

Samuel Kosoff & Sons, Inc., and its alter ego Facts Construction Company, Inc. and United Brotherhood of Carpenters & Joiners of America, AFL-CIO, Local Union No. 12. Case 3-CA-11142

27 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 2 February 1983 Administrative Law Judge Walter H. Maloney Jr. issued the attached decision. The Respondents, Samuel Kosoff & Sons, Inc. and Facts Construction Company, Inc., filed separate exceptions and supporting briefs. The General Counsel filed a brief in support of the judge's decision.¹ The Charging Party filed an answering brief to the Respondents' exceptions and supporting briefs. The Respondents filed answering briefs to the Charging Party's brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Samuel Kosoff & Sons, Inc., and its alter ego Facts Construction Company, Inc., Syracuse, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The General Counsel also filed an exception to the judge's finding that Respondent Samuel Kosoff & Sons, Inc. purchases and delivers to jobsites within the State of New York supplies, goods, and materials valued in excess of \$20,000 which were purchased from businesses which in turn purchased such materials directly from points and places located outside the State of New York. The General Counsel contends that the \$20,000 figure should read \$50,000. The Respondents stipulated and the record shows that the correct figure is \$50,000. Accordingly, we correct this error in fn. 2 of the judge's decision.

² The Charging Party filed with the Board a motion for special permission to appeal from the Order of the administrative law judge denying its motion to reopen the record. In light of our decision to affirm the judge's rulings, findings, and conclusions, we deny this motion.

DECISION

FINDINGS OF FACT

STATEMENT OF THE CASE

WALTER H. MALONEY JR., Administrative Law Judge. This case came on for hearing before me in Syracuse, New York, upon a consolidated unfair labor practice complaint,¹ issued by the Regional Director for Region 3, which alleges that Respondents Samuel Kosoff & Sons, Inc. (Kosoff), and its alter ego, Facts Construction Company, Inc.² (Facts) violated Section 8(a)(1) and (5) of the Act. More particularly, the remaining portion of the consolidated complaint, which is now being severed, alleges that the Respondents Kosoff and Facts are either a single employer which employs carpenters in a single bargaining unit or that Facts is an alter ego of Kosoff. From this premise, the General Counsel argues that Facts, a nonunion company, is obligated to observe the terms and conditions of a union contract which the Carpenters entered into with Kosoff. The complaint also alleges that Kosoff violated Section 8(a)(1) and (5) of the Act by refusing to supply the Union with requested information bearing upon its contention that Kosoff and Facts are one and the same business enterprise. Kosoff and Facts contend that they are totally separate businesses and that Facts has no obligation to adopt and observe the Carpenters' contract. Kosoff further asserts that the information requested by the Union is not relevant to the Union's responsibility in representing carpenters who are employed by Kosoff. Upon these contentions, the issues herein were joined.³

¹ The principal docket entries in this case are as follows:

The charge in Case 3-CA-11142 filed by United Brotherhood of Carpenters & Joiners of America, AFL-CIO, Local Union No. 12 (herein called the Union or Carpenters), against both Respondents on July 27, 1982; original consolidated amended complaint issued on September 9, 1982; Respondent Kosoff's answer filed September 13, 1982; Respondent Facts' answer filed at the hearing; hearing held in Syracuse, New York, November 8-10, 1982; briefs filed by all parties on or before January 3, 1983.

This case was originally consolidated with the complaint in Case 3-CA-11004, which arose out of a charge filed against Respondent Kosoff by the International Union of Bricklayers and Allied Craftsmen, Local 28, AFL-CIO-CLC. Case 3-CA-11004 became the subject of an all-party informal settlement agreement, which was approved at the hearing by me. Accordingly, Case 3-CA-11004 is hereby severed from Case 3-CA-11142. In light of the General Counsel's motion, dated January 18, 1983, advising that compliance with the agreement has taken place and requesting leave to withdraw the complaint, leave is hereby granted.

² The Respondents admit, and I find, that Respondent Kosoff is a New York corporation which maintains its office and principal place of business in Syracuse, New York. It is engaged as a general contractor in the construction industry. In the course of its business, Respondent Kosoff annually derives gross revenues in excess of \$500,000 and purchases and delivers to jobsites within the State of New York supplies, goods, and materials valued in excess of \$20,000 which were purchased from businesses which in turn purchased such materials directly from points and places located outside the State of New York. Accordingly, Respondent Kosoff is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

³ Certain errors in the transcript are noted and corrected.

I. THE UNFAIR LABOR PRACTICES ALLEGED

Respondent Samuel Kosoff & Sons, Inc. has operated a medium-sized general contracting firm in Syracuse, New York, since about 1949. Since its foundation by Samuel Kosoff, now deceased, the firm has operated as a union contractor and has, either directly or through a trade association, maintained contracts with various labor organizations, including Carpenters Local 12. The most recent contract with Local 12 was concluded on behalf of Kosoff and other contractors by Building Trades Employers Association of Central New York, Inc. (now called the Construction Employers Association of Central New York, Inc.). It became effective June 1, 1981, and expires on May 31, 1984. This contract contains 9-1/2 pages setting forth, in the most minute detail, the extent of its coverage in terms of the type of work claimed by the Carpenters.

Depending on the season of the year, Kosoff has employed anywhere from 15 to 50 journeymen who are covered by this agreement or predecessor agreements. Kosoff does not employ electricians, plumbers, or roofers, but subcontracts such work to firms having contracts with unions representing those trades. The Carpenters' contract contains a conventional jobsite no-subcontracting provision.⁴ Kosoff operates not only in the Syracuse area (Onondaga County) but throughout central New York State. The territorial jurisdiction of Local 12 extends only to Onondaga County. However, the Respondent feels obliged to hire union carpenters from other locals when operating elsewhere and occasionally employs members of Local 12 on jobs located outside Onondaga County. Its contract with Local 12 provides for travel pay to cover such eventualities.

The Respondent Kosoff is a corporation which is owned by three individuals—Allen S. Kosoff, the grandson of the founder, Claude W. Powell, and Frederick T. DeLany Jr. Kosoff currently serves as president, Powell as vice president, and DeLany as secretary-treasurer. Allen Kosoff is a registered architect and maintains an office for the practice of architecture in the same building which houses the Kosoff office. He devotes only a fraction of his working time to the operation of the Kosoff corporation. Powell and DeLany are its principal operating chiefs, with DeLany handling most of the labor relations matters. He has served as the corporation's representative to the association which negotiates labor contracts on behalf of the firm. Powell has been

⁴ Art. 27 provides, *inter alia*:

Both parties hereto agree that all work sublet on the job site shall be performed by the subcontractor under the terms of this Agreement. Said subcontractor shall be in contractual relation with the Union. A subcontractor is defined as any person, firm, partnership, self-employed person or corporation who agrees, under contract, oral or written, with the general contractor or his subcontractor to perform on the job site any part or portion of the work covered by this Agreement, including the operation of equipment, performance of labor, and installation of materials. Job site shall mean the area of the job and surrounding the job generally accepted as being under control of the prime contractor during construction.

Forms which can be fabricated on or adjacent to the job site shall not be sublet for fabrication off the job site, patent forms are excluded from this clause.

the firm's representative as trustee on certain jointly administered fringe benefit trust funds.

John D. Schmidt was first employed by Kosoff in 1970 as a laborer. Between that date and February 1981, Schmidt continued to work for Kosoff in progressively more responsible positions, serving as labor foreman, estimator, and then field superintendent. When business became slow in the fall of 1980 and the early winter of 1981, Allen Kosoff hit upon the idea of establishing another company and operating it under the direct supervision and control of Schmidt. On February 19, 1981, Respondent Facts Construction Company, Inc. filed a certificate of incorporation in the State of New York. It had four shareholders who held an equal interest in the corporation—Allen Kosoff, DeLany, Powell, and Schmidt. They were all elected to be directors of the firm. The record is silent as to whether the first three made a cash contribution to establish Facts; Schmidt did not. He was elected president and Allen Kosoff was elected secretary-treasurer. At the same point in time, Allen Kosoff, DeLany, and Powell signed an indemnification agreement with the Lincoln First Bank-Central, the institution with which Kosoff does its banking, which enabled the bank to extend to Facts a \$10,000 line of credit for start-up and operating expenses. About \$6000 or \$7000 of that credit was utilized.

Allen Kosoff testified that the reasons for establishing Facts were two-fold. He and his coprincipals wanted to retain the services of Schmidt in the face of an economic downturn which might have resulted in a decision by Kosoff to terminate his services. Moreover, Kosoff had been losing business, especially residential and commercial renovation work, to nonunion firms with whom they could not compete. Most of its current jobs were obtained on a bid basis. Its owners felt they had been priced out of a market they used to serve. This limitation became particularly acute as new construction work in the area diminished. The principals felt that, by the use of a firm that was not required to pay union wages and fringe benefits and to observe union craft lines, they could obtain additional business which they were then passing up. The four principals of Facts agreed from the outset to operate Facts as a nonunion firm. Indeed, this was their admitted motivation in establishing it.

As discussed more fully hereinafter, Facts began its operation in the early spring of 1981 with Schmidt in charge. It established many of the accoutrements of a separate organization. Facts rented an office from Kosoff's accountant, established a separate telephone listing, and set up its own books and accounts. With the help of Allen Kosoff, Schmidt sent out an advertising circular to prospective customers on a letterhead which he and A. Kosoff designed. The letter was sent to people whom Schmidt had met during his tenure as a Kosoff superintendent and to others in the construction industry whose names were secured in various ways. It read:

I would like to bring to your attention the availability of a full service, reliable construction firm. FACTS offers a complete range of services from budget and detailed estimates to complete design/build packages.

FACTS is one of the most progressive SOLAR AND ENERGY CONSERVATION oriented firms in this area. We have extensive experience in energy rehabilitation and commercial renovation, ranging from modular passive solar additions to million dollar renovation projects. A prime on-going project is the 650 James Street Office Building.

As president of FACTS, I have more than a decade of construction experience, having filled both estimating and project manager positions with Samuel Kosoff & Sons, Inc.

Allen Kosoff, a registered architect, is one of the owners and an active adviser to FACTS. He is highly qualified in the field of passive solar architecture, cost estimating, and remodeling design.

We stress reliability, quality, and value in all of our work and, as FACTS is an open shop firm, our prices are most competitive.

Please contact us for your energy conservation, renovation, and new construction needs.

For your cost estimates, technical service and additional information, contact FACTS at 478-5377.

Schmidt was and is the sole supervisor for Facts. He performs the estimating, enters into contracts with customers, hires and fires employees, directs work at the jobsite, administers its small office, and has borrowed money for vehicle purchases by Facts. Depending on the season, Facts has hired as many as 12 construction employees who are termed utilitymen. While Facts acts as general contractor on its various jobs, these jobs often include plumbing, electrical work, painting, and work other than carpentry. A utilityman is expected to do whatever work is assigned and is paid at various rates, even within the same week, depending upon the job he does and Schmidt's evaluation of how well he does it. While Kosoff has handled jobs in excess of \$1 million and frequently handles jobs in the range of \$300,000-\$500,000, Facts normally does not seek or perform a job in excess of \$70,000.

Bonding has recently become a problem in the construction industry in the central New York area. In order to bid a job of any size, various bonds are required and contractors have been experiencing difficulty in obtaining necessary bonding. Even an established firm like Kosoff could not obtain bonding until its principals and their wives pledged their personal assets to indemnify Kosoff's bonding company. Facts is not a bondable company and is thus precluded from bidding on many projects. As discussed infra, Facts has performed work on bonded jobs but only as a subcontractor for Kosoff, taking advantage of Kosoff's capacity as a bonded bidder as an umbrella for its own performance.

In the fall of 1981, the Charging Party began hearing rumors that Kosoff, one of its signatory employers, was setting up a "double-breasted" operation. As part of an effort to track down these rumors, Charles D. Dennis, the Local's financial secretary, and Kevin Thompson, an organizer from the Carpenters International, visited a job on James Street in the city of Syracuse which they had heard was being performed by Facts. While they were there, they ran into DeLany, who had come to the

James Street building to visit the office of an architect. DeLany asked them what they were doing at the James Street location, stating that "this is my non-organizing outfit."⁵ Some months later, in June 1982, Dennis visited a job in progress at the Agway Building at Widewaters. There he saw Facts putting up divider walls in an empty building and doing other carpentry work. He learned that the job was being performed for the New York Telephone Company, which lets contracting work only to firms that are on its qualified bid list. In the summer of 1982, William E. Bronson, general representative of the Carpenters International, visited a post office at Savannah, New York, and found that Facts was performing a job which had been let to Kosoff by the U.S. Postal Service and then subcontracted to Facts. He also learned that Facts was performing other jobs at post offices under subcontract from Kosoff.

The Union had previously complained to Powell that Kosoff was violating the subcontracting clause in its collective-bargaining agreement by subcontracting carpentry work to a nonunion subcontractor but to no avail. On June 23, 1982, Union President Leon Ilitzki wrote a letter to Allen Kosoff, in the latter's capacity as president of Kosoff, and requested certain information. The letter read:

It has come to this Union's attention that you have an ownership interest in Facts Construction Co., Inc. and that that Company is performing work of the type within the bargaining unit covered by the collective bargaining agreement between this Union and Samuel Kosoff & Sons, Inc. In order for this Local to police the existing collective bargaining agreement, it is necessary for us to have the following information from you:

1. Identify the officers of Facts Construction Co., Inc. ("Facts").
2. Identify the shareholders of Facts and the percentage ownership interest of each shareholder.
3. Identify any persons formerly employed by Samuel Kosoff & Sons, Inc. ("Kosoff") who have been or are now employed by Facts; and identify the capacity of their employment for each entity.
4. Set forth when Facts was incorporated, and identify the work (i.e., by job or project) that has been performed by Facts within the jurisdiction that would be covered by the collective bargaining agreement between this Local and Kosoff.
5. Identify for each of the jobs or projects, the number of employees utilized by Facts in the performance of work that is of the same type as that covered by the above-referred to collective bargaining agreement. For each employee, identify the length and hours of employment.
6. Identify any equipment owned by either Kosoff and/or Facts which is leased to or utilized by the other. Set forth the financial arrangement, if

⁵ Later in his testimony Dennis said that perhaps DeLany had said that "this is my non-union outfit." What is of significance is not whether DeLany used the word "non-organizing" or "non-union" but that he used the word "my."

any, governing the use of equipment, and state whether the arrangement is in writing.

7. Identify the jobs which have been bid by Facts, and state with respect to each job whether or not Kosoff also bid the job.

8. Identify any work that has been let from one corporation to the other.

9. Identify any work performed by one of the companies and which was estimated or bid by the other.

10. With respect to any job or project performed by Facts, state whether or not Kosoff performed work or was present on the same job.

11. State whether any employees of either company are sometimes employed by the other company or receive remuneration from the other company, and, if so, describe the circumstances under which that occurs.

Would you please provide this information within two weeks of receipt of this letter. Thank you very much for your anticipated cooperation.

On July 12, 1982, DeLany replied to Local 12 on behalf of Kosoff. His letter stated:

This letter is to serve as our reply to your request dated June 23, 1982. It has come to our attention that several Unions in the Up-State New York area have been sending the same letter to several different companies. Apparently there is nothing unique or different about your inquiry which, we believe, is but one in a general or blanket solicitation of the building trades. Consequently, we must reject your assertion that your inquiry is necessary "to police the existing collective bargaining agreement."

While we are advised that an employer has an obligation to provide information needed by a bargaining representative, we are also advised that where the scope of the inquiry is outside the recognized bargaining unit, the Union must indicate the probable relevance of the inquiry. Thus, your inquiry does not list any contractual provisions of our labor agreement which are or may have been germane to the requested information. In other words, you must disclose the intent and purpose of your request. Finally, we point out that Samuel Kosoff & Sons, Inc., has no ownership interest in the subject of Facts Construction Co., Inc., and therefore your request must be denied. Moreover, we question the bona fides of your information which, frankly, we believe is a matter of pure speculation.

The charge in the instant case was filed by the Union within 2 weeks after receiving the above-quoted letter.

II. ANALYSIS AND CONCLUSIONS

A. *The Relationship of Kosoff to Facts*

The principal issues litigated in this case are whether Facts and Kosoff are a single employer, with or without separate bargaining units, whether Facts is an alter ego of Kosoff, or none of the above. Toward a resolution of these issues, the parties have cited numerous contrasting

and conflicting Board cases, many of which simply "turn on their facts." One of the clearest expositions of the law in this area can be found in a recent Fifth Circuit case, *Carpenters Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489 (5th Cir. 1982), which arose in the context of a suit filed under Section 301 of the Act. In its decision in *Pratt-Farnsworth*, the court (690 F.2d at 504-505) stated:

The single employer doctrine is a creation of the Board which allows it to treat two or more related enterprises as one employer within the meaning of section 2(2) of the NLRA Often the doctrine is invoked to combine the amount of business of two or more employers so that the whole will exceed the Board's self-imposed jurisdictional minimum. . . . The doctrine is not, however, limited to use only as a jurisdictional tool. The finding that two entities are a single employer may have the consequences of treating them as one for purposes of considering the existence of an unfair labor practice in a proceeding before the Board. E.g., *Hageman Underground Construction*, 253 NLRB 60 (1980) (certain respondents constituted a single employer for purposes of NLRA; backhoe operators employed by such respondents constituted a single appropriate unit; such respondents violated sections 8(a)(5) and (1) of the NLRA . . . by refusing to recognize and bargain with the union as the exclusive representative of the employees in such unit and by failing to abide by the terms of the collective bargaining agreement covering such employees). The factors which the Board uses to determine . . . single employer status are (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. [Citations omitted.] As the court noted in *Don Burgess* [596 F.2d 378, 384 (9th Cir.), cert. denied 444 U.S. 940 (1979)]:

The Board has stressed the first three of these factors, as well as the presence of control of labor relations However, no one of the factors is controlling . . . nor need all criteria be present. Single employer status ultimately depends on "all the circumstances of the case" and is characterized as an absence of an "arm's length relationship found among unintegrated companies." *Local 627, International Union of Operating Engineers v. NLRB*, 171 U.S. App.D.C. 102, 107-108, 518 F.2d 1040, 1045-46 (1975), aff'd on this issue sub nom. *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800 . . . (1976).

A finding of single employer status does not by itself mean that all the subtentities comprising the single employer will be held bound by a contract signed only by one. Instead, having found that two employers constitute a single employer for purposes of the NLRA, the Board then goes on to make a further determination whether the employees of both constitute an appropriate bargaining unit. As

the Ninth Circuit stated in *Don Burgess*, 596 F.2d at 386, even if two firms are a single employer, a union contract signed by one would not bind both unless the employees of both constituted a single bargaining unit. The Ninth Circuit then explained the difference between an inquiry into single employer status and an inquiry into the appropriateness of the bargaining unit:

In determining the appropriateness of a bargaining unit the focus differs from that employed in deciding whether there is a single employer. "In determining whether a single employer exists we are concerned with the common ownership, structure, and integrated control of the separate corporations; in determining the scope of the unit, we are concerned with the community of interests of the employees involved." *Peter Kiewit Sons' Co.*, 231 NLRB 76, 77 (1977).

In discussing this distinction, the Fifth Circuit went on to say:

It is clear that the primary motivation of the Board in making an independent unit determination in a single employer case is to protect the rights under section 7 of the NLRA . . . of the employees of each of the subsidiaries constituting the single employer to bargain collectively with representatives of their own choosing. [690 F.2d at 507.]

Further in its explication of the law in this area, the Fifth Circuit had occasion to discuss the doctrine of alter ego, commenting that it is often more difficult to prove the existence of this status than it is to establish the existence of a single employer within the meaning of the Act. The court stated:

This rationale, broadly read, echoes another Board-created doctrine, that of the alter ego employer. Alter ego issues commonly arise in successorship situations, when ownership of a signatory company changes hands. Although a bona fide successor is not in general bound by prior collective bargaining agreement, an alter ego will be so bound. *NLRB v. Tricor Products, Inc.*, 636 F.2d 266, 269-70 (10th Cir. 1980). This is because an employer will not be permitted to evade its obligations under the NLRA by setting up what appears to be a new company, but is in reality a "disguised continuance" of the old one. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 [other citations omitted]. [690 F.2d at 507.]

In deciding whether a company is an alter ego, the Board will often look to factors which bear some similarity to those involved in a single employer question; in particular, whether the two enterprises have substantially identical management, business purpose operation, equipment customers, supervision and ownership. *Hageman Underground Construction*, 253 NLRB 60 (1980); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). However, the focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a

disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or a technical change in operations. [Citations omitted.] [Id. at 507-508.]

. . . when the Board makes a finding that a non-signatory employer is the alter ego of a signatory employer which has voluntarily agreed to recognize the union's representative status in a unit stipulated in the collective bargaining agreement, the Board generally will not reconsider the unit under the community of interests test, but will simply make a far more limited determination whether the stipulated unit is repugnant to any policy embodied in the NLRA. [Id. at 508-509.]

In my estimation, Respondent Facts Construction Company, Inc., when judged by the standards enunciated above, should be deemed to be an alter ego of Respondent Samuel Kosoff & Sons, Inc. Both firms have, with one exception, the same individual owners and Schmidt's 25-percent share of Facts is, from all we can derive from the record, a gift for which he contributed no capital. Allen Kosoff is an officer of both corporations. Ultimate, as distinguished from immediate, control of labor relations remains in the same hands.⁶ At Kosoff, DeLany and, to some extent, Powell handle labor relations for the firm. Neither does hiring or firing of individual carpenters. Whenever Kosoff takes on a new job, DeLany or Powell designates the job foreman and it is the foreman who hires the complement of employees who are used to man the job. The foremen then obtain journeyman carpenters from their own following, i.e., men who have worked for them before, or from the Carpenters hiring hall. By ancient if unwritten agreement among all of the principals, Kosoff has always operated as a union contractor. On the other hand, it is the same three Kosoff principals, plus Schmidt, acting as the board of directors of Facts, who hired Schmidt, investing in him the power to hire and fire for the firm much as he had done when he was a job superintendent for Kosoff. The only differences were that Schmidt had a new title—president—and was not bound by any limitations contained in a union contract. There is little doubt that the three Kosoff principals who serve on the Facts board of directors could terminate Schmidt as company president (and superintendent of all jobs) as quickly and as easily as Kosoff could have terminated Schmidt when he was on their payroll as a job superintendent. Moreover, the ultimate control of labor relations for Facts remains with the three Kosoff principals plus Schmidt. It was they, and not merely Schmidt, who agreed that the firm should operate on a nonunion basis and this was done before Schmidt sent out the circular letter to customers, informing them, among other things, that Facts would operate nonunion.

⁶ The Board has held that an effort to avoid compliance with a union contract bears heavily upon a finding that there is control of the labor relations of a subsidiary by its parent. *Naccarato Construction Co.*, 233 NLRB 1394 (1977).

Citing *NLRB v. Tricor Products*, supra, the Fifth Circuit in *Pratt-Farnsworth*, supra, pointed out that antiunion motivation or sentiment was a relevant factor in analyzing the existence of alter ego status.⁷ In this case, such sentiment or motivation is admitted. Allen Kosoff took the stand and flatly stated that Facts was established in order to permit the acquisition of work which had disappeared because Kosoff was no longer competitive in certain contracting fields. The Kosoff principals sought to achieve a competitive position in doing smaller contracting by operating a nonunion firm which would not have to pay union scale, union fringes, and be subject to union craft limitations. This element in the determination of alter ego status is well established in the record.

The operations of Kosoff and Facts do not present a situation in which two firms operate in totally different economic climates. To a large extent they share the same market. Both do general contracting in central New York State. Kosoff bids larger jobs which Facts is unable or unwilling to undertake. However, Facts does handle general contracts up to about \$70,000. The record indicates that, in Kosoff's fiscal year ending September 30, 1981, Kosoff paid costs amounting to \$9,222,647.81 on 47 different jobs. Of those jobs, 30 were under \$70,000 and thus well within the range of work performed by Facts. Five of those jobs were for customers who had also hired Facts on other occasions.

It is abundantly clear that Kosoff and Facts do not operate at arm's length, a requirement for separate employer status, and that Kosoff does not treat Facts as it treats its other competitors in the general contracting business.⁸ Kosoff enjoys bondable status and Facts does not. Kosoff obtained two jobs—one from the New York Telephone Company worth \$54,000 and one from the United States Postal Service worth \$200,000—and promptly subcontracted the major portion of the work in each contract to Facts without even requiring the submission of competitive bids.⁹ Because of bonding requirements, Facts could not have obtained either job directly but did obtain the bulk of the work on these jobs through the paternal auspices of Kosoff. The amount of work funneled in this manner to Facts amounted to a substantial, if not major, part of its revenues and served the Kosoff purpose of getting Facts in operation and permitting the work it bid to be done more cheaply under nonunion conditions and at a nonunion wage scale. As a result of having successfully performed a subcontract under Kosoff for the New York Telephone Company, Facts was able to demonstrate its reliability to the satisfaction of the phone company and has now been admitted to the phone company's list of approved contractors for jobs under \$20,000. Kosoff has not been so accommodating to other general contractors whom it regards as competitors. In subcontracting these jobs to Facts, Kosoff violated the provi-

sions of its contract with Local 12 which forbids the subcontracting of carpentry work to nonunion employers, but this breach of contract appears to have given it scant pause.

It is true that Kosoff and Facts use different complements of employees. Some Facts employees have been the sons of Kosoff principals or superintendents who have worked for Schmidt during summer vacations from school. I do not regard this as the typical employee interchange which is discussed in unit determination cases. It is also true that Facts' employees observe no craft lines and are paid varying wages at different intervals, depending on the type of work they are assigned to perform. Kosoff carpenters do nothing but carpentry work and are paid in accordance with the terms and conditions of the union contract. However, these factors do not militate against a finding of alter ego status, since, as the Board pointed out in *Angelus Block Co.*, 250 NLRB 868 (1980), such factors are the products of a status designed and implemented by the parties and result from the failure of the parties to apply the union contract to Facts' employees. Accordingly, they do not evidence the existence of a separate status. It should also be noted that, on the New York Telephone Company job at Widewaters, which Facts performed as one of the Kosoff subcontractors alongside other Kosoff subcontractors, Schmidt in effect acted as job superintendent on Kosoff's behalf in overseeing the performance of Kosoff's other subcontractors, in addition to supervising his own employees. The wearing of two hats on this occasion amount to single, integrated management of the job by a parent and its clone.

As the Respondents are wont to point out, Facts has a separate office, separate books, separate equipment, separate telephone listing, separate insurance policies, and a separate storage area in which to keep its materials. These matters are incidental when compared with the manner in which Facts originated and how it currently obtains a significant portion of the dollar volume of its business.¹⁰ Moreover, Facts holds itself out as being closely associated with Kosoff. Allen Kosoff is an officer of both companies and is active in both. This fact was made known to the trade in the Syracuse area when Facts sent out an announcement advertising that it was open for business. Facts was not only trading on the name of Allen Kosoff personally but on the name of the Kosoff firm, as well, in soliciting business from prospective customers.

In light of these factors, I conclude that Facts was and is a disguised continuance, or at least a disguised extension, of Kosoff and is in fact and law its alter ego. There is nothing in the Act which is repugnant to the existence of a bargaining unit which includes both Kosoff's carpenters and Fact's utilitymen, most of whom perform the same kind of work much of the time. Accordingly, I conclude that Facts is bound by the terms and conditions

⁷ See also *P. A. Hayes, Inc.*, 226 NLRB 230 (1976), and *DMR Corp.*, 258 NLRB 1063 (1981).

⁸ It is interesting to note that Facts acquired its name by being an acronym composed of the first letters of the first names of Kosoff's principals and its office clerical employee.

⁹ Subcontracting to a closely held subsidiary without using competitive bids has been held to be strong evidence of alter ego or single employer status. *Sossamon Electric Co.*, 241 NLRB 324 (1979).

¹⁰ On occasion, Kosoff has accommodated Facts by making available to it, at cost or less than cost, the services of a Kosoff truck and driver to perform hauling that Facts had no capacity to do. The fact that these services were billed to Facts and later paid for still illustrates the less than arm's-length relationship between these two entities.

of the collective-bargaining agreement between Kosoff and Local 12 and that by failing and refusing to extend the provisions of that agreement to include the utility-men employed by Facts both Respondents violated Section 8(a)(1) and (5) of the Act.

2. The refusal of Kosoff to supply the Union with requested information

The Board and the courts have enunciated a liberal discovery-type standard in determining the potential relevance of information which has been sought in aid of a bargaining agent's responsibility. See *Hiney Printing Co.*, 262 NLRB 157 (1982), and cases cited therein. In resisting the General Counsel's claim that it violated the Act by not providing the Union with the information requested in the Union's June 23 letter, Kosoff cites *Ohio Power Co.*, 216 NLRB 987 (1975), for the proposition that the standard of relevance of requested information is very broad and no specific showing is necessary when the information sought covers the terms and conditions of employment within the bargaining unit. However, with respect to information sought which is outside the unit, the standard is narrower and the relevance which is required must be somewhat more precise. Applying this dichotomy to the evidence in this case is somewhat difficult, since the thrust of the Union's request for information was to permit it to determine whether Facts' employees should or should not be included in the Kosoff bargaining unit. Such information has been determined to be relevant to a union's bargaining obligation in such cases as *Leonard B. Herbert, Jr. & Co.*, 259 NLRB 881 (1981), and *Doubarn Sheet Metal*, 243 NLRB 821 (1979), and I regard it as relevant here to the performance by the Union of its duties as the bargaining agent of Kosoff's employees.¹¹ Much of the information sought by the Union in its June 23 letter was placed into evidence in the course of this litigation as bearing upon the relationship between Kosoff and Facts, a fact which, in and of itself, tends to support a finding that the information was and is relevant and produceable. That much of the information sought by the Union is already in evidence is no defense to a Board order which is directed not only to the totality of the contents of the Union's June 23 letter but to Kosoff's prospective conduct as well. *Kroger Co.*, 226 NLRB 512 (1976); *Bel-Air Bowl, Inc.*, 247 NLRB 6 (1980). Accordingly, I conclude that, by failing and refusing to supply the Union with information requested in its letter of June 23, Respondent Kosoff violated Section 8(a)(1) and (5) of the Act.

On these findings of fact and on the entire record herein considered as a whole, I make the following

CONCLUSIONS OF LAW

1. Respondent Samuel Kosoff & Sons, Inc. is now, and at all times material herein has been, an employer en-

¹¹ Kosoff also argues that the Union acquiesced in the existence of the Kosoff-Facts relationship. However, this argument has a hollow ring in light of the fact that Kosoff was deliberately withholding from the Union the information it requested to ascertain the nature of the Kosoff-Facts relationship.

gaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Facts Construction Company, Inc. is the alter ego of Respondent Samuel Kosoff & Sons, Inc.

3. United Brotherhood of Carpenters & Joiners of America, AFL-CIO, Local Union No. 12 (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

4. All carpenters and joiners, as defined in the collective-bargaining agreement between the Union and the Building Trades Employers Association of Central New York, Inc., including those employed by Respondents Samuel Kosoff & Sons, Inc. and Facts Construction Company, Inc., but excluding supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material herein the Union has been the exclusive collective-bargaining representative of all of the employees in the unit found appropriate in Conclusion of Law 4 for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

6. By failing and refusing to supply the Union with requested information relating to its relationship with its alter ego, Facts Construction Company, Inc., Respondent Samuel Kosoff & Sons, Inc. violated Section 8(a)(5) of the Act.

7. By failing and refusing to apply the terms and conditions of the collective-bargaining agreement entered into by the Union and the Building Trades Employers Association of Central New York, Inc. to all employees employed in the bargaining unit found appropriate in Conclusion of Law 4, both Respondents violated Section 8(a)(5) of the Act.

8. The unfair labor practices set forth above in Conclusions of Law 6 and 7 violate Section 8(a)(1) of the Act and have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents herein have committed certain unfair labor practices, I will recommend that they be required to cease and desist therefrom and to take other affirmative actions designed to effectuate the purposes and policies of the Act. The recommended Order will provide that both Respondents be required to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of their nonsupervisory carpenter and joiner employees, that they be required to apply to all of these employees the terms and conditions of the current collective-bargaining agreement between the Union and the Building Trades Employers Association of Central New York, Inc., and that Kosoff be required to supply the Union with the information concerning its relationship with Facts which was requested by the Union in its letter to Kosoff dated June 23, 1982. The Order will require both Respondents, jointly and severally, to make whole the employees of Facts for any loss of wages and benefits they may have suffered by reason of the unfair labor practices found herein, including holiday and vacation pay, travel pay,

overtime, and payments of contributions to health, welfare, vacation, and pension funds required under the terms of the above-recited collective-bargaining agreement, together with any liquidated or other damages required by contract to be paid to benefit fund trustees because of delinquencies in making contributions. *F.M.L. Supply, Inc.*, 258 NLRB 604 (1981). The amounts due for loss of wages, overtime, travel pay, holiday and vacation pay, and any other amounts of money which are easily determined will be paid with interest thereon computed at the adjusted prime rate used by the Internal Revenue Service for the computation of tax payments. *Olympic Medical Corp.*, 250 NLRB 146 (1980); *Isis Plumbing Co.*, 138 NLRB 716 (1962). Inasmuch as a determination of the amounts due to fringe benefit funds, both in contributions and penalties, may be more difficult to compute, I will leave the determination of interest due on such payments to the compliance stage of this proceeding. *Merryweather Optical Co.*, 240 NLRB 1213 (1979). I will also recommend that both Respondents be required to post the usual notice advising their employees of their rights and of the results in this case.

On the basis of these findings of fact and conclusions of law and on the entire record, I make the following recommended¹²

ORDER

I. Respondent Samuel Kosoff & Sons, Inc., Syracuse, New York, its officers, supervisors, attorneys, successors, and assigns, shall supply the Union with information requested in the Union's letter to Kosoff, dated June 23, 1982, relating to Kosoff's relationship to Facts and any other information requested by the Union which is relevant to its responsibility as bargaining agent.

II. Respondents Samuel Kosoff & Sons, Inc. and its alter ego Facts Construction Company, Inc., Syracuse, New York, their officers, supervisors, attorneys, successors, and assigns, shall, jointly and severally

1. Cease and desist from

(a) Refusing to recognize and bargain with United Brotherhood of Carpenters & Joiners of America, AFL-CIO, Local Union No. 12, as the exclusive collective-bargaining representative of all of its carpenters and joiners, as defined in the collective-bargaining agreement between the Union and the Building Trades Employers Association of Central New York, Inc., including those employed by Respondents Samuel Kosoff & Sons, Inc. and its alter ego Facts Construction Company, Inc., but excluding supervisors as defined in the Act.

(b) Refusing to apply the terms and conditions of the collective-bargaining agreement concluded by the Union with the Building Trades Employers Association of Central New York, Inc. to all nonsupervisory employees employed by Facts Construction Company, Inc. who do carpentry and joining work, as defined in that contract.

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act.

(a) Recognize and, upon request, bargain collectively with United Brotherhood of Carpenters & Joiners of America, AFL-CIO, Local Union No. 12, as the exclusive collective-bargaining representative of all of its carpenters and joiners, as defined in the collective-bargaining agreement between the Union and the Building Trades Employers Association of Central New York, Inc., including those employed by Respondents Samuel Kosoff & Sons, Inc. and Facts Construction Company, Inc., but excluding supervisors as defined in the Act.

(b) Applying to all of the nonsupervisory employees employed by Facts Construction Company, Inc., who do carpentry and joining work, as defined in the collective-bargaining agreement between the Union and the Building Trades Employers Association of Central New York, Inc., the terms and conditions of that contract.

(c) Make whole all of the employees of Respondent Facts Construction Company, Inc., for any loss of pay or benefits which they have suffered by reason of the unfair labor practices found herein, and make whole all of the jointly administered benefit trust funds established by the contract between the Union and the Building Trades Employers Association of Central New York, Inc., for any contributions which have not been paid for the benefit of employees of Respondent Facts Construction Company, Inc., in the manner described above in the section entitled "Remedy."

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll and other records necessary to analyze the amounts of backpay and benefit fund contributions due under the terms of this Order.

(e) Post at the offices and jobsites of the respective Respondents in and about Syracuse, New York, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

¹³ 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."

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

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.

Samuel Kosoff & Sons, Inc. will provide United Brotherhood of Carpenters & Joiners of America, AFL-CIO, Local Union No. 12, the information requested by the Union concerning its relationship to Facts Construction Company, Inc., in its letter of June 23, 1982, and will provide the Union with any other requested information which is relevant to the Union's responsibility as bargaining agent.

WE WILL recognize and bargain collectively, upon request, with the Union as the exclusive collective-bargaining agent of all of the carpenters and joiners, as defined

in a contract between the Union and the Building Trades Employers Association of Central New York, Inc., exclusive of supervisors, who are employed either by Samuel Kosoff & Sons, Inc. or Facts Construction Company, Inc., and WE WILL apply the terms and conditions of that contract to the carpenter-joiner employees of Facts Construction Company, Inc.

WE WILL, jointly and severally, make whole all of the nonsupervisory carpenter and joiner employees of Facts Construction Company, Inc., for any loss of pay or benefits, including wages, overtime, holiday, and vacation pay, which they have lost by virtue of our failure to apply the terms and conditions of the union agreement to them, with interest, and WE WILL jointly and severally, make whole any jointly administered benefit trust funds for any contributions covering employees of Facts Construction Company, Inc., which were not paid because of our failure to apply to these employees the terms and conditions of the union agreement, together with any delinquency penalties which may be due, and with interest.

SAMUEL KOSOFF & SONS, INC., AND FACTS
CONSTRUCTION COMPANY, INC.