JD(NY)-11-18
Brooklyn, NY

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

NICO ASPHALT PAVING, INC. and its Successor in Interest and Alter Ego, CITY WIDE PAVING, INC.

Respondents

and **Case 29-CA-186692**

UNITED PLANT & PRODUCTION WORKERS, CC LOCAL UNION 175, IAM[1]

Charging Party

HIGHWAY, ROAD AND STREET CONSTRUCTION LABORERS LOCAL 1010, LIUNA, AFL-CIO

Party in Interest

Francisco Guzman, Esq.,
for the General Counsel.
Michael Scaraggi, Esq.,
for Nico Asphalt Paving, Inc.
and City Wide Paving, Inc.
Eric Chaiken, Esq.,
for the Charging Party.
Andrew Gorlick, Esq., et al.
for the Party in Interest.

DECISION

STATEMENT OF THE CASE

JEFFREY P. GARDNER, Administrative Law Judge. This case was tried in Brooklyn, New York, on consecutive days beginning on December 11, 2017 and ending on December 14, 2017. The complaint alleges that the Respondents (Nico and City Wide)[2] are alter egos of each other and that these entities violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize the Charging Party Union, Local 175 (hereafter "the Union"), on and after

[1] Since this matter was initiated, the Union affiliated with a new national union, and its new name is Construction Council 175, Utility Workers Union of America, AFL-CIO. For purposes of this decision, I will refer to it as "Local 175" or "the Union."

[2] Hereinafter, Respondents will be separately identified as Nico and City Wide, except I will sometimes collectively refer to them in the singular as Respondent, where appropriate.

February 12, 2016, as the collective bargaining representative of its employees engaged in bargaining unit work; and repudiating and refusing to apply the applicable Nico collective bargaining agreement ("CBA") to the bargaining unit employees.

Alternatively, the General Counsel argues that City Wide is a successor to Nico, and violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with Local 175 as the collective bargaining representative of its employees, when it entered into a General Service Agreement with Nico to perform all of Nico's asphalt paving work and hired a majority of its employees from the Nico bargaining unit.

The complaint further alleges that City Wide violated Section 8(a)(2) of the Act by recognizing and signing a contract with the Party in Interest (hereinafter "Local 1010") while it was still obligated to recognize and bargain with the Union.

In its answer, Respondent denied the essential allegations of the complaint, and raised an affirmative defense that the charge is time-barred under Section 10(b) of the Act.[3] After the trial, the parties filed briefs, all of which I have read and considered.[4] Based on those briefs and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent and both of its individual entities have been engaged in operating concrete and masonry businesses with locations in the State of New York. They admit and stipulate to the Board's jurisdiction, including that they are engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Although initially admitting that the Union is a labor organization within the meaning of Section 2(5) of the Act, Respondent withdrew that admission during the trial when the Union offered a technical amendment of its name to reflect that it had affiliated with a new national union. (See GC Exh. 1.)[5] Neither Respondent nor any other party objected at the outset of trial when the General Counsel first moved to amend the Complaint to correct the name of the Charging Party, which I granted. (Tr. 25.) Notwithstanding this technical amendment, there was no evidence offered by any party to contradict the record evidence demonstrating that the Union was and remains a labor organization, and I hereby so find.

---

[3] In its Answer, Respondent also included affirmative defenses relating to the Union's "unclean hands" and other unspecified acts and omissions by the Charging Party which allegedly bar relief. As I found no credible evidence of such conduct on the part of the Union here, I dismiss those defenses.

[4] Respondent's brief was filed one day late due to an internal administrative problem. When it was unable to obtain the consent of all parties for its late submission, Respondent filed a Request to Accept Post-Hearing Brief with a supporting Affidavit of Counsel, and by Order dated February 7, 2018, finding no prejudice to any of the other parties, I granted its request.

[5] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." for the General Counsel's exhibits, "CP Exh." for the Charging Party's exhibits, and "R. Exh." for Respondent's Exhibits. Specific citations to the transcript and exhibits are included only where appropriate to aid review, and are not necessarily exclusive or exhaustive.

II. ALLEGED UNFAIR LABOR PRACTICES

THE FACTS

The two entities in this case, Nico and City Wide, are primarily operated by members of the Pietranico family: Michael Pietranico, Sr., his son, Michael Pietranico, Jr. and his daughter, Dana Marie Pietranico. To avoid confusion, father and son will be referred to as Senior and Junior, and Ms. Pietranico will be referred to by her given name. Senior and Dana Marie testified at the hearing, as did John Denegall, who testified he had been the Superintendent, Office Manager and Vice President for Nico, and now did the same for City Wide. Denegall was stipulated to be the custodian of records for both Nico and City Wide and also testified in that capacity. (Tr. 25.) Respondents were represented by the same counsel.

Nico Asphalt Paving, Inc.

Ownership, Control, Management, Supervision,
Business Purpose, Customers and Equipment

Nico was formed by Senior in 1996 as a concrete and masonry business. Senior is its sole owner and at all relevant times served as Nico's President. Nico was located at 341 Nassau Ave. in Brooklyn, a property owned by Rosal Realty, an entity which in turn is also solely owned by Senior.

Junior served as Nico's manager/superintendent, and was in charge of managing the workers in the field, where he spent most of his time. Dana Marie never worked out in the field in any capacity. She worked exclusively in the office, and at different times held the titles of Vice President, Secretary-Treasurer and Bookkeeper. She earned $1,000 per week in this role.

Denegall began working for Nico in 1999, and was responsible for the day-to-day operations of Nico, including overseeing the workers, trucks and maintenance, and speaking with clients. He did not deal with labor relations, however, which he testified was handled exclusively by Senior and Junior.

It is undisputed that both Nico and City Wide are in the business of permanent restoration of asphalt, primarily in Manhattan. It is also undisputed that Nico's and City Wide's largest customer by far was Consolidated Edison ("Con Ed"), though over its many years in business, Nico had contracted with various other large companies to provide asphalt paving services, and also performed mill and paving services from time to time to smaller entities who called needing that service until approximately February 2016 when Nico ceased actually performing such work.

Besides Con Ed, other significant contracts which Nico had included one with another electric company, Welsbech, and one with Verizon. Unlike the ConEd contract, which is discussed in more detail below, Nico's contracts with Welsbech and Verizon continued in effect after Nico ceased performing any asphalt work. The Welsbech contract to perform asphalt paving work ran from September 1, 2015 to August 30, 2017. The Verizon contract to perform outside plant asphalt paving services ran from January 1, 2013 to December 31, 2016, and was later extended for a year through December 31, 2017.

For both these contracts, City Wide began performing the work in or about February 2016 in place of Nico under a General Services Agreement signed between Nico and City Wide. Neither entity notified or bargained with the Union over the signing of this General Services Agreement.

In addition to these large contracts, Nico performed asphalt paving work for several other smaller contractors, including Safeway, Denella, Triumph, Westmoreland, Network Infrastructure and others. As with the Welsbech and Verizon contracts, even after ceasing to perform any work in its own name in February 2016, Nico continued to be the named contractor for the work being done by City Wide on these contracts pursuant to the General Service Agreement between them.

Nico owns a fleet of at least seventeen trucks and vehicles,[6] which continue to be maintained at its 341 Nassau Ave. property, though Nico has not performed any asphalt work since City Wide took over performing the work Nico had previously performed. Nico historically obtained the asphalt it used for its business from Willets Point Asphalt Corp. The asphalt was provided on a credit line to Nico, which remained open after Nico ceased performing any asphalt work.

Nico's Relationship with Local 175

In or about May 2000, Nico applied to join the New York Independent Contractors Association ("NYICA") and became a member of that organization, which represents members and administers collective bargaining agreements. At that time, NYICA had a collective bargaining agreement with the predecessor union of Local 175, and that CBA has since been continuously renewed.

Indeed, Senior began serving as a member of NYICA's Board in or about 2004, and was actively involved with the organization, including in its contract negotiations with Local 175. During that period, Nico became a signatory to successive assumption agreements, voluntarily recognizing Local 175 as the representative of its employees under Section 8(f) of the Act, and binding it to the terms of the NYICA/Local 175 CBAs.

Thereafter, in 2007, Local 175 petitioned for, and the NLRB conducted, an election among the employees of Nico to determine whether they wished to be represented for purposes of collective bargaining by Local 175. The Union won the election, and was certified as the collective bargaining representative of Nico's employees under Section 9(a) of the Act. Nico signed successive CBAs with Local 175, the most recent of which running from July 15, 2014 to June 30, 2017.

It is undisputed that Nico had acknowledged the Union's representation of its employees, and had been honoring the terms of the parties' CBA until the events at issue in this case. It is also undisputed that Nico did not give the required notice to terminate its NYICA agreement prior to the most recent Local 175 CBA. And, under the evergreen clause in the applicable bargaining agreements with the Union, unless terminated in writing at appropriate times, those agreements automatically renew themselves.

[6] Some of these trucks/vehicles are owned personally by Senior and/or Nico Equipment, Inc. of which Senior is, again, the sole owner.

The Con Ed Contract

Nico had been performing work for Con Ed for many years without any apparent incident, with Local 175 members performing the work. Typically, Con Ed's construction contracts lasted three years, and its most recent contract with Con Ed had been scheduled to expire on December 31, 2013. However, Con Ed repeatedly extended that contract in one-year increments until at least December 31, 2017.[7]

In October 2014, Con Ed amended a portion of its construction contract to require, "unless otherwise agreed," that contractors performing work for them have a collective bargaining agreement with a union that belonged to the Building & Construction Trades Council of Greater New York ("BCTC"). Local 175 was not a member of the BCTC, but nevertheless, Nico was able to continue performing Con Ed work unabated with its Local 175 represented workforce.

In early 2015, during negotiations with Con Ed for another renewal of Nico's contract, Senior was advised that Con Ed was ready to enforce this provision, and would not continue giving Nico the work unless it had an agreement with a BCTC union. Nico shared this information with the Union, and the Union made some efforts to become a BCTC union, but was unsuccessful.

Nevertheless, Nico continued performing the Con Ed work with Local 175 labor throughout the remainder of 2015, and continuing into 2016. Indeed, at least as late as October 2015, Nico was successfully negotiating another bid to extend its contract with Con Ed while its employees were still represented by Local 175.

City Wide is Formed

Ownership, Control, Management, Supervision,
Business Purpose, Customers, Operation and Equipment.

Meanwhile, on December 15, 2015, around the time Nico was set to begin work on another year under its ConEd contract, City Wide was formed as a New York corporation. Although Dana Marie nominally was and remained its sole owner, City Wide's Certificate of Incorporation lists Senior as the sole director of the new corporation at its inception. Both Dana Marie and Senior were still working for Nico at this time. The Union was neither informed of nor bargained with over the creation of City Wide.

The address for process for City Wide was listed as 341 Nassau Ave., the same Senior-owned building where Nico was located. Indeed, City Wide's operations were initially located at 341 Nassau Ave., and it used the same phone number and other office equipment as Nico. Denegall explained that Dana Marie "was given access to the [Nico] phone number that has been around for so long thoughout these two huge organizations so that there would be no disconnect" for the clients when City Wide began providing the services Nico had previously provided for them. (Tr. 73.)

Dana Marie testified that she used one room in Nico's office for her new business, City Wide, although that was contradicted by Denegall, who acknowledged that he used the same

[7] It is not known whether an additional renewal took place after the close of the hearing in this matter.

office, desk and computer as Vice President of City Wide that he had used at Nico. City Wide also hired the same office employee who had supported Denegall at Nico to be his administrative assistant at City Wide.

Dana Marie testified that she formed City Wide with the intention of creating a woman-owned business, though she had no experience in the asphalt industry aside from her office role with Nico. She holds the title of President of City Wide, but also serves as its Secretary-Treasurer, as she had done with Nico. She testified that she used her own savings to capitalize the new business, which she estimated to be around $1 million, though she struggled to explain where she obtained that money, and was evasive upon questioning about the subject.

For the first quarter of 2016, City Wide paid Dana Marie, its owner and president, the sum of $5,000. It is unclear whether that period accounts for 4 weeks or 5 weeks. In that same quarter, City Wide paid Junior, its superintendent/engineer, the sum of $12,480. City Wide paid Senior, who purportedly did not work there or have any ownership interest in the company, the sum of $20,000. Dana Marie testified that City Wide continues to pay Senior $20,000 per month.

Respondent maintains that Senior was not employed by City Wide, and had no official role with the new entity. However, it is not disputed that Senior is paid $20,000 per month by City Wide, and it is not disputed that Senior signed as “Principal” on behalf of City Wide a Form of Labor and Material Payment Bond that permitted City Wide to commence working (GC Exh. 34), and signed as “President” a Notice to Proceed agreement with Con Ed to begin performing what would become City Wide’s largest contract. (GC Exh. 16). It is also not disputed that it was Senior, and not Dana Marie, who responded to reports of potential labor unrest that initially ensued at the yard after it was announced that City Wide was taking over for Nico.

As Superintendent/Office Manager of City Wide, Denegall’s duties were essentially unchanged from what they were at Nico, overseeing the workers and communicating with the same clients as he had when he was employed by Nico. Junior was identified by Denegall as a superintendent/engineer at City Wide, but having the same duties he had when he was a manager/superintendent at Nico.

City Wide subsequently moved its operations across the street to 330 Nassau Ave., a building owned by another Senior-owned entity, RoSal Realty. This location historically had also been used by Nico to store equipment, and to this day Nico trucks are still parked in the yard at 330 Nassau Ave. There is no evidence of any leasing arrangement between the two entities relating to the use or storage of these Nico trucks.

A sizeable majority of the former Nico employees – at least 19 of 28 - became City Wide employees in the last week of February 2016, which was City Wide’s first week of payroll. As employee and Union President Gus Seminatore testified, and as Dana Marie acknowledged, those employees simply changed their union books from Local 175 to Local 1010, and kept working as if nothing had changed.

City Wide does not own any trucks. It purports to rent the trucks which Nico had previously used from the Senior-owned Nico Equipment, Inc., though there is also no written agreement between those two entities evidencing a formal business arrangement to do so.

Nor is there any written agreement evidencing that City Wide ever paid Nico for the asphalt it used to perform work on Nico jobs. Dana Marie acknowledged that City Wide uses Nico's credit line to obtain the asphalt needed to conduct its work, but was unaware how or whether City Wide paid Nico for the asphalt. There is similarly no record of payment by City Wide to Nico for the office furniture and equipment it took over from Nico, or the business referral of the Con Ed contract that passed all but seamlessly from Nico to City Wide.

In that regard, City Wide never applied for or negotiated a contract to perform the ConEd work. Instead, upon its creation, City Wide just began performing on what was essentially Nico's contract, but now pursuant to a new purchase order in City Wide's name, signed by Senior on February 15, 2016 as its "President." Earlier, on February 8, 2016, Senior had signed a Form of Labor and Material Payment Bond worth $32,750,000 on behalf of City Wide as its "Principle."

Dana Marie did not know whether City Wide had ever provided any financial statement to ConEd, or why the insurance bonding company would give a bond to City Wide, a company with no prior work history. She also was unaware whether City Wide had ever provided any information at all to ConEd, other than the purchase order signed by her father, to secure the multi-million dollar bid (formerly Nico's) that it began servicing in February 2016.

City Wide Takes Over for Nico and Refuses to Recognize Local 175

On January 18, 2016, City Wide entered into a collective bargaining agreement with Local 1010. At that time, City Wide had not yet commenced operations, and had not yet hired any employees. Significantly, Denegall, who accompanied Dana Marie to the meeting at which this CBA was signed, was also not yet employed by City Wide. Rather, he was at that time still employed by Nico.

On February 12, 2016, Nico held a meeting with its employees at 341 Nassau Ave. in which Junior informed the employees:

> "if you belong to Local 175, that you can't work here no more because they don't allow 175 to do the work for Con Edison, because you have to belong to the building trades. And so if you want to continue working here, you have to join Local 1010."
>
> (Tr. 286)

Those employees who agreed to join Local 1010 were permitted to continue working for City Wide. Those who remained in Local 175 were no longer permitted to work.[8]

On February 22, 2016, Nico entered into a General Service Agreement with City Wide, subcontracting all of Nico's remaining non-ConEd asphalt paving work. City Wide proceeded to perform the work on these other contracts, for which Nico remained the contracted party. It is undisputed that the Union was neither informed of nor bargained with over the decision to subcontract that work.

[8] In a handful of cases, employees who had membership in a Teamsters or Operating Engineers Union were permitted to work for City Wide.

By letter dated August 17, 2016, Local 175 requested that City Wide bargain with the Union with regard to its asphalt paving employees performing the unit work that had previously been performed by Nico. By letter dated August 23, 2016, City Wide indicated it would not discuss the Union's demands until the Union could demonstrate it meet the requirements of the ConEd contract, including by having membership in the BCTC.

Although aware of the creation of City Wide at that time, the Union's attorney, Eric Chaikin, testified that the Union was unaware of the existence of the General Services Agreement and the fact that City Wide was performing work for which Nico was still the contracted party. Chaikin testified that it was not until October 2016, during settlement negotiations involving an earlier charge, that the Union learned that information. Prior to that, according to Chaikin, the Union had been advised by Respondent that Nico was no longer in business. Respondent provided no evidence to the contrary. The within charge was filed shortly thereafter.

Credibility

Many of the above factual findings are based on uncontradicted testimony, authenticated documentary evidence and testimony against interest by Senior and Dana Marie, which amounted to admissions. To the extent that Senior and Dana Marie gave arguably exculpatory testimony for their actions, I reject their testimony. I found both to be unreliable witnesses. In particular, their mutual assertions about Senior's alleged non-involvement in the management of City Wide, in the face of contradictory documentary evidence, severely undermined their credibility.

Moreover, the explanations given for their allegedly separate business ventures are implausible considering what they each described as a close father-daughter relationship where one was always seeking to help the other, and in light of the family assistance they readily conceded to have given each other in their various roles with these entities. As such, I do not credit their testimony where it differs from my otherwise supported factual findings.

I found Denegall to be similarly not credible. He was often defensive, evasive, contradictory, and unable to recall important details in his testimony, including on significant matters. As one telling example, he testified that there was a gap in time between when Nico ceased its operations and City Wide commenced its own. This was an important fact that is not a matter of confusing dates, but rather, goes to what was happening substantively at this critical time, and what the witness must have known given his position with both companies.

Denegall's testimony was also specifically belied by the companies' own payroll records which demonstrated that there was no gap at all in what was essentially a seamless continuation from one entity to the other. It was further undermined by the revelation that Nico had not actually ceased operations, but rather, had merely "subcontracted" the entirety of its remaining work to City Wide.

I found Chaikin and Seminatore to be credible witnesses. Though their interests were obviously aligned with the charging party, I found both of their demeanors to be honest and straightforward. In particular, I found Chaikin's testimony regarding what he knew and when he knew about the relationship between Nico and City Wide to be both consistent and persuasive.

ANALYSIS

The Supreme Court has long-recognized that the operation of a prior enterprise under a different name can, in certain circumstances, constitute a "disguised continuance" binding the new company to the old company's obligations under the Act. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). In determining whether an enterprise is a "disguised continuance" or "alter ego" of another business, the Board examines whether the entities share substantially identical management, business purpose, operation, equipment, customers and supervision.

Other factors include common ownership or control, lack of arm's length dealings between the two entities and whether one entity was formed or used to avoid union obligations under the Act. No one factor is controlling and not all the indicia need be present to find an alter ego relationship. *Kenmore Contracting Co*., 289 NLRB 336, 337 (1988), enfd. 888 F.2d 125 (2d Cir. 1989), and cases there cited. See also *U.S. Reinforcing, Inc*., 350 NLRB 404, 404–405 (2007).

Moreover, and significantly for this case, strict common ownership is not a necessary requirement if there is a family relationship that shows common control. *El Vocero de Puerto Rico, Inc.,* 357 NLRB 1585, 1585, n. 3 (2011). Rather, the Board has found an alter ego relationship in the absence of common ownership where both companies were wholly owned by members of the same family.

The Board developed its alter-ego doctrine precisely in order "to prevent employers from evading obligations under the Act merely by changing or altering their corporate form." *NLRB v. Allcoast Transfer, Inc*., 780 F.2d 576, 579 (6th Cir. 1986). And because an alter ego is considered the same enterprise as the related employer for purposes of the Act, the alter ego is bound by the collective-bargaining agreement between the related entity and its union. *Midwest Precision Heating & Cooling, Inc. v. NLRB*, 408 F.3d 450, 458 (8th Cir. 2005), and is responsible for the other entity's unfair labor practices. *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 259 n.5 (1974).

A. Nico and City Wide Were and Are Alter Egos

1. <u>Common ownership, management and supervision</u>

Common ownership is a significant factor in alter-ego cases, and the Board has found substantially identical ownership and an alter ego relationship where the original entity and the newly formed entity are owned by members of the same family, including as here, parents and children. *See Kenmore Contracting Co., supra.; Rogers Cleaning Contractors, Inc.* 277 NLRB 482, 488 (1985). The facts of this case overwhelmingly support that same finding.

As an initial matter, although Senior is undisputedly the sole owner of Nico, and Dana Marie is technically the sole owner of City Wide, I am not convinced that Dana Marie's separate "ownership" truly represents an arm's length business transaction. While she testified that she formed City Wide with the intention of creating a woman-owned business, even Respondent does not argue that to be the real reason City Wide was created.

Moreover, Dana Marie testified that she used her own savings to capitalize the new business, which she estimated to be around $1 million, but struggled to explain where she

obtained that money, and was evasive upon questioning about the subject. She also struggled to explain why Senior is paid $20,000 per month by City Wide while she, the supposed owner, is paid no more than $4,000 to $5,000 per month, barely more than she earned at Nico, and even less than her brother earns as City Wide's superintendent.

And finally, it is undisputed that it was actually Senior who initially established City Wide in December 2015, incorporating the new business, and naming himself as its sole director. Taken together, these factors call into question whether the two entities really have two different owners. But, to whatever extent they do technically have two different owners, the family rationale used in *Kenmore* and *Rogers* supports a finding that in fact, Nico and City Wide share substantially identical ownership.

There is also ample evidence that the Pietranico family exercised common control of both entities. While one entity is owned and controlled by Senior and the other nominally owned by his daughter Dana Marie, each worked in essentially the same capacity for the other's company – Senior initially handling the most important matters to impact City Wide involving contracting with Con Ed and dealing with labor relations for both entities, while Dana Marie remained in the office dealing with the finances and paperwork for both entities. Their level compensation from one entity to the other further bolsters this finding that their roles remained effectively unchanged.

Indeed, many of the facts that support a finding of alter ego are barely in dispute regarding Respondent's common management and supervision. The two entities admittedly shared substantially identical day-to-day management, with Senior's and Dana Marie's son/brother, Junior, providing the essential operational management and supervision of both companies, together with Denegall, and all three family members did at least some work for both companies at the same time in February 2016 when operations were switching over from Nico to City Wide.

Dana Marie was the bookkeeper/treasurer for Nico, and performed those same duties for City Wide despite holding the title of President. Indeed, it was clear from the testimony that Dana Marie did not actually exercise the full authority of that position. Rather, her father continued to control important executive functions, not the least of which was to execute the company's most important contract with what had been Nico's and now is City Wide's largest customer, ConEd.

Thus, in these circumstances, it is not as significant that there is a technical difference in ownership of these two entities, one owned by a father and one by his daughter. Senior's dealings with City Wide's primary customer, and with Local 1010, at a time when he was still employed by Nico also support the finding that there was common management. It is also clear from remarks made by both Senior and Dana Marie that the family members consider themselves as part of one enterprise.

Based on these facts, it is clear that Nico and City Wide had substantially identical ownership, management and supervision, all of which strongly support a finding of alter ego.

2. <u>Same business purpose, operations and equipment</u>

Moreover, the facts of this case conclusively show that Nico and City Wide share the same business purpose, operations and equipment. It is undisputed that both entities are

primarily engaged in the business of providing asphalt paving services in Manhattan, and perform that work for almost exclusively the same customers.

Senior had dealt with ConEd as the owner of Nico, and then continued to deal with ConEd on behalf of his daughter for City Wide. That relationship continued seamlessly from one entity to the other, with the one very significant difference being that Nico had actually bid for the work and gone through the necessary and extremely detailed process to secure the ConEd contract. By contrast, City Wide essentially stepped in to replace Nico having undergone none of the ordinary and expected vetting that ConEd had clearly required of its contractors as indicated by the efforts Nico had to undergo to secure the contract work.

Nor was ConEd the only customer that the two entities shared. At its inception, City Wide had no other customers besides those which had previously been Nico's customers, all of which essentially became City Wide's own customers. They also use many of the same suppliers. And, from the outset and continuing to date, City Wide employed almost all of the former employees of Nico for the new company. As such, City Wide's operations were virtually unchanged from what had been Nico's.

With regard to their equipment, in addition to both entities performing the same type of work, both used not only the same type of equipment, but literally the same equipment, purportedly leased to City Wide from Nico or another Senior-owned entity. City Wide also obtained the asphalt needed to perform its business duties from Nico's longtime supplier, and apparently using Nico's account to do so. Thus, the operations, equipment and business purposes of these two entities are essentially identical.

3. Lack of an arm's length relationship

In addition to these entities sharing common management, ownership, supervision, business purpose, operations and equipment, there is substantial evidence of a lack of an arm's length relationship in the many transactions between the two companies, which is an additional factor to consider in making an alter ego determination.

For example, these two entities maintained adjacent offices at the same time and in the same building and City Wide enjoyed the benefit of Nico's phone line, furniture and computers. Yet, there is no credible evidence that it paid Nico for any of these benefits. There were also no records produced to support a finding that the purported equipment leasing arrangement or the acknowledged use by City Wide of Nico's asphalt credit line were the product of arm's length dealings. Nor was there any evidence that City Wide compensated Nico in any way for the assistance in securing the Con Ed contract.

Indeed, when City Wide began its operations, it would have needed a very considerable capital investment in order to begin work, including for equipment, materials and labor. Yet, there was no credible or documented explanation in the record for where that investment came from, or precisely how much it was, and I am left to conclude this was further evidence of a lack of arm's length dealings between the two entities.

4. Intent to evade the Act

Finally, I find there is substantial evidence that City Wide was formed as a way to avoid Nico's agreements with the Union and thus the Act's bargaining requirements. Though arguing

against such a finding, Respondent essentially admits as much. It's primary argument is that City Wide was established only to enable compliance with the Con Ed language by changing the union that represented its employees.[9]

Even accepting as true Respondent's contention that City Wide was formed only after Con Ed announced once and for all that it was no longer going to permit contractors to perform its work unless its employees were represented by a BCTC-affiliated union, I find that by definition means City Wide was formed to avoid dealing with the Union and to avoid bargaining obligations under the Act.[10]

Moreover, to whatever extent Respondent's motivation was instead seeking to avoid economic losses that might result from a potential inability to perform ConEd work, it was not privileged to unilaterally establish an alter ego, without notifying and bargaining with the Union over that in advance. The Board does not permit an employer to avoid its obligations under the Act even if facing a potential loss of customers.[11]

Taking all these facts together, it is clear that Nico and City Wide share substantially identical management, business purpose, operation, equipment, customers and supervision – essentially every indicia of an alter ego. Moreover, these two entities also exhibit other factors including common control, lack of arm's length dealings between the two entities and what amounts to an admission that one entity was formed or used to replace the duly elected collective bargaining representative with a different union in violation of the Act.

B. City Wide Violated Section 8(a)(5) and (1) of the Act by Refusing to Bargain with the Union and by Failing to Apply the Collective Bargaining Agreement in Existence Between the Union and Nico

The Board has held that the collective bargaining agreement of an employer applies to its alter ego, as of the date of the alter ego's first use of bargaining unit employees. *E. G. Sprinkler Corp*., 268 NLRB 1241, 1241 fn.1 (1984). As such, because City Wide was and is the alter ego of Nico, it is subject not only to the bargaining obligations of Nico, but also to the continued application of the bargaining agreement binding Nico. See *E.G. Sprinkler,* cited above, 268 NLRB at 1244; *A.D. Connor, Inc.,* 357 NLRB 1770, 1785–1787 (2011); and *Midwest Precision Heating & Cooling, Inc.,* 341 NLRB 435, 440 (2004), enfd. 408 F.2d 450 (8th Cir. 2005).

It is undisputed that City Wide never recognized the Union as the representative of its employees and never applied the applicable Union agreement to the unit employees it employed, beginning with the commencement of its operations in February 2016. Indeed, when the Union wrote to City Wide demanding recognition and requesting to bargain over

---

[9] This is in direct conflict with Dana Marie's testimony at trial that she started the company for her own interests, "because I wanted to start a woman-owned business." (Tr 420).

[10] Regardless, intent to evade the Act is not an essential component to an alter ego finding. See *Johnstown Corp*., 313 NLRB 170, 171 (1993), remanded, sub. nom., *Stardyne, Inc. v. NLRB*, 41 F.3d 141 (3rd Cir. 1994), and reaffirmed in 322 NLRB 818 (1997). It is merely one additional factor to be considered.

[11] The complaint alleges that Nico and City Wide are alter egos, or alternatively, that City Wide is a successor to Nico. Because I find that they are alter egos, I find it unnecessary to consider that alternative argument. In addition, the complaint does not allege, nor does General Counsel contend in its brief that the two entities are a single employer. I therefore consider any such allegation waived.

wages, hours and working conditions of City Wide's asphalt paving employees, City Wide responded in writing that it would not do so.

It also cannot be disputed that Nico never timely terminated the agreement it had with NYICA, which by its terms renewed itself unless written notice of termination was given. Thus, that agreement, and Nico's agreement with the Union continued in effect, and is binding on City Wide. City Wide's refusal to recognize and bargain with Local 175 violates the Act.

C. City Wide Violated Section 8(a)(2) and (1) of the Act by Recognizing Local 1010.

An incumbent union is the exclusive collective bargaining representative of the unit of employees it represents, and an employer that is under an agreement with an incumbent union may not grant recognition to a different union without violating Section 8(a)(2). *Advance Architectural Metals, Inc.*, 351 NLRB 1208, 1217 (2007). This prohibition also applies to the alter ego of the employer. *Citywide Service Corp.*, 317 NLRB 861 (1995).

Here, City Wide signed a collective bargaining agreement with Local 1010 as part of the establishment of its operations in January 2016, prior to even hiring any employees. Nico then advised its employees in February 2016 that in order to continue working, they would have to join Local 1010, and City Wide required those same employees to do so in order to work.

Because my findings show that Nico and City Wide were and are alter egos, the Union's prior bargaining agreement with Nico remains valid and continues to apply to City Wide's bargaining unit employees. It follows that City Wide, as the alter ego of Nico, was required to recognize Local 175, and Respondents violated the Act when City Wide instead recognized Local 1010 as the collective bargaining representative of its employees.

D. Respondents' arguments for why the Alter Ego Doctrine Should Not Apply to Nico and City Wide Fall Short.

Respondent has not successfully countered the findings and legal conclusions set forth above. Respondent argues that Nico and City Wide cannot be alter egos or single employers because they were never operating concurrently. As an initial matter, that factual assertion is simply not true. The payroll records produced at trial by Respondents unequivocally show that there was overlap in the duties being performed on City Wide's behalf by multiple Nico employees, including by Senior, Dana Marie and Denegall.

But, more importantly, it is irrelevant to the determination. The Board has found entities to be alter egos whether they were operating at the same time, or where one entity took over the operations of another which ceased to operate. It is just such a disguised continuance of a previously operating business that the alter ego analysis is designed to prevent.

Respondent further argues that there was no attempt to conceal or disguise the creation of City Wide, which is also not true in multiple respects.[12] Instead, Respondent maintains that Senior's hands were tied by the ConEd contract language, which the Union was aware of, and was left no choice but for City Wide to be created. While I can appreciate the

[12] Indeed, I find the very fact that City Wide was created near the end of 2015 by Senior as an entity to be wholly owned on paper by Dana Marie, with no notice to the Union that was happening until February 2016 was clearly intended both to disguise and conceal it from the Union.

challenge that ConEd's changing posture presented to Nico's business, the Board does not recognize a company's financial challenges as justification for ignoring its existing collective bargaining relationships or agreements and forming a new entity. See *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73 (2016), *enf'd*. 892 F.3d 362, 374 (2018). ConEd was not Nico's only customer, and Respondent was not privileged to unilaterally create an alter ego to address the challenges created by ConEd's position.

Respondent also argues essentially that there was no real harm done as a result of its actions because most of the Nico employees continued working for City Wide under what it maintains were substantially the same terms and conditions, and suggests that this outcome was actually more favorable to employees, who were able to continue working, than if City Wide had not been created.

As an initial matter, I can find no case where the Board has held that an alleged lack of harm is a valid defense to an alter-ego allegation, and Respondents do not cite to any such precedent. More importantly, there was unquestionably harm done here to the employees who were discharged when they declined to change their union affiliation, harm done to the Union funds that were deprived of their contracted-for contributions, and harm done to the collective bargaining process where the employees' duly-elected collective bargaining representative was summarily replaced at the demand of Respondents.

Finally, Respondents argue that the facts do not support a finding of alter ego, maintaining that the two entities are sufficiently separate. For the reasons described above, the facts here unmistakenly show that Nico and City Wide were and are alter egos, that the Local 175 bargaining agreement is valid and that it continues to apply to City Wide's bargaining unit employees.

E. The Complaint is not Time-Barred by Section 10(b).

Respondent, joined by the Interested Party, raises the affirmative defense that this matter is time-barred by Section 10(b) because the instant charge was not filed until October 20, 2016, more than six months from the date the Union learned of City Wide's creation, and because a prior charge, timely filed, had been withdrawn.

Section 10(b) of the Act states 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 and the service of a copy thereof upon the person against whom such charge is made." The 10(b) period begins to run when the aggrieved party receives actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *United Kiser Services*, 355 NLRB 319 (2010). The Respondent bears the burden of proving this defense.

Significantly, a party may not rely on a 10(b) defense where there has been fraudulent concealment of material facts. That test requires that "(1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without fault or want of due diligence on its part." *Morgan's Holiday Markets*, 333 NLRB 837, 838 (2001) *citing Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977).

Here, Respondent repeatedly concealed multiple facts from the Union, which the Union could not reasonably have known until they were revealed to it. And, each time the Union

became aware of those facts, it filed new timely charges. This began as early as the creation, in secret, of City Wide in late 2015, which was not revealed to the Union until February 2016, whereupon the Union filed its initial charge objecting to the creation of an alter ego. It continued with Respondent's concealment of Senior's involvement with City Wide, which it has continued even to date in its denials regarding the extent of his participation in its creation and initial operations.

Most importantly, Respondent continued its concealment of Nico's ongoing business operations, performing asphalt paving work for Verizon and Welsbhech, all the way until October 6, 2016. Prior to then, Respondent had never disclosed to the Union that Nico was still conducting business through its General Services Agreement with City Wide. Indeed, it had at all times maintained to the Union that Nico had gone out of business. There was no evidence presented that the Union was formally notified of Nico's continued operations at any point prior to those October 6, 2016 settlement discussions.

Upon learning of this previously concealed information on October 6, 2016, the Union filed the within charge just two weeks later on October 20, 2016, well within the 10(b) period, which only begins to run upon the Union's learning of the unlawful conduct. The charge included, for the first time, the allegation that Nico was unlawfully subcontracting work to City Wide pursuant to the newly revealed General Services Agreement.

Moreover, I find that this timely-filed allegation is closely related to the other allegations of the Complaint, which had been the subject of previously-filed timely charges. The Board holds that an otherwise untimely allegation which was first raised timely-filed charge, including one which had been dismissed or withdrawn, will be considered timely if it is closely related to the timely-filed charge. *Redd-I, Inc.*, 290 NLRB 115 (1988)

The *Redd-I* test for whether untimely allegations are "closely related" to a timely filed charge is a three-part test which analyses: (1) whether the untimely allegations involve the same legal theory as the allegations in the timely charge; (2) whether the allegations arise from the same factual circumstances or sequence of events; and (3) whether the respondent would raise the same or similar defenses to both allegations.

The circumstances here meet that test. The allegations of the Complaint all involve the same alter ego theory, they all arise out of the same sequence of events, and the respondent raises essentially the same defense to all of the allegations, namely that it was forced to take the actions it took because of the requirements of ConEd's contract.

As such, I find the Union's charge was timely filed, and accordingly, I conclude that the Complaint is not time-barred.

Conclusions of Law

1. Nico Asphalt Paving, Inc. and City Wide Paving, Inc. were and are alter egos of each other.

2. By failing and refusing to bargain collectively with the Union as the exclusive bargaining representative of its employees, Nico Asphalt Paving, Inc., has violated Section 8(a)(5) and (1) of the Act.

3. By failing and refusing to apply the Nico bargaining agreement that its alter ego, Nico Asphalt Paving, Inc. had and continues to have with the Union, City Wide Paving, Inc. violated Section 8(a)(5) and (1) of the Act.

4. By recognizing Local 1010 as the collective bargaining representative of its unit employees, while still bound by the agreement with Local 175, City Wide Paving, Inc. violated Section 8(a)(2) and (1) of the Act.

5. The above violations constitute unfair labor practices that affect commerce within the meaning of the Act.

Remedy

Having found that Respondents have engaged in certain unfair labor practices, I shall order them and their constituent entities to cease and desist therefrom and to take appropriate affirmative action designed to effectuate the policies of the Act.

Since Respondents have unlawfully failed to apply the terms and conditions of employment under the applicable bargaining agreement to its bargaining unit employees, it must make those employees whole for any loss of earnings or benefits, including, *inter alia*, making all delinquent contributions to the Union's benefit funds as provided for in the collective-bargaining agreement, including any additional amounts due the funds in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216, n. 7(1979). Respondents shall also reimburse affected employees for any expenses resulting from the failure to make contributions to the benefit funds, as set forth in *Kraft Heating & Plumbing*, 252 NLRB 891, n. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981).[13]

Such amounts shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondents otherwise owe the fund.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[14]

ORDER

The Respondents, Nico Asphalt Paving, Inc. and City Wide Paving, Inc., and each of them, their officers, agents, successors, and assigns, shall

---

[13] In the event that lump sum payments are required to be made to employees under this remedy, those payments must be made in accordance with the requirements set forth in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

[14] If no exceptions are filed as provided in 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 Board's Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing and refusing to apply the terms of the collective-bargaining agreement that Respondents entered into with Construction Council 175, Utility Workers Union of America, AFL-CIO ("the Union") and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of their bargaining unit employees.

(b) Recognizing Local 1010 as the collective-bargaining representative of their bargaining unit 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) Honor and abide by the terms and conditions of their collective-bargaining agreement with the Union and make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of the unfair labor practices found in this decision, in the manner set forth in the remedy section of this decision.

(b) Make whole their employees for any expenses ensuing from the Respondents' failure to make required contributions to the Union's benefit funds and make whole the Union's benefit funds for losses suffered, in the manner set forth in the remedy section of this decision.

(c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date such awards are fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(d) 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 monies due under the terms of this Order.

(e) Within 14 days after service by the Region, post at all of its facilities, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 29, 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 the 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 Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced or covered by other material. If the

[15] 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.

Respondents have gone out of business, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all employees and former employees employed by Respondents at any time since December 15, 2015.

(f) 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 Respondents have taken to comply.

Dated, Washington, D.C. November 2, 2018

Jeffrey P. Gardner
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT fail and refuse to recognize and bargain with Construction Council 175, Utility Workers Union of America (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit by refusing to apply the terms and conditions of our collective-bargaining agreement, including wage rates and benefit fund contributions.

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

WE WILL honor and abide by the terms of our collective-bargaining agreement with the Union, and **WE WILL** make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of our refusal to apply the collective-bargaining agreement to all unit employees, plus interest.

WE WILL make all delinquent payments to the Union's benefit funds and **WE WILL** make you whole for any expenses ensuing from our failure to make such payments, including any additional amounts due to the funds on your behalf, with interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating backpay awards to the appropriate calendar years for each employee.

NICO ASPHALT PAVING, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

CITY WIDE PAVING, INC.
(Employer)

Dated _____By _____
(Representative) (Title)

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

Two Metro Tech Center, 100 Myrtle Avenue, Suite 5100, Brooklyn, NY 11201-3838
(718) 330-7713, Hours: 9 a.m. to 5:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-186692 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER: (718) 765-6190