as had J. Westrum. (D&O 7; Tr. 332, GCX 39.) JWE completed pending jobs for which J. Westrum had obtained permits, and obtained its own permits for additional work beginning in April 2015. (D&O 7; Tr. 67-68, GCX 43, GCX 44.)

As with J. Westrum, Jon Westrum handled bidding and served as master electrician for JWE while Alex Westrum did the paperwork. (D&O 7; Tr. 37, 78, 88, 94, 135-36, 138, 141, 333-34.) JWE continued to use the same vehicles and equipment as J. Westrum, including a truck bearing the phone number and contractor license number common to both businesses, and a gang box, or large mobile tool box, bearing a “J. Westrum” sticker. (D&O 6-7; Tr. 25, 73-74, 95-104.) JWE did not compensate J. Westrum for those items. (D&O 7, 11; Tr. 100.)

JWE’s filings with the state of Minnesota provided Jon Westrum’s home address, phone number, and email address, which J. Westrum also used. (D&O 6; GCX 22, 25, 26, 30, 32.) Various JWE filings listed Alex Westrum as manager, accountant/member, or partner/accountant; and Jon Westrum as owner or

owner/president. (D&O 6; GCX 22, 25, 27, 30, 32.) JWE’s tax filings listed Jon Westrum as the proprietor of JWE, a single-member LLC. (D&O 6, 10; Tr. 93, GCX 35, 36.) One filing in 2014—the year JWE was established—purported to provide the company’s gross sales and net income for the previous two years, and stated that JWE had been in business for five years. (D&O 6; GCX 27.) As of March 1, 2017, the Minnesota Secretary of State website continued to list J. Westrum as “active/in good standing,” at Jon Westrum’s home address. (D&O 7; GCX 6.)

**C. The Union Encounters JWE at a Jobsite Outside Its Jurisdiction**

In May 2015, Kripotos visited the Northtown Mall in Blaine, Minnesota, where he encountered three nonunion employees performing work for JWE. (D&O 7; Tr. 182-83.) Having noticed the J. Westrum sticker on the employees’ gang box, Kripotos called Jon Westrum and left him a voice message noting that he had nonunion employees on that job. (D&O 8; Tr. 184-85, BX 1.) Kripotos, however, later discovered that the jobsite was outside the Union’s jurisdiction, within the territory of IBEW Local 110. (D&O 8; Tr. 186.) Because he had no authority in that area, he called and left a voice message about the matter for a Local 110 business representative. (D&O 8; Tr. 186.)

**D. The Union Discovers JWE Operating Within Its Jurisdiction and Jon Westrum Denies Any Obligation Under the Letter of Assent**

At a union meeting on March 3, 2016, Union Business Representative Steven Ludwig reported that he had been on a jobsite where employees working for a nonunion contractor, JWE, wanted to “become union.” (D&O 8; Tr. 207.) Their boss, Ludwig mentioned, was Jon Westrum. (Tr. 214.) Union Business Manager Peter Lindahl, who knew Jon Westrum from their work together for a union contractor years earlier, responded that “Jon Westrum Electric” already was a union company. (D&O 8; Tr. 207, 213-15.) After the meeting, Ludwig performed a search for “Westrum” on the Minnesota Department of Labor website, which returned results for both J. Westrum and JWE. (D&O 8; Tr. 208.) He then confirmed that J. Westrum had signed a letter of assent. (D&O 8; Tr. 208.) Lindahl also had a search performed which revealed that both JWE and J. Westrum had obtained permits for work within the Union’s jurisdiction. (D&O 8; Tr. 215-16, 238.)

Lindahl called Jon Westrum and confronted him about his use of nonunion employees in violation of the Letter of Assent. (D&O 8; Tr. 216-18.) In response, Jon Westrum claimed that when he signed the Letter of Assent, the Union told him that if he did not want to be a union contractor he could simply change his name and operate as a nonunion contractor. (D&O 8; Tr. 217.) Lindahl did not believe that anyone from the Union would have said that, and he told Jon Westrum that he

remained obligated under the contract. (D&O 8; Tr. 217-18.) Jon Westrum insisted that he had gotten out of being union by changing his name and closing his old business. (D&O 8; Tr. 218.)

**E. The Union Files a Grievance; the NECA-Union Labor-Management Committee Determines that J. Westrum and JWE Are Both Bound by the NECA Agreement**

On March 11, 2016, the Union filed a grievance alleging that the Businesses had violated the NECA Agreement by performing electrical work with non-bargaining-unit employees. (D&O 8; Tr. 21, 218-19, GCX 2.) Jon Westrum participated, with NECA representation, in a hearing before a joint Labor-Management Cooperation Committee (“the Committee”) composed of representatives of the Union and NECA. (D&O 8; Tr. 22-23, 29-31.) During the hearing, Jon Westrum acknowledged that he had not provided notice to terminate the Letter of Assent. (Tr. 260-61.) And he admitted that he had changed the name of his business from J. Westrum to JWE because “he couldn’t grow as a union contractor.” (D&O 8-9; Tr. 28, 238.)

On June 13, the Committee issued a decision finding that J. Westrum and JWE had failed to comply with the NECA Agreement while performing work that it covered. (D&O 9; Tr. 26, GCX 3.) In concluding that both entities were bound by the NECA Agreement, the decision noted that the Businesses share “the same owner, manager, and legally required master electrician,” “the same business

address, which is the owner's home address," "the same business email address, which is the owner's email address," "the same business telephone number," "substantially the same corporate filings," and "substantially the same vehicles, equipment, and tools," and that they "perform the same work using substantially the same employees." (D&O 9; GCX 3.)

The Committee ordered J. Westrum and JWE to cease and desist from violating the NECA Agreement; to provide make-whole relief by paying back wages to employees according to the NECA Agreement, remitting back dues to the Union, and making fringe benefit fund contributions owed under the NECA Agreement; and to furnish the Union with time and pay records within 10 business days to allow it to compute the sum owed. (D&O 9; GCX 3.) Neither J. Westrum nor JWE complied. (D&O 9; Tr. 220-21.)

**F. The Businesses Fail To Provide Information Requested by the Union**

On August 12, 2016, in an effort to gather the information it needed to calculate the amount of back pay the Businesses owed their employees under the Committee's decision, the Union submitted a written information request to the Businesses seeking a list of individuals they had employed since May 1, 2015; records showing those individuals' work hours, pay, and benefits; and other information necessary to calculate back wages, dues, and fringe benefit

contributions due. (D&O 9; Tr. 219-20, GCX 42.) The Businesses did not provide the information. (D&O 9, 13; Tr. 220-21.)

**G. The Union Files an Unfair-Labor-Practice Charge; the General Counsel Issues a Complaint; an Administrative Law Judge Finds that the Businesses Violated the Act; the Businesses File Limited Exceptions with the Board**

On August 23, the Union filed an unfair-labor-practice charge alleging that the Businesses had violated Section 8(a)(5) and (1) of the Act by repudiating the NECA Agreement and failing to provide information to which the Union was entitled. (D&O 4; GCX 1(a).) The General Counsel issued a complaint based on the Union's charge, and the case was tried before an administrative law judge. (D&O 1, 4; GCX 1(c).)

After a hearing, the judge found J. Westrum and JWE to be alter egos and a single employer within the meaning of the Act. (D&O 11-12.) Accordingly, the judge found that the Businesses were bound by the NECA Agreement in effect when the Letter of Assent was signed, as well as the successor agreement in effect from May 1, 2015, through April 30, 2018. (D&O 12.) The judge found that the Businesses had violated Section 8(a)(5) and (1) of the Act by refusing to recognize the Union as the representative of their employees; by failing to apply the governing collective-bargaining agreement; and by failing to provide information to which the Union was entitled. (D&O 12-13.) The judge rejected the

Businesses' affirmative defenses, including their claim that the Union's charge was barred by the Act's statute of limitations. (D&O 13-14.)

The Businesses filed two exceptions to the judge's decision with the Board. (Respondent's Exceptions to Judge Steckler's Decision and Order (June 28, 2017) ("Resp. Exceptions").) Specifically, the Businesses asserted that the judge was biased against the Businesses and that the Union's charge was untimely. (Resp. Exceptions.)

## **II. The Board's Conclusions and Order**

The Board (Members McFerran, Kaplan, and Emanuel) summarily affirmed the administrative law judge's uncontested findings. (D&O 1 & n.2.) Addressing the Businesses' exceptions, the Board rejected the claim of bias on the judge's part and concluded, in agreement with the judge, that the Businesses had failed to meet their burden of proving that the Union's charge was untimely. (D&O 1 & nn.1-2.) Accordingly, the Board found that the Businesses violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize the Union, apply the terms of the NECA Agreements, and furnish the Union with the information that it requested on August 12, 2016. (D&O 1 & n.2, 14.)

To remedy the Businesses' violations, the Board ordered them to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their

rights under Section 7 of the Act. (D&O 2.) Affirmatively, the Board's Order requires the Businesses to recognize the Union as the collective-bargaining representative of its bargaining-unit employees; abide by the current NECA Agreement; make unit employees whole for any loss of earnings and other benefits resulting from the Businesses' failure to apply the 2012-15 and 2015-18 NECA Agreements; pay unpaid fringe benefit contributions; furnish information to the Union and the Board's Regional Director; and post a remedial notice and mail it to employees. (D&O 2-4.)

### **SUMMARY OF ARGUMENT**

Nearly all of the Board's Order is effectively uncontested before the Court. As to JWE, the Board is entitled to summary enforcement of its Order in full because that business entity has defaulted before the Court by failing to enter an appearance, file an answer to the Board's application for enforcement, or submit a brief. As to J. Westrum, the Court lacks jurisdiction to consider its objection to the Board's findings that the Businesses are alter egos and a single employer, as no such argument was urged before the Board. And J. Westrum has not disputed, before the Board or the Court, that the Businesses violated the Act by refusing to recognize the Union, abide by governing collective-bargaining agreements, and provide information to the Union. As to all of those findings, accordingly, the

Board is entitled to summary affirmance. In any event, substantial evidence and settled law support those findings.

The only argument J. Westrum has preserved for the Court's review is its contention that the Union's unfair-labor-practice charge was not timely filed. On that point, substantial evidence supports the Board's credibility-based finding that J. Westrum failed to meet its burden of proving, as an affirmative defense, that the Union had clear and unequivocal notice of the Businesses' unfair labor practices more than six months before it filed a charge. J. Westrum's argument rests on Jon Westrum's discredited testimony that he told the Union in May 2015 that he had dissolved J. Westrum to operate JWE on a nonunion basis. The Board affirmed the judge's reasonable rejection of that testimony, and J. Westrum fails to establish extraordinary circumstances that would warrant overturning that credibility determination. J. Westrum does not appear to argue that the Union was on notice for other reasons, but in any event, the Board reasonably found that the Union did not have constructive knowledge of the Businesses' repudiation of the NECA Agreement before March 2016. The Court should therefore uphold the Board's rejection of J. Westrum's statute-of-limitations defense and enforce the Board's Order in full.

## STANDARD OF REVIEW

The Board's findings of fact are "conclusive" if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The Court "afford[s] great deference to the Board's affirmation of the [administrative law judge]'s findings." *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013). And the Court will not displace the Board's choice between two fairly conflicting views of the facts, even if it "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488. *Accord St. John's Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 (8th Cir. 2006).

Determinations of witness credibility are "within the sound discretion of the trier of facts, and should be reversed only in extraordinary circumstances." *Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1262 (8th Cir. 1994) (citation and internal quotation marks omitted). For those reasons, the Court will not overturn the Board's credibility determinations "unless they shock the conscience." *RELCO Locomotives*, 734 F.3d at 787.

The Court "defer[s] to the Board's conclusions of law if they are based upon a reasonably defensible construction of the Act." *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003).

## ARGUMENT

### **The Court Should Enforce the Board's Order, Which JWE Has Not Contested and Which J. Westrum Only Properly Challenges Based on a Statute-of-Limitations Defense that the Board Reasonably Rejected**

#### **A. The Court Should Summarily Enforce the Board's Order Against JWE**

The Board found that J. Westrum and JWE, as alter egos and a single employer, violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize the Union, to apply the terms of their collective-bargaining agreements with it, and to provide information that the Union requested. (D&O 1 & n.2, 11-15.) Before the Court, Jon Westrum has appeared pro se on behalf of himself and his sole proprietorship, J. Westrum Electric. JWE, however, failed to enter an appearance through counsel, answer the Board's application for enforcement, or file a brief. *See* Letter from the Clerk of Court to Jon P. Westrum, CM/ECF Entry ID 4647508 (Apr. 6, 2018) ("As JWE LLC is a business entity, any responsive brief must be filed by an attorney."). Because of JWE's default, including its failure to submit an answer within 21 days after the Board filed its application for enforcement of its Order, the Board is entitled to "judgment for the relief requested" in full against JWE under Rule 15(b)(2) of the Federal Rules of Appellate Procedure. *See Trafford Distrib. Ctr. v. NLRB*, 478 F.3d 172, 187 n.5, 182 (3d Cir. 2007) (granting summary enforcement against alter ego that failed to file answer). *Cf. Ackra Direct Mktg. Corp. v. Fingerhut Corp.*, 86 F.3d 852, 856

(8th Cir. 1996) (upholding default judgment against business for failure to appear through counsel); *Flynn v. Thibodeaux Masonry, Inc.*, 311 F. Supp. 2d 30, 37 (D.D.C. 2004) (granting default judgment against unrepresented corporation that was alter ego of pro se sole proprietorship).

**B. The Board Is Entitled to Summary Affirmance of Its Findings that the Businesses Constitute Alter Egos and a Single Employer and that They Violated the Act by Failing To Recognize the Union, Abide by the NECA Agreements, and Provide Information the Union Requested**

Under Section 10(e) of the Act, the Court lacks jurisdiction to consider any objection the Businesses did not urge before the Board, absent extraordinary circumstances not present here. *See* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075, 1077 (8th Cir. 1992). Before the Board, the Businesses did not challenge the administrative law judge's findings that they are alter egos and a single employer. (D&O 1 n.2; Resp. Exceptions.) Accordingly, J. Westrum's argument on that score (Br. 5-8) comes too late and is not properly before the Court.

Nor did the Businesses dispute before the Board that they violated the Act by failing to recognize the Union, abide by binding collective-bargaining agreements, and provide information the Union requested. (D&O 1 n.2; Resp. Exceptions.) And J. Westrum further waives any challenge to those findings by

not disputing them in its opening brief. *See Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007); *NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 966 (8th Cir. 2005). Those findings, accordingly, must be “accepted as true for purposes of this adjudication.” *Cornerstone Builders*, 963 F.2d at 1077. In any event, as we now show, ample evidence and settled law support all of the Board’s findings.

**1. The Businesses Are Bound by the NECA Agreements as Alter Egos and a Single Employer**

In the construction industry, Section 8(f) of the Act permits an employer and a union to enter into a prehire collective-bargaining agreement before the union has established its majority support among the employer’s employees, or even before the employer has hired employees. *See* 29 U.S.C. § 158(f); *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266 (1983); *NLRB v. Am. Firestop Sols., Inc.*, 673 F.3d 766, 768 (8th Cir. 2012). A construction-industry employer may become a party to such an agreement by signing a letter of assent that authorizes a multiemployer bargaining group to represent the employer in negotiations with the union and binds the employer to Section 8(f) agreements that the multiemployer group enters into. *See, e.g., Local 257, Int’l Bhd. of Elec. Workers v. Grimm*, 786 F.2d 342, 345 (8th Cir. 1986). In accordance with those principles, as the Board found (D&O 5-6, 12), the Letter of Assent that Jon Westrum signed in June 2012 bound J. Westrum to the collective-bargaining agreement then in effect between the Union

and NECA, as well as to their subsequent agreement, which was in effect from May 1, 2015, through April 30, 2018.

Once an employer has entered into a Section 8(f) agreement, it “cannot avoid its obligations under the Act merely by forming a new corporate entity when the newly formed entity is in reality only a ‘disguised continuance of the old employer.’” *Midwest Precision Heating & Cooling, Inc. v. NLRB*, 408 F.3d 450, 458 (8th Cir. 2005) (quoting *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)). The new entity “is bound by the collective bargaining agreement between [the old] business entity and a union if the two business entities are alter egos.” *Id.* Similarly, the Board may “treat[] two or more related enterprises as a single employer for purposes of holding the enterprises jointly to a single bargaining obligation.” *Iowa Exp. Distrib., Inc. v. NLRB*, 739 F.2d 1305, 1310 (8th Cir. 1984).

In determining whether a new employer is an alter ego, the Board weighs “a variety of factors, including whether the two entities have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership,” as well as “whether a motive for the new entity’s taking over of the operations of the old entity was to evade responsibilities under the Act and whether dealings between the two entities were at arm’s length.” *Midwest Precision Heating & Cooling*, 408 F.3d at 458-59. The single-employer test likewise

“depends upon all the circumstances of the individual case,” and it looks primarily to whether two businesses share “(1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control.” *Iowa Exp. Distrib.*, 739 F.2d at 1310. *See Crest Tankers, Inc. v. Nat’l Maritime Union*, 796 F.2d 234, 236-37 & n.1 (8th Cir. 1986) (emphasizing similarity of single-employer and alter-ego doctrines).

Ample evidence supports the Board’s finding (D&O 11-12) that J. Westrum and JWE are alter egos and a single employer under the Act. The common owner of both businesses, as the Board found (D&O 11), is Jon Westrum. And even if Alex Westrum is a member of JWE, ownership rests within the same family, making it substantially identical. (D&O 11.)<sup>2</sup> *See Cofab, Inc.*, 322 NLRB 162, 163-64 (1996), *enforced mem.*, 159 F.3d 1352 (3d Cir. 1998). As to management and operation, Jon and Alex Westrum run both businesses, with Jon Westrum bidding contracts, serving as master electrician, and supervising workers, and Alex Westrum handling paperwork. (D&O 11.) *See, e.g., Greater Kan. City Laborers Pension Fund v. Thummel*, 738 F.2d 926, 929-30 (8th Cir. 1984) (alter ego status where couple that owned and operated both entities “continued to perform the same tasks for the corporation that they performed for the sole proprietorship”).

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<sup>2</sup> In attempting to show that ownership has changed, J. Westrum concedes that the Businesses are in fact one and the same: it claims that Alex Westrum “wants to build *a company* that was stagna[nt] under his uncle’s care” and “wants to try making *the company* bigger.” Br. 5, 12 (emphasis added).

As the Board further found, “[t]he business purpose of both entities is identical”—namely, to perform the same kind of electrical contracting projects for retail stores. (D&O 11.) *See, e.g., Midwest Precision Heating & Cooling*, 408 F.3d at 459 (alter ego status where new entity kept substantially all of prior entity’s residential building customers). Indeed, JWE took over projects J. Westrum had begun as part of a seamless transition from one entity to the other. (D&O 11; Tr. 68.) *See Woodline Motor Freight, Inc. v. NLRB*, 843 F.2d 285, 289 (8th Cir. 1988) (alter ego status where “[t]here was no interruption in service” between entities).

Upon beginning operations, as the Board found (D&O 11), JWE hired J. Westrum’s entire workforce. That continuity of employment supports alter ego and single employer status. *See, e.g., NLRB v. Tricor Prods., Inc.*, 636 F.2d 266, 270-71 (10th Cir. 1980) (alter ego status where new employer “absorbed [prior employer’s] employees and acquired [its] machinery and equipment, as well as its pending orders”).<sup>3</sup> And as the Board found (D&O 11), JWE received trucks and other equipment from J. Westrum at no cost. That non-arm’s-length transfer of assets further supports the Board’s findings. (D&O 11-12.) *See Midwest Precision Heating & Cooling*, 408 F.3d at 459 (alter ego status where purchase of

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<sup>3</sup> J. Westrum does not advance its case by contrasting the scale of its early work as a “one-man shop” with JWE’s multiple-employee operation. (Br. 4-5.) The Board may find alter ego status “despite a significant change in scope of the business.” *Trafford Distrib. Ctr.*, 478 F.3d at 182. And in any event, whatever its size was at the outset, J. Westrum hired additional electricians and became a larger business before the transition.

prior employer's assets was not at arm's length); *Bolivar-Tees, Inc.*, 349 NLRB 720, 720 (2007) ("The hallmark of a single employer is the absence of an arm's-length relationship among seemingly independent companies."), *enforced*, 551 F.3d 722 (8th Cir. 2008).

Finally, substantial evidence supports the Board's finding (D&O 11-12) that Jon Westrum's motive for transitioning his operations to JWE was to avoid J. Westrum's responsibilities under the Letter of Assent. Jon Westrum admitted that he changed to JWE because "he couldn't grow as a union contractor." (D&O 8-9; Tr. 28, 238.) *See Crest Tankers*, 796 F.2d at 237-38 & n.2 (motivation "to avoid a labor contract" supports finding alter ego status, even if there is also "some legitimate business reason" for a change in corporate organization).

In sum, the Court should summarily affirm the Board's findings, which are supported by substantial evidence, that JWE is an alter ego of, and single employer with, J. Westrum, and therefore bound by the Letter of Assent that Jon Westrum signed.

**2. The Businesses Violated Section 8(a)(5) and (1) of the Act by Refusing To Recognize the Union, Apply Binding Collective-Bargaining Agreements, and Provide Information the Union Requested**

After an employer signs a letter of assent, it remains bound by applicable Section 8(f) agreements unless and until it gives notice in accordance with the letter of assent's termination clause. *See Gary's Elec. Serv. Co.*, 326 NLRB 1136, 1136 (1998), *enforced sub nom. Elec. Workers Local 58 Pension Trust Fund v. Gary's Elec. Serv. Co.*, 227 F.3d 646 (6th Cir. 2000). Otherwise, the employer's refusal to apply the Section 8(f) agreement, or to recognize the union with which it was signed, constitutes an unlawful refusal to bargain under Section 8(a)(5) and (1) of the Act. *See* 29 U.S.C. § 158(a)(5) and (1); *John Deklewa & Sons, Inc.*, 282 NLRB 1375, 1377-78, 1389 (1978), *enforced sub nom. Int'l Ass'n of Iron Workers, Local 3 v. NLRB*, 843 F.2d 770, 779-80 (3d Cir. 1988). *See also St. John's Mercy Health Sys.*, 436 F.3d at 846 ("A violation of Section 8(a)(5) of the Act produces a derivative violation of Section 8(a)(1)."). In addition, while a Section 8(f) agreement is in effect, an employer violates Section 8(a)(5) and (1) by failing to provide information, upon request, that the union needs to enforce the agreement. *See Gary's Elec. Serv.*, 326 NLRB at 1136. *See also Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979) (employer must provide information union requires for "administering and policing of a contract").

The Board found (D&O 12), and the Businesses have not disputed, that they never complied with the termination clause in the Letter of Assent that J. Westrum signed by giving notice during the 150-day window it provided for withdrawal. And as shown above, the agreement continued to bind JWE as the alter ego of, and a single employer with, J. Westrum. The Board further found (D&O 12-13), and there has been no dispute before the Board or the Court, that the Businesses refused to apply the NECA Agreements, recognize the Union, and provide information the Union required to calculate the amount due under an arbitral award. Accordingly, the Court should summarily affirm the Board's findings (D&O 1 & n.2), which are supported by substantial evidence, that the Businesses violated the Act by failing to honor their obligations under the collective-bargaining agreements by which they were bound.

**C. The Union Timely Filed Its Charge Within Six Months After Learning of the Businesses' Unfair Labor Practices**

J. Westrum's only contention properly before the Court is that the Union's charge initiating this case was untimely under Section 10(b) of the Act. (Br. 8-10.) That section provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). The six-month limitations period, however, does not begin to run until the charging party has clear and unequivocal notice of a violation of the Act. *See NLRB v. La-Z-Boy Midwest, a Div. of La-Z-*

*Boy Inc.*, 390 F.3d 1054, 1061 n.1 (8th Cir. 2004); *Vallow Floor Coverings*, 335 NLRB 20, 20 (2001). And because a Section 10(b) allegation is considered an affirmative defense, the party relying on it has the burden of establishing that notice of the violation outside the limitations period was clear and unequivocal. *See Positive Elec. Enters., Inc.*, 345 NLRB 915, 918 (2005).

Substantial evidence supports the Board's finding, in accordance with those principles, that the Businesses failed to meet their burden of showing that the Union's charge was untimely. (D&O 1 n.2, 13-14.) As the Board found, the Union did not receive clear and unequivocal notice of the Businesses' refusal to apply the NECA Agreement and recognize the Union until March 2016, when Jon Westrum told Union Business Manager Lindahl that he had changed J. Westrum's name to JWE in order to operate nonunion. (D&O 14.) The Union filed its charge less than six months later, on August 23, well within the Section 10(b) period. (D&O 4; GCX 1(a).)

The Board reasonably rejected Jon Westrum's claim that the Union was on notice of the Businesses' unlawful conduct 10 months earlier, in May 2015. In support of that position, J. Westrum asserts that, after Union Business Representative Kripotos talked to JWE employees at a jobsite that was located outside the Union's geographical jurisdiction in May 2015, Jon Westrum told Kripotos that he had dissolved J. Westrum and created JWE as a nonunion

company. (Br. 9.) Because of that conversation, he seems to contend, the Union should have known that JWE was J. Westrum's alter ego and that Jon Westrum "would probably conduct non-union business within their jurisdiction at some point in the future as JWE." (Br 10.) Further, J. Westrum argues that the Union should have acted on that surmise by searching out any permits that JWE subsequently obtained for work within the Union's jurisdiction. (Br. 10.)

The argument fails because it is founded on discredited testimony. The judge rejected Jon Westrum's account of a May 2015 conversation on credibility grounds, finding instead that it was not until March 2016 that he told the Union he had transferred his work to a nonunion business, and the Board affirmed that the judge's ruling. (D&O 1 n.2, 9-10.) J. Westrum does not acknowledge that Jon Westrum's testimony was discredited, nor does it attempt to demonstrate extraordinary circumstances or any conscience-shocking error that could warrant overturning the Board's credibility-based findings. *See Porta-King Bldg. Sys.*, 14 F.3d at 1262; *RELCO Locomotives*, 734 F.3d at 787.

In any event, the credibility determinations the Board affirmed are unassailable. As the judge explained, Jon Westrum's testimony throughout the hearing "had internal conflicts," was "frequently disproven," and was "externally inconsistent with" other evidence. (D&O 9.) The judge thoroughly documented (D&O 9-10) his fundamental unreliability as to a wide range of matters, including,

for example, the year in which he formed J. Westrum (Tr. 35, 41-43, GCX 5, GCX 6), why he created JWE (Tr. 28, 34, 237), whether he collected unemployment benefits while working (Tr. 272), and who owned the trucks the Businesses used (Tr. 95-100).

As to Jon Westrum's testimony about a purported May 2015 conversation, the judge noted that it "initially was short on details." (D&O 8.) When asked about the Northtown Mall job that he said he discussed with Kripotos in May 2015, Jon Westrum was unsure of the project's duration or how many employees he had there, and he went back and forth as to which of the Businesses had performed the work. (Tr. 127.) The exchange he ultimately described was in substance the same as the conversation that Union Business Manager Lindahl credibly testified that he had with Jon Westrum 10 months later, in March 2016—a conversation Jon Westrum did not describe at the hearing. (D&O 10; Tr. 129-32, 217-18.) It was reasonable, then, for the judge to find that the conversation in which Jon Westrum admitted to transferring his business to a nonunion entity took place with Lindahl in March 2016, not with Kripotos in May 2015. (D&O 10.)<sup>4</sup>

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<sup>4</sup> J. Westrum references (Br. 13) phone records (BX 3) showing a phone call to Kripotos in May 2015, but those records do not establish what was said. And the judge was not required to credit Jon Westrum's testimony that, in May 2015, he told Kripotos he had dissolved J. Westrum to work nonunion through JWE, merely because Kripotos did not recall having a conversation at that time. *See, e.g., NLRB v. Am. Bakery & Confectionery Workers' Local Union 300*, 411 F.2d 1122, 1125 (7th Cir. 1969) ("It does not follow from the fact that there was no direct evidence

In sum, as the Board found, the judge reasonably declined to credit Jon Westrum’s claim about a purported May 2015 conversation, “given his overall problems with credibility, lack of detail, and testimonial inconsistencies, all of which are well documented in the decision.” (D&O 1 n.2.) *See Positive Elec. Enters.*, 345 NLRB at 918-20 (rejecting Section 10(b) defense based on discredited testimony); *Vallow Floor Coverings*, 335 NLRB at 21 (same). Under the Court’s precedent, there is no basis for disturbing that finding. *See Aerotek, Inc. v. NLRB*, 883 F.3d 725, 732 (8th Cir. 2018) (“We find no reason to disturb the ALJ’s credibility determinations given that the findings were based on inconsistencies between testimony and documentary evidence.”); *JHP & Assocs., LLC v. NLRB*, 360 F.3d 904, 910 (8th Cir. 2004) (upholding Board’s rejection of testimony the administrative law judge deemed incredible because witness was “not candid or forthright”).

Aside from Jon Westrum’s discredited testimony, J. Westrum does not appear to argue that the Union was on notice of the Businesses’ violations for any other reason. In any event, the Board reasonably rejected other grounds for finding constructive knowledge. (D&O 1 n.2.) As the Board found (D&O 1 n.2), Kripotos’s mere awareness in May 2015 that Jon Westrum was using nonunion

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contradicting the testimony . . . that the trier of the facts must accept such testimony as a verity.”); *NLRB v. Howell Chevrolet Co.*, 204 F.2d 79, 86 (9th Cir. 1953). J. Westrum does not argue otherwise.

labor on a job outside the Union’s jurisdiction “hardly demonstrates that the Union had constructive knowledge that the [Businesses] had repudiated the contract.” (D&O 1 n.2.) *See SAS Elec. Servs., Inc.*, 323 NLRB 1239, 1253 (1997) (charge was timely where union business manager “credibly testified that he had had no knowledge that [the employer] was performing work within the [u]nion’s jurisdiction” prior to the Section 10(b) period).

Further, as the Board explained (D&O 1 n.2, 14), due diligence did not require the Union to catch the Businesses performing work in the Union’s jurisdiction sooner than it did. Kripotos and other union representatives made reasonable efforts to enforce compliance with the Union’s agreements by patrolling its territory and visiting job sites. (D&O 5, 14; Tr. 180-81, 188.) But construction-industry work is “uniquely temporary, transitory and sometimes seasonal.” *Jim McNeff*, 461 U.S. at 266. And small or short-term projects, as Kripotos explained, may be particularly difficult to discover. (D&O 5; Tr. 181-82.) Here, the Businesses were small (D&O 14), and “there were over 200 signatory contractors to the NECA Agreement.” (D&O 1 n.2.) As the Board found, “the Union could not possibly monitor each one.” (D&O 1 n.2.) *See Positive Elec. Enters.*, 345 NLRB at 920 (union was not on notice of repudiation by employer which was “a small operation and one of 75 signatory contractors”);

*Gary's Elec. Serv.*, 326 NLRB at 1142 (union with contractual ties to 240 employers was not on notice of one small employer's noncompliance).

Finally, substantial evidence supports the Board's finding that the Businesses' conduct within the Union's jurisdiction "was not so bald as to put the Union on notice that they had repudiated the NECA Agreement." (D&O 1 n.2.) J. Westrum notes (Br. 10) that JWE obtained permits for work within the Union's jurisdiction after the Northtown Mall encounter, and the record shows that four such permits were issued between May 2015 and March 2016. (GCX 44.) But the Board has declined to find that a union slept on its rights even where an employer performed far more work in violation of a collective-bargaining agreement over a much longer period. *See Baker Electric*, 317 NLRB 335, 346 (1995) (union was not on notice of employer's intent to repudiate Section 8(f) agreement where employer never informed union that he had begun hiring and instead operated nonunion without discovery for 17 years), *enforced mem.*, 105 F.3d 647 (4th Cir. 1997); *Neosho Construction Co., Inc.*, 305 NLRB 100, 101-03 (1991) (employer's performance of 20 nonunion jobs in union's territory over 14 years did not put union on notice of its intent to repudiate Section 8(f) agreement). Jon Westrum fails to show that the Union, in the exercise of reasonable diligence, should have

caught him in the act of performing unauthorized work in its territory sooner than it did.<sup>5</sup>

As the Board recognized (D&O 13-14), *A&L Underground*, 302 NLRB 467 (1991), which J. Westrum cites (Br. 10), is not to the contrary. In that case, the Board reaffirmed that the Section 10(b) period begins only when a party has clear and unequivocal notice of a violation of the Act, and that the burden of showing that notice is on the party asserting the defense. *Id.* at 469. The parties in that case stipulated that the union had such notice when the employer stated that it was repudiating any agreements between them, yet the union waited more than eight months to file a charge. *Id.* at 467. Here, as shown, the Union filed its charge

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<sup>5</sup> J. Westrum did not argue to the Board, nor does it argue to the Court, that the Union was on notice by virtue of the Businesses' failure to remit dues or make contributions to benefit funds after signing the Letter of Assent in 2012. There is, in any event, no basis for such an argument. Benefit contributions would not have been made to the Union itself, but to the separate plan administrator. (Tr. 200, 224-25, 249-50, 259-60.) And an employer has no obligation under the NECA Agreement to remit dues or make fringe benefit contributions unless and until it hires employees and begins performing work. (Tr. 224-25, 250, 321.) As Lindahl credibly testified (D&O 11), it is not uncommon for a small contractor like J. Westrum to do no work—and thus to submit no reports and pay no dues or benefit contributions—for years at a time. (Tr. 225, 250.) *Cf. SAS Elec. Servs.*, 323 NLRB at 1253 (“[I]t is not unusual for contractors (especially small or new ones) to become temporarily or permanently inactive for financial reasons, or to perform work outside the Union's trade or territorial jurisdiction.”); *Baker Electric*, 317 NLRB at 340 (“Neither a sole proprietor nor a corporation makes contributions to the benefit funds until [it] ha[s] employees.” (internal quotation marks omitted)).

within six months after Jon Westrum told Union Business Manager Lindahl in March 2016 that he was operating nonunion. The charge, accordingly, was timely.<sup>6</sup>

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<sup>6</sup> J. Westrum makes a passing reference (Br. 10) to a “single-employee unit” defense. *See McDaniel Electric*, 313 NLRB 126, 127 (1993) (noting that the Board will not require an employer to bargain with a stable single-employee unit). That defense was not urged before the Board, and the Court therefore lacks jurisdiction to consider it. In any event, the defense fails. Even if J. Westrum did not immediately hire employees after signing the Letter of Assent, “[a]n 8(f) contract is enforceable throughout its term, although at a given time there may not be any employees to which the contract would apply.” *John Deklewa & Sons*, 282 NLRB at 1389. And it is undisputed that the Businesses subsequently employed multiple employees to perform work covered by the collective-bargaining agreement. (GCX 39.)

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enforce the Board's Order in full.

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National Labor Relations Board

June 2018

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	No. 18-1242
	)	
v.	)	Board Case No.
	)	18-CA-182656
JON P. WESTRUM d/b/a J. WESTRUM	)	
ELECTRIC AND JWE LLC, ALTER EGOS	)	
AND A SINGLE EMPLOYER	)	
	)	
Respondents	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 7490 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2013, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC  
this 4th day of June 2018

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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ELECTRIC AND JWE LLC, ALTER EGOS	)
AND A SINGLE EMPLOYER	)
	)
Respondents	)

**CERTIFICATE OF SERVICE**

I hereby certify that on June 4, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that one of the participants in the case, Jon P. Westrum, is not a CM/ECF user, and that I will serve him with a copy of the brief once it has been reviewed and accepted for filing by the Court.

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Dated at Washington, DC  
this 4th day of June 2018