

Ronald E. Evans d/b/a Evans Sheet Metal, Barbara Ann Evans d/b/a/ Evans Sheetmetal, Ronald E. Evans, Inc. t/a Evans Sheet Metal, and Evans & Evans, Inc. and Local Union No. 44, Sheet Metal Workers International Association, AFL-CIO.
Case 4-CA-27272

August 1, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND COWEN

On January 7, 2000, Administrative Law Judge C. Richard Miserendino issued the attached decision. Respondent Evans & Evans, Inc. filed exceptions and a supporting brief.¹ The General Counsel and Charging Party each filed an answering 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,² and conclusions³ as modified and to adopt the judge's recommended Order as modified and set forth in full below.⁴

1. The General Counsel alleged that the Respondents violated Section 8(a)(5) and (1) of the Act by failing to adhere, since June 1998, to the terms and conditions of a collective-bargaining agreement by failing to employ union members, failing to pay union wages, and failing to

¹ Aside from Evans & Evans, Inc., none of the other Respondents was represented at the Board hearing, and none but Evans & Evans, Inc. has filed exceptions. Thus, the term "Respondent" in the singular herein will designate Evans & Evans, Inc. (E&E, Inc.).

² There are no exceptions to the judge's finding, in sec. II.C.1 of his decision, that the charge was timely filed pursuant to Sec. 10(b) of the Act, or to the judge's finding, in sec. II.C.2.b of his decision, that certain of the Respondents are collaterally estopped from relitigating their alter ego status. There are also no exceptions to the judge's omission from his conclusions of law and recommended Order of any reference to Respondent Barbara Ann Evans d/b/a Evans Sheetmetal.

³ We shall modify the judge's conclusions of law to correct inadvertent errors. Specifically, in Conclusions of Law 1 and 3, the judge refers to "Evans Sheet Metal" and "Ronald E. Evans, Inc." as distinct entities. Elsewhere in his decision, however, the judge uses "Evans Sheet Metal" interchangeably with "Ronald E. Evans, Inc." to designate the same entity. In context, it is evident that when the judge refers to "Evans Sheet Metal" in his Conclusions of Law, he means to designate the sole proprietorship Ronald E. Evans d/b/a Evans Sheet Metal. We shall also modify the judge's Conclusions of Law accordingly.

⁴ The same confusion of party names in the judge's conclusions of law (see supra fn. 3) also appears in his recommended Order. We shall modify the judge's recommended Order to correct this inadvertent error, as well as to improve readability and eliminate redundancy. We shall also modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001), and we shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

make payments into union benefit funds. The Respondent countered that the collective-bargaining agreement upon which these alleged violations were predicated had terminated in 1993. The judge rejected the Respondent's defense on two independent grounds. First, the judge found that the Respondent was collaterally estopped from relitigating the continuing existence of the agreement by the judgment of the United States District Court for the Middle District of Pennsylvania in *Local Union #44 Sheet Metal Workers v. Evans Sheet Metal*, No. 4:CV-96-1931 (1999). Second, the judge found on the merits that the agreement continued in existence. The Respondent accepts, challenging both bases for the judge's finding of contract existence. For the reasons set forth below, we affirm the judge's merits finding. Accordingly, we find it unnecessary to pass on the judge's discussion and application of the collateral-estoppel doctrine to resolve the contract-existence issue.⁵

Evans Sheet Metal (Evans) and Local Union No. 44, Sheet Metal Workers International Association, AFL-CIO (the Union) are parties to a collective-bargaining agreement (the CBA), a copy of which was entered into evidence as General Counsel's Exhibit 3. The CBA was signed on behalf of Evans and the Union on May 24, 1990.⁶ For present purposes, the most important provision of the CBA is article XIII, section 1, which states as follows:

This Agreement and Addenda Numbers 1 through 2 attached hereto shall become effective on the 1st day of May, 1990, and remain in full force and effect until the 30th day of April, 1993, and shall continue in force from year to year thereafter unless written notice of reopening is given not less than ninety (90) days prior to the expiration date. In the event such notice of reopening is served, this Agreement shall continue in force and effect until conferences relating thereto have been terminated by either party by written notice, provided, however, that, if this Agreement contains Article X, Section 8, it shall continue in full force and effect until modified by order of the National Joint Adjustment

⁵ Our dissenting colleague faults us for not passing on the issue of collateral estoppel. We disagree with the criticism. As noted, we find, on the merits, that Respondent was bound to the contract at issue. It is therefore unnecessary to decide whether Respondent is collaterally estopped from raising that issue. For, even if Respondent is not collaterally estopped from raising the merits, it does not prevail on the merits. Further, by expressly saying that we do not reach the issue of collateral estoppel, we obviously are not, by implication or otherwise, resolving that issue.

⁶ Shortly after the contract was signed, the Union allegedly notified Evans that the contract was null and void. However, inasmuch as this notice was not written, it did not terminate the contract.

Board or until the procedures under Article X, Section 8 have been otherwise completed.

The CBA also contains article X, section 8, which sets forth mediation and arbitration procedures to be utilized in the event the parties' reopener-related conferences fail to result in "a renewal of this Agreement."⁷ Finally, the CBA also contains, inter alia, a union-security clause and provisions requiring employer contributions to several union funds.

Article X, section 2 of the CBA provides for the resolution of grievances by a local joint adjustment board. In July 1996, a local joint adjustment board found that Evans had violated the CBA by employing nonunion personnel to perform work covered by the CBA. As a remedy, the local board ordered Evans to make a monetary payment into a union fund. When Evans failed to comply, the Union and the trustee of the fund sued to enforce the award in Federal district court. In the district court action, Evans contended that the CBA had ceased to exist because an agent of the Union had advised Evans shortly after execution that the CBA was null and void. The district court rejected Evans' argument, finding that even if what Evans claimed it was *told* by an agent of the Union were true, that oral statement failed to cancel the CBA because article XIII, section 1 provides for contract termination only through *written* notice. Based on a joint stipulation of the parties, the district court also found that Evans had never reopened the CBA.

Several months later, at the Board hearing in this matter, further evidence related to article XIII, section 1 was introduced. According to Union Business Manager Matt Franckowiak, in 1993 the Union sent a written notice of reopening to its signatory contractors, including Evans, for the purpose of renegotiating wages and benefits. Franckowiak also testified that after the Union sends out notices of reopening, it invites independents to contact the Union regarding negotiations. After sending the 1993 reopener notice, the Union negotiated wage and benefit increases with the Sheet Metal Contractors Association of N.E. Pennsylvania, Inc. (the Association). Evans was not a member of the Association, and there is no evidence that Evans and the Union ever engaged in "conferences" relating to the Union's reopener notice as contemplated by article XIII, section 1. However, Evans continued to comply with the CBA by accepting em-

ployee referrals from the Union after 1993, and by making payments to union benefit funds until 1996.

The judge found that Evans took no action to reopen the contract in accordance with the provisions of article XIII, section 1. The Respondent does not except to this finding. The judge additionally found, in section II,B,1 of his decision, that "[t]he Union sought to reopen the contract, but failed to comply with the explicit contractual requirements to reopen or terminate the agreement." Specifically, the judge pointed out "that there were no negotiations between the parties to the contract and that neither party to the collective-bargaining agreement complied with the contract's explicit notice requirements for proper termination of the agreement." Accordingly, the judge ultimately found that the CBA continued in full force and effect.

Excepting, the Respondent contends the written notice of reopening that the Union sent Evans in 1993 terminated the CBA in accordance with article XIII, section 1. The Respondent's argument is that, pursuant to article XIII, section 1, the CBA continued in force from year to year *unless* written notice of reopening was given; written notice of reopening was given; therefore, the CBA terminated. We disagree.

Initially, we recognize that the judge erred insofar as he found that the Union's reopener notice failed to comply with the contractual requirements for *reopening* the CBA. Franckowiak's undisputed testimony, which the judge did not discredit, was that the Union provided a timely written reopener notice. Article XIII, section 1 requires nothing further to effect reopening. The question remains, however, whether the Union's reopener notice *terminated* the CBA. Although we agree with the judge that it did not, it is necessary to interpret article XIII, section 1 to show why that is so.⁸

In interpreting article XIII, section 1, the parties' actual intent underlying the provision is paramount. To determine that intent, we look to the language of article XIII, section 1 and to relevant extrinsic evidence, such as the conduct of the parties in relation to that provision. See *Mining Specialists*, 314 NLRB at 268-269.

Construing the language of article XIII, section 1 as a whole, we find that the CBA continued beyond April 30, 1993, notwithstanding the Union's reopener notice. The first sentence of this provision states that the CBA shall "remain in full force and effect until the 30th day of April, 1993, and shall continue in force from year to year thereafter unless written notice of reopening is given not

⁷ Although the parties do not rely on art. X, sec. 8, our colleague does so rely. That reliance is misplaced, and his interpretation of art. XIII, sec. 1 as it relates to art. X, sec. 8 is incorrect. Art. XIII, sec. 1 provides that the contract continues during art. X, sec. 8 proceedings even after negotiations have been terminated. It is thus another way of keeping the contract alive after negotiations are over. Surely, it is not a means of terminating a contract prior to negotiations.

⁸ It is well settled that the Board has the authority to interpret collective-bargaining agreements in the course of deciding unfair labor practice cases. *Mining Specialists*, 314 NLRB 268 fn. 5 (1994), and cases cited therein.

less than ninety (90) days prior to the expiration date.” The second sentence, however, expressly states, “In the event such notice of reopening is served, *this Agreement shall continue in force and effect until conferences relating thereto have been terminated by either party by written notice*” (emphasis added). Reading these sentences together, we cannot accept the Respondent’s argument that the parties intended the mere service of a reopener notice to terminate the CBA altogether. Rather, we find that the parties plainly intended the service of a reopener notice to end only the automatic renewal of the CBA in 1-year increments, while ensuring the continuation of the CBA “until conferences relating [to the reopener notice] have been terminated . . . by written notice.”

Here, there is no dispute that the Union sent Evans a timely written reopener notice. While, as the judge found, there is no evidence that the parties held the conferences contemplated by article XIII, section 1, there is also no dispute that neither party complied with the further notice requirement necessary to terminate the CBA. By the terms of article XIII, section 1, then, the CBA continued in effect.

The Respondent’s argument that the reopener notice sufficed to terminate the CBA fails because it would require us to focus exclusively on the first sentence of article XIII, section 1, and the Board does not consider in isolation clauses that were written to operate together. See *Sheet Metal Workers Local 91 (Schebler Co.)*, 305 NLRB 1055, 1056 (1991). Thus, even if sentence one, read in isolation, could be read to imply that a written notice of reopening terminates the CBA, the second sentence negates that implication by expressly providing for a continuation of the contract, notwithstanding that notice, until conferences relating to the notice have ended.

Notwithstanding this clear contractual language, our dissenting colleague says that because “conferences” between Evans and the Union never even began, the CBA expired. We disagree.

The language of article XIII, section 1 demonstrates that the parties intended that the notice of reopening would serve as the first step toward the negotiation of a new contract and not that the notice would serve to terminate the agreement, which would instead continue in effect until the negotiations ended. Our holding here—that the notice itself did not serve to terminate the agreement, even if the contemplated negotiations never commenced—is consistent with ordinary industrial practice, which guides our understanding of the parties’ intent. Parties typically allow time for bargaining upon the imminent expiration of a contract—and, indeed, they are required by law to do so. At the same time, it is common for parties to provide for certainty and stability in the

workplace by agreeing that, during the period for negotiations, the existing agreement will remain in effect. And that is what the parties here explicitly agreed to do. In contrast, without clear evidence, there is no reason to conclude that the parties would intend for the contract to terminate before negotiations for a new contract even begin, simply because they desire to begin negotiations. The old agreement need not be terminated in order to negotiate a new contract, and continuing the old agreement in the interim period serves important interests.

Evans’ post-1993 conduct confirms our finding that the CBA continued in force after the reopener notice was given. Under the CBA, employers are required to contribute to various union funds. Until at least 1996, Evans continued to make contributions to the union funds. The CBA also requires employers to hire individuals referred by the Union from its hiring hall. Evans continued to accept employee referrals from the Union beyond 1993. Thus, Evans’ conduct was consistent with the continued existence of the CBA.⁹

Accordingly, we find that the CBA continued in force and effect, and we affirm the judge’s finding of a violation of Section 8(a)(5) and (1).¹⁰

2. E&E, Inc. excepts to the judge’s finding that it is the alter ego of Ronald E. Evans d/b/a Evans Sheet Metal and Ronald E. Evans, Inc. For the reasons stated by the judge, we affirm his finding in this regard. E&E, Inc. also excepts to the judge’s findings of fact, conclusions of law, and recommended Order insofar as they are directed at Evans and Evans (E&E), the unincorporated entity. We affirm and adopt the judge’s findings of fact, conclusions of law, and recommended Order in this regard for the reasons stated below.

E&E, Inc. argues that E&E’s liability has not been litigated because E&E was not named as a party in the General Counsel’s complaint, and the complaint was never amended to add E&E as a party. Thus, E&E, Inc. contends that to impose liability on E&E for any unfair labor practice violates due process. Contrary to E&E, Inc., however, E&E’s liability was both alleged and litigated.

⁹ Our dissenting colleague’s observation that Evans might have continued complying with the CBA because of a “mistaken” belief that the CBA continued in force begs the very question at issue here—i.e., whether the CBA continued in force. And his speculation that Evans’ ongoing payments to the Union funds might have been prompted by fear of provoking the Union or by a belief that such payments were required so long as it employed Union members is just that—speculation. The record contains no evidence of such a motivation.

¹⁰ The Respondent contends that it was free to repudiate its bargaining relationship with the Union “following the expiration of the [CBA] in 1993” because its 8(f) bargaining relationship never lawfully converted to recognition of the Union under Sec. 9(a). Having found, contrary to the Respondent, that the CBA did not expire in 1993, we do not reach the 8(f) issue raised by the Respondent.

Paragraph 2(g) of the complaint alleges that E&E, Inc. was established as a disguised continuance of the other named Respondents “[i]n or about June 1998.” That date is significant because the record shows that although E&E existed in June 1998, E&E, Inc. did not. E&E, Inc. was not incorporated until February 1999. However, E&E came into existence in November 1997. Thus, although E&E was not formally named as a party, complaint paragraph 2(g) implicitly alleges its alter ego status. Furthermore, E&E, Inc. chose not to answer the allegations in paragraph 2(g) by denying that E&E, Inc. existed in or about June 1998. On the contrary, E&E, Inc. litigated those allegations on their merits without regard to the distinction it now belatedly insists on between E&E and E&E, Inc.

The Board has long held that an unnamed alter ego of a named respondent may be held derivatively liable to remedy the respondent’s unfair labor practices. *Coast Delivery Service*, 198 NLRB 1026, 1027 (1972); *Southeastern Envelope Co.*, 246 NLRB 423 (1979). Before derivative liability may be imposed, however, fair notice of and full opportunity to litigate the alleged alter ego status of the unnamed entity must be furnished. *Southeastern Envelope*, 246 NLRB at 424. Typically, the requisite notice and opportunity to litigate are furnished at the compliance stage. However, the Board’s precedent does not preclude full and fair litigation of derivative liability before compliance, *George C. Shearer Exhibitors*, 246 NLRB 416 fn. 3 (1979), *enfd.* 636 F.2d 1210 (3d Cir. 1980), and E&E’s liability has been fully and fairly litigated here. As stated above, E&E’s alter ego status was implicitly alleged in the complaint, and issue was joined over the merits of that allegation at the hearing. Accordingly, we reject E&E, Inc.’s claim of a due-process violation.¹¹

AMENDED CONCLUSIONS OF LAW

In Conclusions of Law 1, 3, and 4, delete “Evans Sheet Metal” and replace with “Ronald E. Evans d/b/a Evans Sheet Metal.”

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that Respondents Ronald E. Evans d/b/a Evans Sheet Metal, Ronald E. Evans, Inc. t/a Evans Sheet Metal, Evans and Evans, and Evans & Evans, Inc., Scranton, Pennsylvania and Throop, Pennsylvania, its officers, agents, successors, and assigns, shall

¹¹ Chairman Hurtgen finds that the record establishes that both E&E and E&E, Inc. were established to avoid the contract between Evans and the Union. In light of this and the other elements of alter ego status, he concludes that E&E and E&E, Inc. are alter egos of Evans.

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local Union No. 44, Sheet Metal Workers International Association, AFL–CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

All employees employed by Respondents and engaged in (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing, and servicing of all ferrous or nonferrous metal work and all other materials used in lieu thereof and of all air-veyor systems and all air-handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over insulation and all duct lining; (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; and (e) all other work included in the jurisdictional claims of Sheet Metal Workers International Association, excluding guards and supervisors as defined in the Act.

(b) Failing to adhere to the terms and conditions of the collective-bargaining agreement with the Union effective May 1, 1990 by, among other things, failing to employ union members, failing to pay union wages, and failing to make required union benefit fund payments.

(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) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above unit.

(b) On request, reinstate and abide by the terms and conditions of employment in the collective-bargaining agreement with the Union effective May 1, 1990.

(c) Make the contractually required payments to the union benefit funds that were unlawfully withheld since June 1998, make whole the unit employees for any losses they may have suffered as a result of the failure to make such payments, and for any other losses they may have suffered as a result of the failure to adhere to the terms and conditions of employment in the collective-bargaining agreement with the Union effective May 1, 1990, in the manner set forth in the remedy section of the judge’s decision.

(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 desig-

nated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Scranton and/or Throop, Pennsylvania, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondents' authorized representative, shall be posted by the Respondents 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. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed both of the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since June 11, 1998.

(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.

MEMBER COWEN, dissenting.

The Respondents are alleged to have violated Section 8(a)(5) and (1) by failing to adhere, since June 1998, to the terms and conditions of a collective-bargaining agreement (the CBA). Respondent Evans & Evans, Inc. contended that the CBA terminated in 1993. The judge rejected this contention and found the 8(a)(5) violation on two grounds. First, based on a prior court judgment, he found that collateral estoppel precluded relitigation of the existence of the CBA. Second, reaching the merits, the judge found that the CBA continues in force. My colleagues affirm the violation on the merits ground, and decline to pass on the judge's collateral estoppel finding. I would apply collateral estoppel and not reach the merits.

I do not join my colleagues' refusal to pass on the judge's application of collateral estoppel. Under extant Board law, court judgments are not given collateral-estoppel effect in Board proceedings. See *Field Bridge*

Associates, 306 NLRB 322 (1992), *enfd.* 982 F.2d 845 (2d Cir. 1993). Ignoring *Field Bridge*, the judge gave collateral-estoppel effect to a court judgment. We should address this error, either by reversing the judge or overruling *Field Bridge*. To decline to reach the error is inconsistent with the Board's responsibility as the final agency authority on matters of Board law. Furthermore, contrary to my colleagues, it is necessary to pass on collateral estoppel. We cannot sidestep the issue and proceed to the merits because to reach the merits is to permit relitigation, and to permit relitigation is to reject collateral estoppel.

In *Field Bridge Associates*, the Board all but banned the application of collateral estoppel in Board proceedings.¹ *Field Bridge* stated a "general rule" barring the application of collateral estoppel against the General Counsel. As explained below, however, the holding of *Field Bridge* is broader than its stated "general rule," prohibiting the application of collateral estoppel against respondents and the General Counsel alike. The *Field Bridge* holding is understandable, but overbroad. It is understandable because the Board does possess primary jurisdiction of the Act. It is overbroad, however, because court findings sought to be given issue-preclusive effect in Board proceedings frequently fall outside the scope of the Board's primary jurisdiction.

To redress the overbreadth of the *Field Bridge* rule, I would overrule *Field Bridge* for the reasons stated below in part I and establish the following framework for applying collateral estoppel in Board proceedings. In any case where a party asserts collateral estoppel based on a prior court judgment, the Board should first determine whether the previously decided issue falls within its primary jurisdiction. If it does, the Board is entitled to redecide that issue in the exercise of its primary jurisdiction. If it does not, the Board should determine whether collateral estoppel applies under settled issue preclusion doctrine. Applying this more tailored approach here, I would affirm the judge's finding that Respondent Evans & Evans, Inc. is collaterally estopped from relitigating the existence of the CBA. However, since my colleagues will not join me in this approach, I also find on the merits, for the reasons set forth below in part II, that the CBA terminated on April 30, 1993. Accordingly, I would dismiss the complaint.²

¹ Here and throughout this dissent, I refer to the application of collateral estoppel where the preclusive effect arises from an earlier court decision. There is no controversy over giving collateral-estoppel effect to prior Board decisions. See, e.g., *Fayette Electrical Cooperative*, 316 NLRB 1118 (1995).

² Because I would dismiss the complaint, I find it unnecessary to decide whether Evans & Evans, Inc. is the alter ego of Ronald E. Evans d/b/a Evans Sheet Metal and Ronald E. Evans, Inc. For the same rea-

¹² 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."

I. COLLATERAL ESTOPPEL

A. Purpose and Substance of Collateral Estoppel

Collateral estoppel “is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction.” *Montana v. U.S.*, 440 U.S. 147, 153 (1979). The application of collateral estoppel protects against “the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Id.* at 154.

The doctrine itself requires that “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Id.* at 153. The elements of collateral estoppel have been parsed as follows:

1. the determination . . . must be over an issue which was actually litigated in the first forum;
2. that determination must result in a valid and final judgment;
3. the determination must be essential to the judgment which is rendered by, and in, the first forum;
4. the issue before the second forum must be the same as the one in the first forum; and
5. the parties in the second action must be the same as those in the first.

NLRB v. Donna-Lee Sportswear Co., 836 F.2d 31, 34 (1st Cir. 1987).

The last of these five elements—the “same parties” requirement—must be qualified in two respects. First, the issue-preclusive effect of a prior determination applies not just to parties, but also to their privies—“privity” signifying merely that the “relationship between [the] two . . . is sufficiently close so as to bind them both to an initial determination, at which only one of them was present.” *Id.* at 34–35.

Second, although the party against whom the estoppel is asserted must have been a party (or in privity with a party) to the prior action, the party asserting collateral estoppel—whether as a shield or a sword—need not have been. In other words, collateral estoppel may be asserted nonmutually, both defensively, see, e.g., *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313 (1971), and offensively, see, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), except that nonmutual collateral estoppel may not be asserted *offen-*

sively against the United States Government, *U.S. v. Mendoza*, 464 U.S. 154 (1984). It should be noted, however, that *Mendoza* poses no barrier to asserting collateral estoppel against the General Counsel. Because the General Counsel is always the prosecuting party before the Board, any attempt by a respondent to collaterally estop the General Counsel is necessarily *defensive*.

In Board proceedings, collateral estoppel may be asserted in two ways. First, as in the instant case, the General Counsel may seek to preclude a respondent from relitigating an issue on which the charging party prevailed in a prior litigation. For brevity’s sake, I will refer to this scenario as “respondent preclusion.” Respondent preclusion presents an instance of nonmutual collateral estoppel because the party asserting preclusion, the General Counsel, was not a party to the prior litigation. However, respondent preclusion typically does not require a finding of privity because the respondent usually will have been a party to the prior action.³ Second, a respondent may seek to preclude the General Counsel from litigating an issue on which the respondent prevailed in a prior litigation with the charging party. I will refer to this scenario as “GC preclusion.” Because the General Counsel typically will not have been a party to the earlier litigation, GC preclusion usually requires a finding that the General Counsel is in privity with the charging party.

B. The Board’s Approach to Collateral Estoppel

In the majority of collateral estoppel cases decided before *Field Bridge Associates* in 1992, the Board applied black-letter preclusion doctrine, cutting off relitigation where the elements of the doctrine were met, or (more frequently) denying preclusion because they were not. See *Joint Council of Teamsters No. 42*, 248 NLRB 808 (1980)⁴ (precluding respondent unions from relitigating whether dump truck owner-operators are employees or independent contractors); *Sabine Towing & Transportation Co.*, 263 NLRB 114 (1982) (precluding the General Counsel from relitigating whether respondent unlawfully refused nonemployee union organizers access to its employees); *Newport News Shipbuilding & Dry Dock Co.*, 253 NLRB 721 (1980)⁵ (finding no General Counsel preclusion because the issue decided by the federal court

³ The instant case happens to be atypical in this regard. Respondent Evans & Evans, Inc. was not a defendant in the federal district court action. Thus, before Evans & Evans, Inc. may be found collaterally estopped by the district court’s judgment, it must be determined, *inter alia*, that Evans & Evans, Inc. was in privity with a defendant in the district court action.

⁴ Enfd. 702 F.2d 168 (9th Cir. 1981), cert. denied 464 U.S. 827 (1983).

⁵ Enfd. 663 F.2d 488 (4th Cir. 1981).

son, I also find it unnecessary to pass on the merits of Evans & Evans, Inc.’s due process argument concerning Evans and Evans, the unincorporated entity.

differed from the issue before the Board); *Penntech Papers, Inc.*, 263 NLRB 264 (1982)⁶ (same); *Raymond Prats Sheet Metal Co.*, 285 NLRB 194 (1987) (same); *Big D Service Co.*, 293 NLRB 322 (1989) (finding no respondent preclusion because “alter ego” issue raised in Board proceeding was not decided in prior court action).

Intermixed with the foregoing decisions, however, were others in which the Board refused to apply collateral estoppel even though the elements of the doctrine were satisfied. Most notable among these were *Stanwood Thriftmart*, 216 NLRB 852 (1975), and *Donna-Lee Sportswear*, 281 NLRB 719 (1986). Both involved General Counsel preclusion, and in each the alleged violations were based on the existence of a contract that a court had found did *not* exist.⁷ The Board presented two different reasons for rejecting issue preclusion in these two cases. In *Stanwood Thriftmart*, the Board relied on a jurisdictional rationale, stating that “the sole issue . . . is whether Respondent’s conduct was unlawful under Section 8(a)(5) of the Act, and only the Board, initially, has the jurisdiction to make that determination.” 216 NLRB at 853. In *Donna-Lee Sportswear*, the Board relied on the fact that it had not been a party to the prior court action. 281 NLRB at 719 fn. 2. Denying enforcement, the courts held that the Board erred in failing to apply collateral estoppel. See *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976); *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31 (1st Cir. 1987).

In a third pre-*Field Bridge* decision, the Board invoked both jurisdictional and nonparty grounds for rejecting collateral estoppel. See *Allbritton Communications*, 271 NLRB 201 (1984).⁸ Alluding to the jurisdictional rationale, the *Allbritton* Board questioned whether “the Board may be precluded from *deciding* an issue previously decided in a private action brought under Sec. 301 of the Act.” *Id.* at 202 fn. 4 (emphasis added). Next, however, the Board formulated a “general rule” against General Counsel preclusion resting squarely on the nonparty rationale: “The general rule is that the Government, not having been a party to the prior litigation, is not barred from litigating an issue involving enforcement of Federal

⁶ Enfd. 706 F.2d 18 (1st Cir. 1983), cert. denied 464 U.S. 892 (1983).

⁷ To be precise, in *Donna-Lee Sportswear* the federal district court found the nonexistence of the contract, whereas in *Stanwood Thriftmart* the district court rescinded the contract.

⁸ Enfd. 766 F.2d 812 (3d Cir. 1985), cert. denied 474 U.S. 1081 (1986), overruled on other grounds by *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499 (1993).

law which a private plaintiff has litigated unsuccessfully.”⁹ *Ibid.*

In 1992, the Board issued its leading case on collateral estoppel, *Field Bridge Associates*. 306 NLRB at 322. Between the jurisdictional and nonparty grounds for rejecting collateral estoppel, *Field Bridge* appears to rely chiefly on the latter, but in actuality gives primacy to the former. Citing *Allbritton*, *Field Bridge* reiterates the “general rule,” which relies on the nonparty rationale:

The Board adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully.

306 NLRB at 322. However, the nonparty rationale did not apply in *Field Bridge* because it was not a General Counsel preclusion case. It was a respondent preclusion case, and the respondent *had* been a party to the earlier court action. As explained more fully below, however, the *Field Bridge* Board was unconcerned with the distinction between the General Counsel and respondent preclusion because its main concern was to safeguard the Board’s jurisdiction—i.e., its power to redecide issues previously decided by a court. If collateral estoppel applies against either respondents or the General Counsel, the Board’s jurisdiction would be circumscribed. To block relitigation of an issue *before* the Board is to prevent decision of that issue *by* the Board, regardless of which party is precluded. Accordingly, to protect its decisional freedom, the *Field Bridge* Board prohibited the application of collateral estoppel against respondents and the General Counsel alike—with one possible exception. Distinguishing the First Circuit’s decision in *Donna-Lee Sportswear*, the *Field Bridge* Board left open the possibility that collateral estoppel might apply in cases where “the existence of a contract . . . [is] the essence of the unfair labor practice charge.” *Id.* at 323 fn. 2.¹⁰

⁹ In enforcing the Board in *Allbritton*, the Third Circuit did not comment on the Board’s discussion therein of a “general rule” against General Counsel preclusion.

¹⁰ *Field Bridge* distinguished *Donna-Lee* more narrowly than the formula quoted above indicates. After leaving open the possibility of General Counsel preclusion in a case where “the existence of a contract . . . [is] the essence of the unfair labor practice charge,” 306 NLRB at 323 fn. 2, *Field Bridge* then states that it would not apply General Counsel preclusion where the contract issue decided by the court was a threshold issue, beyond which lies one or more 8(a)(3) allegations: “Where, as here, the contract issue has implications concerning the nature of a strike and the provisions of Sec. 8(a)(3) of the Act, we believe that the Board should not be bound by a state court resolution of that contract issue.” *Id.* In other words, under footnote 2 of *Field Bridge* the Board could still reject collateral estoppel where a finding contrary to the court’s on the contract-existence issue would enable the Board to reach other unfair labor practice allegations. Apparently the “essence” of such unfair labor practices would not be the existence of a

Since *Field Bridge* was decided in 1992, the Board has relied on *Field Bridge* to reject General Counsel preclusion in three cases. See *Hospitality Care Center*, 314 NLRB 893 fn. 1 (1994); *Precision Industries*, 320 NLRB 661, 663 (1996);¹¹ *Thalbo Corp.*, 323 NLRB 630, 634 (1997).¹² In *Precision Industries*, the Board again distinguished the First Circuit's decision in *Donna-Lee Sportswear*, and also the Ninth Circuit's in *Heyman*, as instances where "the issue in the unfair labor practice case—the existence, vel non, of a contract—was the same as the one that had been decided in the court proceeding." 320 NLRB at 663 fn. 13.¹³

Hospitality Care Center, *Precision Industries*, and *Thalbo* each involved a General Counsel preclusion scenario. By contrast, one post-*Field Bridge* case involved respondent preclusion. In *Best Roofing Co.*, 311 NLRB 224 (1993), the Board had to decide whether to pierce the corporate veil and hold the individual respondents personally liable for financial obligations of the respondent corporations. That issue had been decided adversely to the individual respondents in a prior court action, and the General Counsel sought to preclude them from relitigating the issue before the Board. With no explanation, the Board "decline[d] to afford collateral estoppel effect" to the district court's decision. 311 NLRB at 224. However, "for reasons of judicial economy," the Board stated that it would "defer to the district court's findings of fact." *Ibid.*¹⁴

contract, despite the fact that the court's finding of "no contract" would logically entail the noncommission of those unfair labor practices.

¹¹ Enfd. 118 F.3d 585 (8th Cir. 1997), cert. denied 523 U.S. 1020 (1998). In enforcing the Board's order in *Precision Industries*, the Eighth Circuit applied the rules of res judicata (claim preclusion) rather than collateral estoppel (issue preclusion). The court said nothing about the Board's stated "general rule" against General Counsel preclusion.

¹² Enfd. 171 F.3d 102 (2d Cir. 1999). In enforcing the Board's Order in *Thalbo*, the Second Circuit found collateral estoppel inapplicable "without adopting so broad a rule" as the Board's stated rule against General Counsel preclusion. *Id.* at 109.

¹³ In applying collateral estoppel in the instant case, the judge relied on another post-*Field Bridge* decision, *Tri-County Roofing, Inc.*, 311 NLRB 1368 (1993). Contrary to the judge, the Board did not apply collateral estoppel in *Tri-County Roofing*. Although the administrative law judge in that case relied on factual findings made by United States District Court Judge Louis Bechtel in a related prior RICO action, he appears to have used those findings merely as background for the Board proceeding. Moreover, the Board in *Tri-County* backed away from the judge's invocation of collateral estoppel: "We find that the RICO case and the decision of Judge Louis Bechtel do not preclude our decision here but in fact bolster the need for our Order and notice." 311 NLRB at 1368 fn.1.

¹⁴ In deferring to the court's factual findings, the *Best Roofing* Board relied in part on the fact that the respondents did not seek to relitigate those findings. 311 NLRB at 224–225. This makes clear that *Best Roofing* did not merely decline to apply collateral estoppel in some discretionary sense, but in fact rejected it. If the *Best Roofing* Board

Although *Best Roofing* does not cite *Field Bridge* or *Allbritton*, the Board's refusal to apply respondent preclusion in *Best Roofing* is entirely consistent with those decisions. First, notwithstanding its stated rule against GC preclusion, *Field Bridge* actually held against respondent preclusion because it was a respondent preclusion case. Furthermore, to the extent the estoppel issue is understood as the Board framed it in *Allbritton*—i.e., in terms of the Board being prevented from *deciding* an issue—respondent preclusion would be just as limiting to the Board's decisional freedom as General Counsel preclusion.

C. Analysis

Critically evaluating the Board's position on collateral estoppel means coming to grips with *Field Bridge*. As I have already pointed out, *Field Bridge* begins by stating a rule that, as worded, appears to prohibit only General Counsel preclusion. As the analysis in that decision unfolds, however, it becomes evident that the actual rule of *Field Bridge* is far broader. The actual rule of *Field Bridge* is that the Board—as judge, not as litigant—cannot be prevented from *redeciding* issues previously decided by a court. The Board's position on collateral estoppel flows from this rule: to protect the Board's decisional freedom, *Field Bridge* prohibits the application of collateral estoppel against the General Counsel and respondents alike. That said, however, the reasons *Field Bridge* advances are presented as reasons for a rule against General Counsel preclusion, and some of them support *only* that rule. For analytical purposes, therefore, it will be necessary at times to refer to the "stated rule" or the "stated rule against GC preclusion," even though the actual rule of *Field Bridge* is the broader rule set forth above.

Preliminarily, it should be pointed out that collateral estoppel would have been inapplicable in *Field Bridge* in any event under black-letter preclusion doctrine. Collateral estoppel requires, inter alia, identity of issues, and the issue before the Board differed from the one decided by the court. The court found that respondent had assumed *part* of the contract, whereas the Board had to decide whether the *whole* contract had been assumed.

would not have even deferred to the court's findings had the respondents attempted to relitigate them, then a fortiori it would not have collaterally estopped an actual attempt at relitigation. Thus, I would also overrule *Best Roofing* with respect to its collateral estoppel holding. In doing so, however, I would leave open the possibility of a *Best Roofing*-type adoption of judicial findings of fact in appropriate cases for the sake of achieving administrative efficiencies. Where the Board redecides an issue on primary jurisdiction grounds, it is asserting its right "to say what the law is" with respect to the Act. In some such cases, it might be a waste of the Board's resources to relitigate the facts.

Service Employees Local 32B–32J v. NLRB, 982 F.2d 845, 849 (2d Cir. 1993). In addition, under a well-settled exception to the doctrine, collateral estoppel may be inappropriate where the second forum must decide an issue under a different evidentiary standard than was applied by the first forum. See 18 Charles Alan Wright, et al., *Federal Practice & Procedure* § 4422 at 209 et seq. (1981). The issue in *Field Bridge* was contract assumption, which must be proved in Board proceedings by clear and convincing evidence. *Field Bridge*, 306 NLRB at 323. Thus, even if identity of issues were satisfied, a state court finding of contract assumption under a less demanding standard of proof would not preclude the respondent from relitigating that issue under the Board’s higher standard.

Field Bridge presents four reasons for the stated rule against General Counsel preclusion:

1. applying GC preclusion would interfere with the Board’s exclusive jurisdiction over unfair labor practices;
2. the Board was not a party to the earlier litigation;
3. the Government ought not be precluded by private litigation from litigating an issue involving the enforcement of federal law; and
4. several federal courts of appeal agree with the stated rule.

1. *Field Bridge* reason #1: The “Jurisdiction Guarding” rationale

The most important reason *Field Bridge* relied on for the stated rule against General Counsel preclusion is that such a rule is necessary to safeguard the Board’s jurisdiction. Indeed, *Field Bridge* presents this “jurisdiction guarding” rationale as the foundation “[u]nderlying” the stated rule itself. 306 NLRB at 322.

Taken at face value—as a reason for rejecting General Counsel preclusion specifically, and not collateral estoppel generally—this rationale is puzzling. Since respondent preclusion holds just as much potential for interfering with the Board’s jurisdiction as General Counsel preclusion, it is unclear why this rationale should be urged in defense of a rule against precluding litigation specifically by “the Government.” The mystery dissipates, however, once it is grasped that the *Field Bridge* Board understood the collateral-estoppel issue as it had been framed in *Allbritton*—i.e., as whether “the Board may be precluded from *deciding* an issue previously decided in a private action.” 271 NLRB at 202 fn. 4 (emphasis added). This is a strange way of putting it. Collateral estoppel precludes litigants from relitigating an issue, not courts (or quasi-judicial entities such as the Board) from redeciding it. It goes without saying, of course, that

when a litigant is precluded from relitigating an issue in a second forum, that second forum is necessarily prevented (not “precluded” or “estopped,” simply prevented) from deciding that issue in that case. But that has never been considered a legitimate reason for refusing to apply collateral estoppel. Indeed, if it were, the doctrine would become entirely superfluous. There would be no point in ascertaining whether the parties had a full and fair opportunity to litigate a given issue in the first forum, if the real question is whether the second forum has had an opportunity to *decide* that issue. Obviously, the second forum will never have had that opportunity. Thus, to frame the collateral estoppel question as the Board did in *Allbritton* and *Field Bridge* is to reject the doctrine in advance of further analysis.

Under the “jurisdiction guarding” rationale, it does not matter whom the estoppel is asserted against because either way, the Board’s decisional freedom would be limited. Thus, the “jurisdiction guarding” rationale requires the rejection of both the General Counsel and respondent preclusion. The question, then, becomes whether the nature of the Board’s jurisdiction justifies this result.

In support of its affirmative answer to that question, *Field Bridge* quotes from *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940), and Section 10(a) of the Act, and cites *National Licorice Co. v. NLRB*, 309 U.S. 350, 362–364 (1940). Taking the last source first, in the cited pages from *National Licorice* the Supreme Court held that the respondent’s employees were not indispensable parties to a Board proceeding. In so holding, the Court stated that there was little need in Board proceedings for rules governing party joinder. 309 U.S. at 363. The *National Licorice* Court had nothing to say concerning the need in Board proceedings for rules governing collateral estoppel.

The language *Field Bridge* quotes from *Amalgamated Utility Workers* speaks of the Board’s exclusive jurisdiction to deal with unfair labor practices. However, *Amalgamated Utility Workers* was decided in 1940—7 years before Congress enacted Section 301. As the Supreme Court has long since recognized, Section 301 deprived the Board of exclusive jurisdiction over unfair labor practices: “The authority of the Board to deal with an unfair labor practice which also violates a collective-bargaining contract is not displaced by §301, but it is not exclusive and does not destroy the jurisdiction of the courts under §301.” *Smith v. Evening News Assn.*, 371 U.S. 195, 197 (1962).

Finally, for its “jurisdiction guarding” rationale, *Field Bridge* relies on Section 10(a) of the Act, which states in relevant part that the Board’s power to prevent unfair

labor practices “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.” Admittedly, this language, read literally and in isolation, could support an argument against the General Counsel and respondent preclusion alike. In my view, however, such a reading of Section 10(a) cannot be seriously defended in light of Section 301. To adopt such a reading, one would have to believe that in enacting Section 301, Congress intended to create an area of shared jurisdiction between the courts and the Board without also intending that the judgments of the courts, in the exercise of that jurisdiction, would be entitled to the usual preclusive effects. One would have to believe, in other words, that Congress intended to create the illusion of jurisdiction, with the finality of court judgments rendered pursuant to Section 301 routinely exposed to collateral attack in Board proceedings.

Furthermore, the legislative history of Taft-Hartley is inconsistent with the *Field Bridge* Board’s reliance on Section 10(a) to reject collateral estoppel. Congress amended Section 10(a) in 1947. Previously, Section 10(a) had stated that the Board’s power to prevent unfair labor practices “shall be exclusive, and shall not be affected by any other means of adjustment,” and so forth. The House version of Section 10(a) retained the exclusivity clause and deleted the “other means of adjustment” clause. The Senate version did just the opposite: it deleted the exclusivity clause, but retained the language providing that the Board’s power shall not be affected by other means of adjustment. The conference committee adopted the Senate’s version, explaining that the retention of the latter language “makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies.” 1 Leg. Hist. 556 (LMRA 1947). The *Field Bridge* Board’s interpretation of Section 10(a) is at odds with Congress’s intent. If Section 10(a) is read as authorizing the Board to deny court findings collateral-estoppel effect, the result would be to supplant, not to supplement, judicial remedies. Put differently, when the Board ignores the preclusive effect of a court judgment in order to assert its decisional freedom, it acts in lieu of the court, not in addition to it. This is contrary to what Congress intended. The “jurisdiction guarding” rationale also runs counter to the federal policy underlying the Full Faith and Credit Clause and its statutory counterpart, 28 U.S.C. § 1738. The Board is not unique in the fact that part of its jurisdiction is nonexclusive. Federal and state courts share concurrent jurisdiction of numerous federal laws. If the Board is justified in refusing collateral-estoppel

effect to Section 301 judgments to protect its jurisdiction, then by the same logic a federal court should be entitled to deny collateral-estoppel effect to a state court judgment on an issue of federal law. Of course, the federal courts are forbidden to do so by 28 U.S.C. § 1738. Although Section 1738 has been held not to apply to the Board, see *NLRB v. Yellow Freight Systems*, 930 F.2d 316, 319–320 (3d Cir. 1991), it expresses a Federal policy of constitutional dimensions, which the Board’s “jurisdiction guarding” rationale simply ignores.

Notwithstanding the foregoing critique, however, the “jurisdiction guarding” rationale for the Board’s rejection of collateral estoppel retains a measure of validity because the Board has primary jurisdiction of the Act. Thus, where a court applies a provision of the Act as a rule of decision as to a particular issue, the Board should be free to redecide that issue on primary jurisdiction grounds. For example, a federal court may be asked to find a collective-bargaining agreement provision prohibiting the subcontracting of work to nonsignatory employers to be in violation of the Sherman Act. To decide that issue, the court might find it necessary to decide whether the challenged provision is protected by either the garment or construction industry provisos to Section 8(e). See, e.g., *Local 210, Laborers v. Labor Relations Div. Associated General Contractors of America*, 844 F.2d 69 (2d Cir. 1988). If that latter issue subsequently were to come before the Board under circumstances that would otherwise preclude its relitigation, in my view the Board would be justified in redeciding it based on its primary jurisdiction of the Act.

2. *Field Bridge* reason #2: The “Nonparty” rationale

As explained above, the “jurisdiction guarding” rationale advanced in *Field Bridge* is not a reason solely for the stated rule against General Counsel preclusion, but rather for the general prohibition against General Counsel and respondent preclusion alike. For the reasons just given, the “jurisdiction guarding” rationale is unpersuasive. The possibility yet remains, however, that some other reason would support the stated *Field Bridge* rule. That is, one or more of the remaining rationales presented in *Field Bridge* might justify a rule against General Counsel preclusion, but not a corresponding rule against respondent preclusion. Such an asymmetric doctrine would raise troubling questions of fairness, but that is a separate matter.

The “nonparty” rationale must have been meant primarily as a reason for the stated rule against General Counsel preclusion, since the General Counsel typically will not have been a party to the prior court action, whereas the respondent typically will have been. Pre-

liminarily, however, it must be pointed out that the “non-party” rationale, although advanced in *Field Bridge*, did not apply there. The Board’s conclusion to the contrary—i.e., that the New York State court judgment should not have a preclusive effect in the Board proceeding because “the Board was not a party to the New York State court proceedings,” 306 NLRB at 323—was simply misconceived. The Board’s nonparty status in the state court action was irrelevant to the collateral estoppel analysis because the General Counsel in *Field Bridge* was the party asserting the estoppel. The party against whom the estoppel was asserted—the respondent—was a party to the state court action, and that is all that matters given that mutuality of estoppel is not required.¹⁵

In any event, the “nonparty” rationale states a logically incomplete reason to deny General Counsel preclusion because collateral-estoppel doctrine requires that the party sought to be estopped have been either a party or in privity with a party to the prior action. Thus, the “non-party” rationale must be understood as ruling out, a priori, the very possibility of finding the General Counsel in privity with the charging party in any particular case (except possibly in cases like *Donna-Lee Sportswear*, which *Field Bridge* distinguished). Such a rule runs counter to the nature of privity determinations, which depend upon the facts and circumstances of each case. See, e.g., *First Alabama Bank v. Parsons Steel, Inc.*, 747 F.2d 1367, 1378 (11th Cir. 1984) (“A finding of privity is no more than a finding that all of the facts and circumstances justify a conclusion that non-party preclusion is proper.”), revd. on other grounds 474 U.S. 518 (1986).

In *Donna-Lee*, the First Circuit found the General Counsel in privity with the charging party because, inter alia, the Board’s presence in the dispute was derivative: without a charge filed by the charging party, the Board never would have been involved. This consideration applies in all unfair labor practice cases. The First Circuit’s finding of General Counsel privity also rested on

¹⁵ In stating that the *Field Bridge* Board must have meant the “non-party” rationale as a reason for refusing to apply collateral estoppel specifically against the General Counsel, I am focusing on the language of the stated rule itself—that “if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully.” 306 NLRB at 322 (emphasis added). In this formulation, the word *Government* must refer to the General Counsel, since the Board—i.e., the quasi-judicial entity that adjudicates unfair labor practice allegations—does not litigate. However, we saw above that *Field Bridge* ignored the distinction between the General Counsel and the Board in advancing the “jurisdiction guarding” rationale; and I cannot be certain that it did not intend to do likewise with respect to the “non-party” rationale. In other words, the *Field Bridge* Board may have literally meant what at one point it said—that *the Board* may not be collaterally estopped where it was not a party to the prior litigation.

the fact that in *Donna-Lee*, the General Counsel and charging party asserted the same interests and positions. Again, this is virtually always the case in Board proceedings. The General Counsel and charging party typically assert the same interests and positions—that is, when the charging party “asserts” anything at all instead of simply allowing the General Counsel to act as its proxy. I do not contend, however, that these two considerations would necessarily mandate a finding of General Counsel privity in all cases. To do so would be to fall into the same error *Field Bridge* commits in refusing to consider the facts and circumstances of each case. However, in my view these considerations justify a presumption in favor of finding the General Counsel in privity with the charging party for issue preclusion purposes.¹⁶ Because the General Counsel will typically be in privity with the charging party, the “nonparty” rationale fails to justify the stated rule against General Counsel preclusion.

3. *Field Bridge* Reason #3: The “Public Advocate” Rationale

The “public advocate” rationale is implicit in the stated “general rule” that “the Government . . . is not barred from litigating an issue involving enforcement of Federal law” by a prior unsuccessful private lawsuit. 306 NLRB at 322. As authority for the “public advocate” rationale, *Field Bridge* cites footnote 4 from *Allbritton* and the sources cited therein. *Allbritton* footnote 4 states the “general rule” substantially as it is stated in *Field Bridge*, and cites one case: *U.S. v. East Baton Rouge Parish School Board*, 594 F.2d 56 (5th Cir. 1979). *Allbritton* also cites two treatises, but they both rely on *East Baton Rouge*.

East Baton Rouge was a Voting Rights Act case brought by the United States challenging the system under which school board members were elected to the defendant school board. Prior to the United States’ action, residents of East Baton Rouge Parish had lost a challenge to the same electoral system in a private Voting Rights Act case. The district court dismissed the Government’s case as collaterally estopped by the unsuccessful private lawsuit. The Fifth Circuit reversed, stating that

the district court’s conclusion is directly contrary to the general principle of law that the United States will not be barred from independent litigation by the failure of a private plaintiff. This principle is based primarily upon the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens.

¹⁶ I discuss such a presumption more fully below, *infra* at fn. 19.

594 F.2d at 58 (citations omitted).

Abstractly considered, the “public advocate” rationale is the most persuasive reason *Field Bridge* advances for the stated rule against General Counsel preclusion. Certainly the General Counsel’s interest in enforcing Federal labor law on behalf of the public’s interest should not be impaired by the results of private litigation. But when this rationale is examined in light of the actualities of Board litigation, it becomes apparent that the General Counsel does not need the stated rule against General Counsel preclusion to safeguard its public advocacy role.

To begin with, the General Counsel’s situation is crucially different from that of the United States in *East Baton Rouge*. The Justice Department had to deal with the potentially preclusive effects of a prior private Voting Rights Act case. The General Counsel will never confront a like situation, however, because there is no private cause of action under the NLRA. For that reason, General Counsel preclusion is rarely asserted in Board proceedings and will usually fail because the issue before the Board—an alleged violation of the Act—will not have been previously litigated and decided in court.¹⁷ The one area in which General Counsel preclusion would typically apply if *Field Bridge* were overruled would involve prior findings, in Section 301 actions, concerning the existence of a collective-bargaining agreement. In this area, however, the General Counsel has no public advocacy interest. The public does not have an interest that the General Counsel is charged with protecting merely in whether a contract exists between private parties. Once formed, collective-bargaining agreements

¹⁷ Prior to *Field Bridge*, the Board rejected General Counsel preclusion in several cases based on nonidentity of issues. See *Newport News Shipbuilding & Dry Dock Co.*, 253 NLRB at 721; *Penntech Papers, Inc.*, 263 NLRB at 264; *Raymond Prats Sheet Metal Co.*, 285 NLRB at 194. And as we have seen, in *Field Bridge* itself collateral estoppel was inapplicable under black-letter preclusion doctrine.

Furthermore, in cases decided since *Field Bridge* in which General Counsel preclusion has been rejected in reliance on that decision, collateral estoppel would not have applied even without the stated rule against General Counsel preclusion. In *Hospitality Care Center*, 314 NLRB at 893, the prior federal district court action had been settled by stipulation. When a lawsuit is settled by agreement, however, the issues thus resolved have not been actually litigated. Absent this element, collateral estoppel does not apply. See 18 *Federal Practice & Procedure* § 4443. In *Precision Industries*, 320 NLRB at 661, the “identity of issues” element was again missing. In the prior court judgment, it was determined that the respondent had not assumed a contractual duty to provide certain benefits. The issue before the Board, however, was whether the respondent had a successor’s duty “not to change terms and conditions of employment (contract or no contract) without first affording the Union an opportunity to bargain.” 320 NLRB at 663. Finally, in *Thalbo Corp.*, 323 NLRB at 630, collateral estoppel was inapplicable under general collateral-estoppel principles, as was pointed out by the court of appeals. See *NLRB v. Thalbo Corp.*, 171 F.3d 102, 109–111 (2d Cir. 1999).

give rise to a variety of issues affecting the public interest that the General Counsel is charged with protecting. However, the mere question of whether such an agreement exists is predominantly a private matter between the contracting parties, see *Donna-Lee Sportswear*, 836 F.2d at 38, and disputes concerning contract existence are generally for the courts to resolve, *id.* at 36.

In some cases, to be sure, the Board may decide to apply a special rule of contract formation in keeping with the federal labor law policy that formation of collective-bargaining agreements is to be encouraged “as a stabilizing factor in labor-management relations.” *Auciello Iron Works*, 303 NLRB 562, 567 (1991), *enfd.* 60 F.3d 24 (1st Cir. 1995), *affd.* 517 U.S. 781 (1996). In cases of this nature, where a court finds no contract after applying a common-law contract rule different from the Board’s special rule, the General Counsel *would* have a public advocacy interest in relitigating that finding. In such cases, however, collateral estoppel would appear not to apply in any event. “Preclusion ordinarily should apply if two cases present the same issue of law application. . . . Preclusion should not apply if there has been a change either in the facts or the governing rules.” 18 *Federal Practice & Procedure* § 4425 at 253. Thus, for example, a court finding in a Section 301 action that contract formation did not occur, based on the common-law rule that a counteroffer renders the original offer incapable of acceptance, would present a different issue of law application than in the Board proceeding because the Board does not apply that common-law rule. See *Auciello Iron Works*, 303 NLRB at 566; *Transit Service Corp.*, 312 NLRB 477, 481 (1993). Accordingly, in any case where an issue of contract existence genuinely implicates the General Counsel’s public advocacy interest, General Counsel preclusion would be defeated without the stated rule.

Despite the fact that no private cause of action exists under the Act, courts occasionally find it necessary to apply a provision of the Act as a rule of decision concerning a particular issue, such as in the 8(e) proviso example discussed above. Obviously, the General Counsel would have a public advocacy interest in relitigating that issue, as it involves the application of the Act. Step one of my proposal protects that interest, however, by securing the Board’s right to redecide that issue as falling within its primary jurisdiction.

4. *Field Bridge* reason #4: The “Consensus” rationale

Finally, *Field Bridge* contends that several courts of appeal agree with the position adopted therein. This ambiguous contention is true from one perspective and false from another. Understood as a claim of judicial support

for the view that the Board is entitled to reject collateral estoppel in all cases to protect its primary jurisdiction in a few, it is false. No court of appeals has ever agreed with this position. On the contrary, two courts have refused to enforce Board orders on this very ground: the Ninth Circuit in *Heyman*, 541 F.2d at 796, and the First Circuit in *Donna-Lee Sportswear*, 836 F.2d at 31. And the Second Circuit has twice declined to endorse the *Field Bridge* general rule. See *Service Employees*, 982 F.2d at 849; *Thalbo*, 171 F.3d at 109.

On the other hand, some courts of appeal have accorded priority or deference to Board findings over conflicting court findings. For example, at issue in *Peninsula Shipbuilders' Assn. v. NLRB*, cited in *Field Bridge*, was the validity of a dues-checkoff provision in a collective-bargaining agreement. A federal district court found it valid as a matter of contract law, whereas the Board found it invalid as a matter of federal labor law. The Fourth Circuit gave priority to the Board's finding based on the Board's primary jurisdiction of the Act. 663 F.2d 488, 492 (4th Cir. 1981). *Field Bridge* also cites *New Orleans Typographical Union No. 17 v. NLRB*, 368 F.2d 755, 767 (5th Cir. 1966). This case involved a dispute over the assignment of work. An arbitrator, applying the terms of one collective-bargaining agreement, awarded the work to one union; the Board, applying the factors relevant to a jurisdictional dispute under Section 10(k) of the Act, assigned the work to employees represented by the other union. The Fifth Circuit enforced the Board's assignment over the district court's order enforcing the arbitrator's decision because the Board's 10(k) determination implicated "public rights," whereas the arbitrator's decision involved only "private contractual rights." 368 F.2d at 767.

Although neither *Peninsula Shipbuilders* nor *New Orleans Typographical* directly involved collateral estoppel, I would agree that these cases implicitly support the proposition that the Board's primary jurisdiction should be safeguarded in appropriate cases from the preclusive effects of prior court judgments. Step one of my proposed rule does just that. However, these cases do not support the overbroad *Field Bridge* rule, which requires the Board to reject collateral estoppel even where the Board's primary jurisdiction is not implicated.¹⁸

¹⁸ In support of its "consensus" rationale, *Field Bridge* also cites *NLRB v. Huttig Sash & Door Co.*, 377 F.2d 964, 970 (8th Cir. 1967). In doing so, however, the Board mischaracterized the Eighth Circuit's decision. According to *Field Bridge*, in *Huttig* the Eighth Circuit "reaffirmed the Board's jurisdictional competence to determine matters properly within its statutorily defined sphere, without being constrained to grant *res judicata* or collateral estoppel effect to Federal District Court judgments rendered in closely related Section 301 proceedings." 306 NLRB at 323 (emphasis added). But *Huttig* had nothing to do with

D. Conclusion

The Board should abandon its current position on collateral estoppel. By refusing to apply that settled doctrine where appropriate, the Board subjects respondents to the expense and vexation of having to relitigate matters that have already been fully litigated and finally decided. It deprives court judgments of finality, and thus also deprives the parties subject to those judgments of the reliance and repose to which they are entitled. It wastes already strained agency resources. And it risks giving rise to conflicting court and Board decisions, leaving employers, employees, and unions in a state of legal uncertainty, which in turn could undermine the central goal of the Act: industrial peace and stability.

Furthermore, as we have seen, none of the reasons the Board relied upon to support *Field Bridge's* initial stated rule against GC preclusion, or its actual rule against both GC and respondent preclusion, withstands scrutiny. The "jurisdiction guarding" rationale ignores both congressional intent and the federal policy underlying the Full Faith and Credit Clause and 28 U.S.C. § 1738. The "nonparty" rationale merely expresses a conclusive presumption against General Counsel privity, ignoring the fact that the interests of the General Counsel and charging party are typically sufficiently closely identified to support a finding of General Counsel privity. The "public advocate" rationale, although valid in the abstract, does not justify the stated rule because the General Counsel's interest in this regard is adequately protected without it. Finally, the courts of appeal have never agreed that the Board is entitled to refuse to apply collateral estoppel.

Having said as much, it remains true that the Board's central purpose in *Field Bridge*—to safeguard the Board's exercise of its primary jurisdiction—remains sound. Although an across-the-board rejection of collateral estoppel is an overbroad means of accomplishing that purpose, any rule the Board substitutes for the *Field Bridge* approach must continue to ensure that the Board's role as the primary interpreter of the Act will not be limited by the preclusive effects of prior court judgments. My approach satisfies this imperative by providing that in any case where collateral estoppel is asserted, the Board must first determine whether the issue previously

collateral estoppel. Indeed, that case did not even involve a prior adjudication. It involved a contract provision stating that interpretation of the contract would be for an arbitrator to perform. The question before the Eighth Circuit was whether, despite this provision, the Board could interpret the contract in the course of resolving an unfair labor practice dispute. The court held that it could, thus affirming, as *Field Bridge* states, "the Board's jurisdictional competence to determine matters properly within its statutorily defined sphere." However, the Eighth Circuit said nothing about *res judicata* or collateral estoppel.

decided by the court falls within the Board's primary jurisdiction. If it does, the Board is entitled to redecide that issue. If it does not, the Board should then proceed to determine whether collateral estoppel applies under general preclusion doctrine.¹⁹

To be clear, I view the "primary jurisdiction" exception to applying collateral estoppel narrowly. In my view, the exception would apply only where the court applies a provision of the Act as the rule of decision on an issue, as in the 8(e) example discussed above. It would not apply where non-Act law serves as the rule of decision on an issue, and the court's finding on that issue merely *affects* the Board's application of the Act in a subsequent Board proceeding. It should be kept in mind, however, that the "primary jurisdiction" determination would only be the first step in the analysis. For collateral estoppel to apply, the elements of that doctrine must still be met—and that is not an easy task. As we have seen, collateral estoppel would have been defeated under general preclusion doctrine in *Field Bridge* itself and in every subsequent Board decision that has relied on *Field Bridge*. Thus, in practical terms it is unlikely that the approach outlined here would change the outcome of many cases. It would, however, facilitate the disposition of cases involving respondents and charging parties that have engaged in parallel court litigation under Section 301. Furthermore, it would place the Board's law on collateral estoppel on a more defensible footing. Considering the chilly reception the courts of appeal have given *Field Bridge*, that should prove helpful in enforcement proceedings.

E. Application

It remains only to apply the approach outlined above to this case. The district court found that the CBA continues in force, and the General Counsel seeks to preclude relitigation of that issue. In finding the existence of the CBA, the district court applied common-law contract principles, not the Act. Thus, the Board's primary jurisdiction is not implicated. Proceeding, therefore, to the

second step of the analysis, it must be determined whether collateral estoppel applies under settled preclusion law.

First, the issue of whether the CBA continued in force after 1993 was actually litigated and actually decided in the Federal district court. In support of its motion for summary judgment, Evans Sheet Metal asserted that the CBA ceased to exist because a union official told Ronald Evans that it was null and void. The district court considered Evans Sheet Metal's assertion and found that even if it were true, an oral statement could not cancel the CBA because article XIII, section 1 provides for termination through a written notice. Thus, the district court found that the CBA continued in effect in accordance with its terms.

Second, the district court's determination resulted in a valid and final judgment. As General Counsel's Exhibit 10 demonstrates, the district court ordered entry of judgment in *Local Union #44 Sheet Metal Workers v. Evans Sheet Metal*, No. 4:CV-96-1931 (1999).

Third, the district court's determination of the contract existence issue was essential to the district court's judgment. That judgment enforced a local joint adjustment board decision against Evans Sheet Metal. The court's finding that the contract continued in force after 1993 was essential to the judgment because the local board found that Evans Sheet Metal had violated the CBA in June 1996.

Fourth, the issue before the Board is the same as the issue decided by the district court. The district court found that the CBA continued in force and effect beyond 1993, and Respondent Evans & Evans, Inc. asks the Board to find that the CBA terminated upon its stated expiration date of April 30, 1993.

Fifth, the party sought to be precluded in this proceeding was a party, or in privity with a party, in the district court action. Here, Evans & Evans, Inc. seeks to relitigate the contract issue decided by the district court. Evans & Evans, Inc. was not a party to the district court action. However, in determining whether Evans and Evans, Inc. and the unincorporated Evans and Evans were alter egos of the parties to the district court action, the administrative law judge made a number of findings that would also support a finding of privity for collateral estoppel purposes. For example, the judge found that Evans and Evans employed the same nonunion workers, occupied the same location, used the same equipment and telephone number, had essentially the same customers, and did the same type of work as Evans Sheet Metal. Although Evans and Evans eventually changed its location and incorporated, the judge found that the nature of the business, the customers, the workers, and even some

¹⁹ To prevent manipulation of the step-two preclusion analysis in a manner that could result in unfair asymmetry—i.e., one rule for the General Counsel and another for respondents—I would provide that where the estoppel is asserted against the General Counsel, the General Counsel will be presumed to be in privity with the charging party. The burden would then be on the General Counsel to demonstrate unusual circumstances militating against a finding of privity. In demonstrating the existence of such circumstances, the General Counsel's task would be to show that notwithstanding the inapplicability of the "primary jurisdiction" exception, the General Counsel's public advocacy interest requires that it not be bound by the results achieved by the charging party in the prior litigation. This would necessarily be an unusual situation, since the scope of the Board's primary jurisdiction and of the General Counsel's public advocacy interest are typically coextensive.

of the equipment stayed the same. On these facts, the judge found that Evans and Evans, and Evans & Evans, Inc., are alter egos of Ronald E. Evans, Inc., and Evans Sheet Metal. On these same facts, I would find that Evans & Evans, Inc. is in privity with the defendants in the district court action.

Since all elements of collateral estoppel are met, if there had been a Board majority to overrule *Field Bridge* I would have agreed with the judge's result and found that Evans & Evans, Inc. is collaterally estopped from relitigating whether the CBA continues in force and effect. Without collateral estoppel, were I to reach the merits, as *Field Bridge* dictates, I would dismiss the complaint for the reasons stated below in part II.

II. CONTRACT EXISTENCE ON THE MERITS

On the merits of the contract existence issue, my colleagues find that the CBA continued in force and effect beyond April 30, 1993. In so finding, they rely on the language of section 1 of CBA article XIII and the conduct of Evans Sheet Metal (Evans). Contrary to my colleagues, I would find that the CBA terminated on April 30, 1993. As I read article XIII, section 1, it provides that a written notice of reopening will terminate the CBA on the latest of (a) its stated expiration date of April 30, 1993; (b) the date on which reopener-related conferences are terminated by written notice (if the CBA does *not* contain article X, section 8); or (c) the date on which the CBA is modified by order of the National Joint Adjustment Board, or on which procedures under article X, section 8 have been otherwise completed (if the CBA *does* contain article X, section 8). Here, the Union gave Evans a written notice of reopening; but there is no evidence that subsequently, the Union and Evans ever held reopener-related conferences, that the National Joint Adjustment Board issued an order modifying the CBA, or that any other procedures under article X, section 8 were undertaken. Thus, the Union's reopener notice terminated the CBA on its stated expiration date of April 30, 1993.

According to my colleagues, the CBA did not terminate because neither party provided a written notice terminating reopener conferences—even though they acknowledge that no such conferences were ever held. Assuming, however, that article XIII, section 1 requires something more than a reopener notice to terminate the CBA, it is not a written notice terminating conferences. The CBA between Evans and the Union contained article X, section 8, triggering the proviso language in article XIII, section 1. To reiterate, article XIII, section 1 provides, *inter alia*, that the CBA continues in force after service of a reopener notice

until conferences relating thereto have been terminated by either party by written notice, *provided, however*, that, if this Agreement contains Article X, Section 8, it shall continue in full force and effect until modified by order of the National Joint Adjustment Board or until the procedures under Article X, Section 8 have been otherwise completed.

(Emphasis added.) Because the CBA did contain article X, section 8, the written notice requirement upon which my colleagues rely was supplanted, and the CBA would have terminated without a written notice when procedures under article X, section 8 were “otherwise completed.” Thus, even if the CBA did not terminate through service of the reopener notice without more, I would find that any article X, section 8 procedures were “otherwise completed” by the Union's total abandonment of the process it set in motion when it served Evans the reopener notice.

In finding contract existence, the majority also relies on the fact that Evans continued after 1993 to accept job referrals from the Union and to make payments into Union funds. This no more compels the conclusion that the CBA continued in force than does the wording of article XIII, section 1. Evans may have acted out of a mistaken belief that the contract continued in force; it may have wished to avoid provoking a confrontation with the Union; or it may have simply thought that if it employed union workers, it had to pay into Union funds. Indeed, my colleagues go no further than to state that Evans' post-1993 conduct was consistent with the continuation of the CBA. Given the possible alternative explanations for Evans' conduct, it was also consistent with the CBA's termination.

Thus, were I to reach the merits on the contract issue, I would find the CBA terminated and dismiss the complaint. For the reasons set forth in part I, however, the better path in this case would have been to preclude relitigation of the existence of the CBA. Such a resolution would have been particularly desirable here, considering that the evidence of contract termination upon which Evans & Evans, Inc. now seeks to rely—the Union's service of a written reopener notice—could have been presented to the district court and was not. There is no good reason to give the Respondents a second bite at the apple. Under current Board law on collateral estoppel, however, the Respondents get that second bite.

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 Local Union No. 44, Sheet Metal Workers International Association, AFL-CIO, as the exclusive bargaining representative of our employees in the following appropriate unit:

All employees employed by Ronald E. Evans d/b/a Evans Sheet Metal, Ronald E. Evans, Inc., Evans & Evans, Inc., and/or Evans and Evans and engaged in (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing, and servicing of all ferrous or non-ferrous metal work and all other materials used in lieu thereof and of all air-veyor systems and all air-handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over insulation and all duct lining; (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; and (e) all other work included in the jurisdictional claims of Sheet Metal Workers International Association, excluding guards and supervisors as defined in the Act.

WE WILL NOT fail to adhere to the terms and conditions of the collective-bargaining agreement with the Union effective May 1, 1990, by, among other things, failing to employ union members, failing to pay union wages, and failing to make required union benefit fund payments.

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

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above unit.

WE WILL, on request, reinstate and abide by the terms and conditions of the collective-bargaining agreement with the Union effective May 1, 1990.

WE WILL make the contractually required payments to the benefit funds that we unlawfully failed to make since June 1998, plus any additional amounts due to the funds.

WE WILL make whole the unit employees for any losses they may have suffered as a result of our failure to adhere to the terms and conditions of employment in our collective-bargaining agreement with the Union effective May 1, 1990, plus interest.

RONALD E. EVANS D/B/A EVANS SHEET METAL,
RONALD E. EVANS, INC., EVANS & EVANS,
INC., AND EVANS AND EVANS

Lea F. Alvo-Sadiky, Esq., for the General Counsel.

Thomas R. Davies, Esq., of Lancaster, Pennsylvania, for the Respondent, Evans & Evans, Inc.

Robert D. Mariani, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on September 1, 1999. The charge was filed on July 6, 1998, and was amended on May 27, 1999. The complaint also issued on May 27, 1999. It alleges that Ronald E. Evans d/b/a Evans Sheet Metal (Ronald Evans), Barbara Ann Evans d/b/a Evans Sheetmetal (Barbara Evans), Ronald E. Evans, Inc. t/a Evans Sheet Metal (Evans Sheet Metal), and Evans & Evans, Inc. (collectively, the Respondent) are a single employer and alter egos of one and other. It further alleges that the Respondent and Local Union No. 44, Sheet Metal Workers International Association, AFL-CIO (Union) are parties to a collective-bargaining agreement and that the Respondent failed to adhere to the terms of the contract in violation of Section 8(a)(1) and (5) of the Act by, among other things, failing to employ union members, failing to pay union wages, and failing to make benefit payments to the union benefit funds. The Respondent, except Barbara Ann Evans, filed a timely answer denying the material allegations of the complaint.¹ The parties were afforded a full and fair oppor-

¹ An answer was filed by the law firm of Harmon & Davies, P.C. on behalf of Ronald E. Evans, Evans Sheet Metal, and Evans & Evans, Inc. No answer was filed by Barbara Ann Evans. At the hearing, Thomas R. Davies, Esquire, stated that his law firm only represented Evans & Evans, Inc., and no longer represented Ronald E. Evans and Evans Sheet Metal. Hence, Ronald E. Evans and Evans Sheet Metal were not represented by counsel at the hearing nor did Ronald E. Evans appear and testify. Barbara Ann Evans was not represented by counsel at the hearing, but she did appear and testify.

tunity to appear, present evidence,² examine and cross-examine witnesses, and file posthearing briefs.³

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, and counsel for Respondent, Evans & Evans, Inc. I make the following

FINDINGS OF FACT

I. JURISDICTION

Ronald E. Evans d/b/a Evans Sheet Metal and Barbara Ann Evans d/b/a Evans Sheetmetal were sole proprietorships engaged in the sheet metal fabrication and assembling business located in Scranton, Pennsylvania. Ronald E. Evans, Inc. t/a Evans Sheet Metal is a corporation that was engaged in the sheet metal fabrication and assembling business located in Scranton, Pennsylvania. Evans & Evans, Inc. is a corporation, engaged in the sheet metal fabrication and assembling business, with a facility located in Throop, Pennsylvania. During the 12-month period preceding December 31, 1998, Ronald E. Evans, Barbara Ann Evans, and Evans Sheet Metal provided services valued in excess of \$50,000 to enterprises located within the Commonwealth of Pennsylvania, and received goods valued in excess of \$50,000 directly from points outside the State. During the 9-month period preceding September 1, 1999, Evans & Evans, Inc. provided services valued in excess of \$50,000 to enterprises located within the Commonwealth of Pennsylvania, and received goods valued in excess of \$50,000 directly from points outside the State.⁴

The Respondents admit, and I find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondents admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

1. Whether the charge is time-barred by Section 10(b) of the Act?
2. Whether Ronald E. Evans, Barbara Ann Evans, and Evans Sheet Metal are a single employer and alter egos of one and other known as Evans Sheet Metal?
3. Whether Evans & Evans, Inc., is an alter ego of Evans Sheet Metal?
4. Whether the collective-bargaining agreement between Evans Sheet Metal and the Union automatically renewed and therefore is still in effect?

² At the end of the General Counsel's case-in-chief, counsel for Evans & Evans, Inc. moved to dismiss the complaint on the ground that it was time-barred by Sec. 10(b) of the Act and that the General Counsel had not established that Respondent Evans & Evans, Inc. is the successor and alter ego of Evans Sheet Metal. I reserved ruling on the motion, which for the reasons stated below, I now deny.

³ The General Counsel's unopposed motion to correct transcript is granted.

⁴ The undisputed evidence shows that Evans & Evans, Inc. was not incorporated until February 4, 1999.

5. Whether Evans & Evans, Inc., as an alter ego, violated Section 8(a)(1) and (5) of the Act by failing to adhere to the terms of the collective-bargaining agreement between Evans Sheet Metal and the Union?

B. Facts

1. The collective-bargaining relationship

For several years, Ronald E. Evans operated a sheet metal business located at 1117 West Market Street, Scranton, Pennsylvania, known as Evans Sheet Metal, a sole proprietorship. In 1984 Ronald Evans had his wife, Barbara Ann Evans, obtain a tax identification number from the U.S. Internal Revenue Service for a sheet metal business named Barbara Ann Evans, Evans Sheetmetal, a sole proprietorship, which was also located at 1117 West Market Street, Scranton, Pennsylvania. This business was operated and managed solely by Ronald Evans. On December 15, 1989, Ronald Evans incorporated a sheet metal business known as Ronald E. Evans, Inc. which operated out of the same physical location as Evans Sheet Metal, and Evans Sheetmetal. In addition to owning and operating Evans Sheet Metal and operating and managing Evans Sheetmetal, Ronald Evans was the sole shareholder, officer, and manager of Ronald E. Evans, Inc.

On the same date, December 15, 1989, Ronald Evans, acting on behalf of Evans Sheet Metal acknowledged in writing that the Union was the exclusive representative of the sheet metal workers employed by his business. (GC Exh. 2.) Five months later, on May 1, 1990, Ronald Evans, as manager of Evans Sheet Metal, executed a 3-year collective-bargaining agreement with the Union for a term beginning on May 1, 1990, and ending on April 30, 1993. (GC Exh. 3.)

Article XIII of the contract stated that it would be automatically renewed if neither party sought to reopen the contract at the end of the contract term. Specifically, the contract provided, in pertinent part, that it "shall continue in force from year to year thereafter unless written notice of reopening is given not less than ninety (90) days prior to the expiration date. In the event such notice of reopening is served, this Agreement shall continue in force and effect until conferences relating thereto have been terminated by either party by written notice. . . ." (GC Exh. 3.) In 1993, Evans Sheet Metal took no action to terminate the agreement. The Union sought to reopen the contract, but failed to comply with the explicit contractual requirements to reopen or terminate the agreement. For several years thereafter (1993-1996), Ronald E. Evans, Inc. and Ronald E. Evans made several contractually required payments to various Union funds (Tr. 21; GC Exh. 11) and accepted job referrals from the Union.

In June 1996, Evans Sheet Metal ceased making payments to the Union benefit funds. On June 18, 1996, the Union filed a grievance under the collective-bargaining agreement asserting that Evans Sheet Metal violated the agreement by engaging in the fabrication of duct work with employees who were not members of the Union. On July 23, 1996, the Local Joint Adjustment Board convened in accordance with the provisions of the contract to review and decide the matter. The adjustment board sustained the grievance and ordered Evans Sheet Metal to pay wages and fringe benefits in the amount of three times the

amount specified in the collective-bargaining contract for all hours worked by nonunion workers from June 12, 1996, and forward. Evans Sheet Metal was also ordered to immediately cease and desist employing nonunion workers.

2. The Section 301 lawsuit

Evans Sheet Metal failed to comply with the arbitration award of the Local Joint Adjustment Board. On October 28, 1996, the Union and Matthew Franckowiak, as trustee of the Local 44 education fund, filed a Section 301 lawsuit⁵ against Evans Sheet Metal and Ronald E. Evans t/a Evans Sheet Metal and Ronald E. Evans, Inc. to enforce the arbitration award in the United States District Court for the Middle District of Pennsylvania. Notably, the federal court complaint alleged that Evans Sheet Metal and Ronald E. Evans, Inc. were a single employer and alter egos of each other.

In response to the lawsuit, Ronald E. Evans asserted, among other things, that at the time of the execution of the collective-bargaining agreement in May 1990, his wife, Barbara Ann Evans, was the owner and operator of Evans Sheet Metal, a sole proprietorship. He further asserted that on or about January 1, 1990, Evans Sheet Metal was dissolved as a going business and that it was not reactivated until July 1996. (GC Exh. 7.) In light of this and other assertions, and because Barbara Ann Evans was not a named defendant in the lawsuit, the district court granted the Union leave to amend its complaint, which it did, and the case moved forward.

By Order, entered on April 12, 1999, the federal court enforced the award of Local Joint Adjustment Board. In a separate memorandum, the court found that the evidence established that even though Barbara Ann Evans was listed as the owner and operator of Evans Sheetmetal, the sheet metal business was operated by Ronald E. Evans and that he, Ronald E. Evans, was the actual owner of the proprietorship which operated during the relevant time period (1989–1998). The federal court also found that Ronald E. Evans, Inc., was the successor and alter ego of Ronald E. Evans t/a Evans Sheet Metal.⁶ (GC Exh. 10.)

Specifically concerning the alter ego relationship, the federal court found that:

Ronald E. Evans, Inc. was incorporated on December 15, 1989.

Ronald E. Evans is the sole shareholder and sole officer of Ronald E. Evans, Inc.

Ronald E. Evans, Inc. uses the business address of 1117 Market Street, Scranton, Pennsylvania.

Ronald E. Evans, Inc. operated from the same physical location as Evans Sheet Metal and is owned by Ronald E. Evans, who is the president of Ronald E. Evans, Inc.

Ronald E. Evans exercises actual control over the operations and management of Evans Sheet Metal and Ronald E. Evans, Inc. including actual control over the day-to-day operations in labor relations of Evans Sheet Metal and Ronald E. Evans, Inc.

⁵ 29 U.S.C. § 185(a).

⁶ In footnote, the federal court stated that “Mrs. Evans has suffered a default judgment for failure to respond after due notice. She has therefore been adjudged an owner of Evans Sheet Metal.”

Evans Sheet Metal and Ronald E. Evans, Inc. are both engaged out of the same physical location in the business of fabricating, assembling, erecting, installing, dismantling, repairing and servicing of ferrous and nonferrous metal work.

Ronald E. Evans, Inc. and Evans Sheet Metal have used the same facilities and the same equipment in fabricating, assembling, erecting, installing, dismantling, repairing and servicing of ferrous and nonferrous metal work.

Ronald E. Evans also operated Barbara Ann Evans Evans Sheetmetal.

Ronald E. Evans, Inc. is the successor to Evans Sheet Metal.

Ronald E. Evans, Inc. is the alter ego of Ronald E. Evans doing business as Evans Sheet Metal.

Ronald E. Evans was bound by the collective-bargaining agreement between Evans Sheet Metal and the Union.

(GC Exh. 10.)

In addition, the federal court found that at least through calendar year 1998, Evans Sheet Metal/Ronald E. Evans, Inc. continued to operate a sheet metal business, that it did not employ any members of the Union during calendar years 1996, 1997, and 1998, that instead it employed individuals who were not members of the Union, but nevertheless performed bargaining unit work.

Ultimately the court concluded that the Union was entitled to enforce the contract and the arbitration award, and that Ronald E. Evans t/a Evans Sheet Metal was liable to the Union and its education fund “in the amount of three (3) times the amount specified in the current collective-bargaining agreement for all hours worked by nonmembers of Local Union 44, from June 12, 1996 forward.” (GC Exh. 10.)

3. The advent of Evans and Evans

Robert E. Evans, a nephew of Ronald E. Evans, was a foreman employed by Evans Sheet Metal. He had worked for his uncle on and off for many years and effectively learned the sheet metal trade from him.

Prior to August 1997,⁷ Ronald Evans told his wife, Barbara Evans, that his nephew, Robert E. Evans, was going to start a sheet metal business, which he, Ronald Evans, would manage. On or about August 1997, Robert Evans started such a business which came to be called Evans and Evans. He purportedly borrowed \$3000 from his uncle, Ronald Evans, which Robert verbally agreed to repay without interest whenever he could. (Tr. 127, 172.) Evans and Evans was physically located at the same location as Evans Sheet Metal. It owned no equipment, but used the equipment belonging to Evans Sheet Metal at no cost. It had no telephone, but used the phone and phone number of Evans Sheet Metal at no cost. In addition to himself, and his uncle, Ronald Evans, Robert Evans d/b/a Evans and Evans eventually employed many of the same nonunion sheet metal workers employed by Evans Sheet Metal, to wit: Joseph Ma-

⁷ The record does not reflect the actual date of this conversation.

loney, David Michael Evans, and Frank Harrington. (Compare GC Exh. 10, p. 9 and GC Exh. 26; Tr. 148–150.)

4. The subcontract and lease

On December 30, 1997, Evans Sheet Metal purportedly subcontracted a project to Evans and Evans to perform sheet metal work at the Clarks Summit Elementary School, Clarks Summit, Pennsylvania. (R Exh. 3.) Ronald E. Evans signed the subcontract as manager of Evans Sheet Metal. Robert E. Evans signed as owner of Evans and Evans. According to the terms of the subcontract, Evans Sheet Metal, as contractor, was to pay Evans and Evans the sum of “cost plus 10%” for doing the work. (R Exh. 3, p. 7.) The subcontract also provided that the contractor, Evans Sheet Metal, was to make available and furnish at no cost to the subcontractor, Evans and Evans, the use of the facilities and equipment at 1117 W. Market St., Scranton, Pennsylvania 18508 (i.e., the location of Evans Sheet Metal). (R Exh. 3, p. 9.)

On the same date, December 30, Ronald Evans also purportedly subleased to his nephew, Robert Evans, the same premises covered under the subcontract for 6 months beginning January 1, 1998, for a rent of \$5000 payable in one installment. (GC Exh. 19.) The lease was renewable at the end of the 6 months for as long as necessary to complete the Clarks Summit Elementary School job.

5. The Evans and Evans jobs

a. The Clarks Summit Elementary School project

The Clarks Summit project began in January 1998. It was supposed to be completed by June 1, 1998, but actually ran through September 1998. On or about September 3, 1998, Evans and Evans completed the mechanical punch list and sent the prime contractor, J. L. Turner, a memorandum on letterhead for “Evans and Evans, Inc.” (GC Exh. 35.) The closing paragraph stated:

All punch list items are completed including caulking of shelving units and new diffuser assembly in Room 308. It has been a pleasure working with you. I am looking forward to our next job. If I could be of further assistance to you please call: 717-344-4393.

Ronald E. Evans

The phone number (717-344-4393) is the phone number for Evans Sheet Metal.

b. The OMS project

In spring 1998, Evans and Evans was also the sheet metal contractor on a facility known as the “OMS” project, which was being constructed by the Commonwealth of Pennsylvania in Taylor, Pennsylvania. James Woodruff, the State mechanical construction inspector, testified that Robert Evans was the main person on the job for Evans and Evans, but that he saw Ronald E. Evans at the jobsite maybe 15–20 times during the course of the job which ran from May–December 1998. Woodruff recalled that in the very beginning of the job, he, Ronald Evans, and a representative of the general contractor discussed the placement of sleeves for air ducts. (Tr. 84.) He also re-

called seeing Ronald Evans toward the end of the project with some cans of sealant used for pressure testing the air ducts.

The evidence also shows that the blueprints for the OMS project were originally drawn by Robert Evans, but reviewed and labeled by Ronald E. Evans. (Tr. 142.)

c. The Moses Taylor Hospital project

In June 1998, a union member reported to Union Business Representative Andrew Williams that Evans was doing sheet metal work using nonunion workers at Moses Taylor Hospital, Scranton, Pennsylvania. Williams visited the worksite where he found Robert Evans and another person installing duct work. Robert Evans was wearing a T-shirt with a decal that stated “Evans and Evans.” Williams introduced himself to Robert Evans, who stated that he already knew Williams because he had worked for Evans Sheet Metal under the collective-bargaining agreement. Robert Evans also stated that he now owned Evans and Evans and that he did not want any trouble.⁸

A week after he encountered Robert Evans working at the Moses Taylor Hospital, Williams went to 1117 West Market Street, Scranton, Pennsylvania. He had visited the facility before when Evans Sheet Metal was employing union members. Standing off-site, Williams observed that the physical layout and the equipment were the same as that used by Evans Sheet Metal. (GC Exh. 14.) In addition, the name “Evans Sheet Metal” was written on a truck in the yard next to the sheet metal shop. In the yard, there was a truck that belonged to Ronald E. Evans.

6. Evans and Evans relocates

In September 1998, as the Clarks Summit project neared completion, Robert Evans relocated Evans and Evans to a building at 170 Boulevard Avenue, Throop, Pennsylvania. (R Exh. 5.) A short time later, Union Business Representative Williams visited the new location. He photographed Ronald E. Evans getting into the same truck that was parked in the yard located at 1117 W. Market Street, Scranton, Pennsylvania. (GC Exh. 16.) Williams could not determine, however, whether the equipment inside the building was the same equipment that had been used at the old location.

However, James Schmidt, an apprentice for Bevalaqua Sheet Metal, testified that in the past his employer had made arrangements with Ronald Evans to use a special piece of equipment called a barlock machine at Evans Sheet Metal located at 1117 W. Market Street, Scranton, Pennsylvania. Schmidt testified that in 1999, after Evans and Evans moved to Throop, Pennsylvania, his employer sent him to the new facility to use what appeared to be the same barlock machine. (Tr. 120.)

7. The incorporation of Evans & Evans, Inc.

On February 3, 1999, Evans and Evans was incorporated as Evans & Evans, Inc. located at 170 Boulevard Avenue, Throop, Pennsylvania. Robert Evans was the corporation’s sole share-

⁸ There is no evidence of any contractual arrangement between Robert Evans, or Evans and Evans Sheet Metal, and G. Weinberg, the prime contractor on the Moses Taylor Hospital project. To the contrary, the evidence supports a reasonable inference that Evans Sheet Metal or Ronald Evans was the subcontractor. (Tr. 152, 173.)

holder and officer. (R Exh. 7.) A few months later, Ronald E. Evans moved to Fayetteville, North Carolina, where he took a job as project manager for Lawman Heating & Cooling, Inc.

On June 16, 1999, Ronald E. Evans faxed to Robert Evans from Fayetteville, North Carolina, completed copies of the IRS Form 941, Employer's Quarterly Federal Tax Return, and 1998 W-2 forms for Evans and Evans.

8. Robert Evans' less than candid testimony

I find that Robert Evans was a less candid witness. Throughout his testimony, he attempted to minimize Ronald E. Evans' involvement with Evans and Evans. The evidence viewed as a whole, however, does not support his testimony. Barbara Ann Evans credibly testified that Ronald Evans told her that Robert Evans was going to start a business, and that he, Ronald Evans, would manage it. In addition, the evidence shows that Ronald Evans helped his nephew start and manage Evans and Evans. According to Robert, his uncle, Ronald Evans, gave him an interest free loan, which was never fully repaid, and allowed him to use at no cost the building, equipment, and telephone of Evans Sheet Metal. On the OMS project, Ronald Evans reviewed and labeled the blueprints, interfaced with the State inspector on difficult issues at the request of Robert Evans, and worked on the job. On the Clarks Summit project, Ronald Evans obtained the job and submitted the final mechanical punchlist to the contractor which supports a reasonable inference that he was intimately familiar with the project. Notably, Ronald Evans placed his name at the bottom of the punchlist memo, which he closed by stating, "I am looking forward to our next job. If I can be of further assistance to you please call: 717-344-4393," which is the telephone number for Evans Sheet Metal. The use of the singular possessive pronoun, "I" likewise supports a reasonable inference that Ronald Evans was involved with the management of the project and that he anticipated managing other projects for Evans and Evans.

The evidence also shows that even after Ronald Evans relocated to North Carolina, Robert Evans looked to him to prepare the income tax returns for Evans and Evans. Although Robert Evans testified that he and his aunt, a bookkeeper/accountant, took the payroll information from his computerized Quickbooks, entered it into a software program that prepares the forms, and printed out W-2 forms for the 1998 tax year, he nevertheless faxed the information to his uncle, Ronald Evans, for final review before filing. Thus, the evidence shows that Ronald Evans had input into operation of Evans and Evans, even after he ceased working for the business.

Robert Evans' efforts to portray his interaction with Ronald Evans as arms'-length business transactions are equally dubious. He conceded that from the outset Ronald Evans gave him an unsecured, interest free, verbal loan of \$3000 to start Evans and Evans, which Robert was to pay back whenever he could. The evidence shows, however, that the loan was never fully repaid. (GC Exh. 20.) Nor did Robert Evans fully pay the \$5000 rent that was due under the so-called lease agreement signed on December 30, 1997. According to the business check register, Robert Evans purportedly prepaid his uncle \$4500 for rent one week before the lease was signed. However,

he was unable to account for payment of the remaining \$500 balance and eventually surmised that his Uncle Ronald must have waived payment or "spotted" him the other \$500. (Tr. 134.) The same check register discloses that 6 months later, Robert Evans paid another \$5000 to Ronald Evans for rent. When questioned about the additional payment he could not recall if the payment was actually for rent and conceded that at that point in time he would have owed only \$3000 for additional rent. (Tr. 162-164.) Finally, Robert Evans made no attempt to explain or reconcile why he even signed a lease when the purported subcontract clearly states that Evans and Evans was entitled to use the Evans Sheet Metal facilities at no cost. (R Exh. 3, p. 9.)

In addition, Robert Evans' assertions that there was no other "Evans" in the name "Evans and Evans" are unpersuasive. He testified that he named the business that way because he was proud of his name and hoped to bring other family members into the business some day. (Tr. 127-128.) The explanation is a little hard to fathom particularly in light of the undisputed evidence showing that Ronald Evans was significantly involved in the business of Evans and Evans from inception to incorporation.

I also find that Robert Evans' testimony that he was embarrassed by the personal foibles of Ronald Evans and therefore sought to distance himself from him as soon as possible is incredulous. Contrary to his assertions, the evidence shows that Ronald Evans gave Robert Evans a job out of high school; taught him to draft blueprints; gave him an interest free loan to start a business; allowed him to use the facilities, equipment, and telephone of Evans Sheet Metal at no cost; gave him a lucrative subcontract (i.e., Clarks Summit project); allowed him to barter off his reputation and name (i.e., OMS project); and helped Robert set-up shop in Troops, Pennsylvania. (Tr. 127, 128, 154.) Even after Ronald Evans moved to North Carolina, Robert Evans sought his advice regarding the business' 1998 income tax forms, talked to him on the phone, and invited him to his wedding.

Finally, at the very end of his testimony Robert Evans admitted that he may have purposely sought to mislead Union Representative Andy Williams at the Moses Taylor project by telling him that a new company, Evans and Evans, was working that job, when in fact the job belonged to Evans Sheet Metal. (T.188.) I find that the admission supports a reasonable inference that Robert Evans would fabricate a story if he thought it might help Ronald Evans.

For these, and demeanor reasons, I reject Robert Evans' testimony that Evans and Evans was a sole proprietorship, which he alone owned, and I reject his testimony that Ronald Evans, his uncle, was minimally involved in the operation and management of Evans and Evans.

C. Analysis and Findings

1. The 10(b) issue

The underlying charge in this case was filed on July 6, 1998. The Respondent argues that the charge was untimely because Union Business Agent Andrew Williams testified that he first heard of Evans and Evans in August 1997, shortly before he visited the Moses Taylor Hospital worksite. However, the evi-

dence viewed as a whole shows, and I find, that Williams was mistaken about the date. Robert Evans testified that Evans and Evans did not begin operating until November 1997. (Tr. 126, 166, 173, 186.) He also stated that he did not have any employees until January 1998. (Tr. 178.) Thus, it is extremely unlikely that Williams could have seen Robert Evans and another employee wearing an Evans and Evans T-shirt working on the Moses Taylor Hospital project in August 1997. In addition, Union Business Manager Matthew Franckowiak testified that he did not hear about Evans and Evans until June 1998, when Williams went to Moses Taylor Hospital. Finally, Williams also testified that he was not sure of his dates because there had “been so many dates for so long.” (R Exh. 65.)

I therefore find that Williams misstated the date that he first learned about Evans and Evans. The evidence establishes that the Charging Party first learned of Evans and Evans in June 1998, shortly before the charge was filed. Accordingly, the Respondent’s motion to dismiss the complaint is denied.

1. Collateral estoppel and the Federal court’s determinations

a. The legal standard

The doctrine of collateral estoppel or issue preclusion provides that “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Montana v. U.S.*, 440 U.S. 147, 153 (1979). It can be applied if (1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question. *Board of Trustees of Trucking Employees Pension Fund v. Centra*, 983 F.2d 495, 505 (3d Cir. 1992). The collateral estoppel doctrine has been successfully applied in Board proceedings. *Tri-County Roofing, Inc.*, 311 NLRB 1368, 1378 fn. 11 (1993), enf’d. 148 LRRM 2640 (3d Cir. 1995), cert. denied 516 U.S. 818 (1995); cf. *Best Roofing Co.*, 311 NLRB 224 (1993).

b. The single-employer/alter ego determination

In the prior Section 301 lawsuit, the federal district court found that Ronald E. Evans, Inc. is the alter ego of Ronald E. Evans doing business as Evans Sheet Metal. (GC 10, p. 12, par. 11.) The Charging Party urges that the federal court’s findings of fact and conclusions of law be adopted as to whether Ronald E. Evans, Inc. and Evans Sheet Metal constitute alter egos of one another. There is no objection of record to this request. I note that the issue here, whether Ronald E. Evans d/b/a Evans Sheet Metal, Barbara Ann Evans d/b/a Evans Sheet Metal, Ronald E. Evans, Inc. t/a Evans Sheet Metal are alter egos within the meaning of the Act was squarely in issue and fully litigated in the federal court proceeding and that resolution of the issue was necessary for the disposition of that case. Notably, there, unlike here, Ronald E. Evans, Evans Sheet Metal, and Ronald E. Evans, Inc. were represented by counsel throughout the entire proceeding. I further note that in making a judgment on the merits the federal court relied upon and applied appropriate Board precedent. *Stardyne Inc.*, 41 F.3d 141,

151 (3d Cir. 1994) (quoting *Crawford Doors Co.*, 226 NLRB 1144 (1976)). In addition, the federal court’s factual findings were largely undisputed in that those findings were based in large part on a joint request of findings of fact submitted by the parties. (GC Exh. 9.) Also, no appeal was taken from the final judgment entered in the Federal court proceedings and the time for such an appeal has long since expired. Finally, as noted above, Respondents Ronald E. Evans, Evans Sheet Metal, and Ronald E. Evans, Inc. failed to appear at the hearing and were not represented by counsel. Thus, the Federal court’s findings with respect to the alter ego issue concerning Ronald E. Evans and Evans Sheet Metal are not challenged here.

Accordingly, I find that Ronald E. Evans, Evans Sheet Metal, and Ronald E. Evans, Inc. are collaterally estopped from relitigating the alter ego issue in the case. Further, I adopt the findings of fact of the federal district court and in doing so, I specifically find that Ronald E. Evans, Inc. is the alter ego of Ronald E. Evans and Evans Sheet Metal.

c. The contract automatically renewed

Although not a party to the Federal court proceeding, the General Counsel urges that Ronald E. Evans, Evans Sheet Metal, and Ronald E. Evans, Inc. should also be collaterally estopped from relitigating the issue of whether the 1990–1993 collective-bargaining agreement automatically renewed. Evans & Evans, Inc. was not a party to the Federal court proceeding and does not directly address the application of the collateral estoppel doctrine in its posthearing brief.⁹ It argues, however, that the contract was terminated when the Union filed a notice of reopener.

The issue before me is the same issue that was fully litigated in the Federal court by the same counsel, Thomas R. Davies, Esq., who now represents Evans & Evans, Inc. The Federal court’s findings of fact were based in large part on a joint request for findings of fact that he endorsed and submitted to the court. I further note that those findings are consistent with the evidence presented in this proceeding which shows that no action was taken by Ronald E. Evans, Evans Sheet Metal, or Ronald E. Evans, Inc. to open the contract in accordance with the provisions of article XIII and that there were no negotiations between the parties to the contract and that neither party to the collective-bargaining agreement complied with the contract’s explicit notice requirements for proper termination of the agreement. Thus, contrary to the position now taken by counsel for Evans & Evans, Inc. the evidence here, like there, supports a finding that the contract continued in full force and effect. Indeed, the undisputed evidence shows that after April 30, 1993, Evans Sheet Metal adhered to the contract for approximately 3 years as evidenced by the numerous payments made by Ronald E. Evans, Inc. and Ronald E. Evans to the Union funds and the acceptance of referrals from the Union.

I therefore afford collateral estoppel effect to the federal court decision and adopt its findings of fact, which are consistent with the evidence in this proceeding. In doing so, I find that the collective-bargaining agreement was not terminated by

⁹ The Union inexplicably did not address this issue in its posthearing brief.

the written notice to reopen and that the contract automatically renewed and continued in full force and effect.

2. Evans Sheet Metal and Evans & Evans, Inc. are alter egos

In determining whether two nominally distinct entities are alter egos, the Board looks to whether the two have substantially identical management, business purpose, operation, equipment, customers, supervision, common ownership, whether the two use the same building, whether there was a "hiatus" between the closing of one and the opening of the other, and whether the purpose of creating the new entity was to evade the responsibilities of the Act. In making the evaluation, no one factor is determinative, nor do all of the above indicia have to be present in order to find that an alter ego relationship exists. In particular, identical ownership and unlawful motive are not prerequisites for finding an alter ego relationship. *Cofab, Inc.*, 322 NLRB 162, 163 (1996), *enfd.* 159 F.3d 1352 (3d Cir. 1998).

The General Counsel alleges that Evans and Evans is the "disguised continuance" or alter ego of Evans Sheet Metal and the record supports this view. The transition from Evans Sheet Metal to Evans and Evans, the unincorporated entity, was virtually seamless. On December 30, 1997, Evans and Evans on paper took over the Clarks Summit job from Evans Sheet Metal. It employed the same nonunion workers as Evans Sheet Metal. It occupied the same location and used the same equipment and telephone number. It had essentially the same customers and did the same type of work.

The evidence shows that the same individuals, Ronald and Robert Evans, were involved in the management and supervision of Evans Sheet Metal and Evans and Evans. As reflected by the mechanical punch list sent to the Clarks Summit general contractor, Ronald Evans, the owner and manager of Evans Sheet Metal was involved in the management of the Evans and Evans as it was intended to be from the outset. The evidence also discloses that Ronald Evans was involved with the supervision and management of the OMS project for the Commonwealth of Pennsylvania. Robert Evans, a foreman for Evans Sheet Metal, and was also actively involved in the management and supervision of the Evans and Evans.

Although Evans and Evans moved to Throop, Pennsylvania, in September 1998, the evidence discloses that little, if anything, other than an address change, occurred with respect to the alter ego indicia. The nature of the business, the customers, the workers, and even the some of the equipment stayed the same. While it is unclear exactly what role Ronald Evans played in Evans and Evans after the move, the evidence shows that he was paid \$3000 in October 1998 for what Robert Evans described as repairs to the new building. Thus, I find that Evans and Evans, the unincorporated entity, was the alter ego of Evans Sheet Metal.

Likewise, the undisputed evidence shows that when Evans and Evans was incorporated as Evans & Evans, Inc. on February 3, 1999, the nature of the business, the employees, and the customers basically remained the same. The incorporated entity occupied the same location as the unincorporated entity and used some of the same equipment, like the barlock machine. The evidence also shows that monies owed to Evans and Evans from the Clarks Summit project were deposited into the corpo-

ration's checking account on June 23, 1999. (Tr. 174; GC Exh. 20.) Robert Evans, a foreman for Evans Sheet Metal and a manager/supervisor of Evans and Evans, was the sole shareholder and president of Evans & Evans, Inc. which he continued to own, operate, manage, and supervise Evans & Evans, Inc. Accordingly, I find that Evans & Evans, Inc. is the alter ego of Evans and Evans, and Evans Sheet Metal.

Finally, I find that the cases cited by the Respondent are inapposite. In both *Victor Valley Heating & Air Conditioning*, 267 NLRB 1292 (1983), and *Adanac Coal Co.*, 293 NLRB 290 (1989), the Board held that, despite a familiar relationship between the owners of the two entities, the totality of circumstances in each case did not establish an alter ego relationship. In *Victor Valley*, unlike here, the Board adopted the judge's findings that there was not substantially identical ownership, management or supervision, but rather that the two entities were operated separately and that the new entity was to take over a field of business which the older entity was abandoning. In *Adanac Coal Co.*, also unlike here, the Board adopted the judge's findings that in addition to the lack of showing of substantially identical ownership, other factors relevant to an alter ego determination mitigate against such a finding, including that the older entity was forced to cease operations by legitimate economic and business considerations.

On the basis of all foregoing factors, I find that Evans and Evans and Evans & Evans, Inc., are alter egos of Evans Sheet Metal and Ronald E. Evans, Inc.

3. The 8(a)(5) violation

It is undisputed that since June 1998, Evans Sheet Metal, and its alter egos, Evans and Evans, and Evans and Evans, Inc. failed to adhere to the terms of the collective-bargaining agreement by, among other things, failing to employ union members, failing to pay union wages, and failing to make benefit payments to the union benefit funds. Accordingly, I find that by failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit, the Respondent has violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondents, Evans Sheet Metal, and Ronald E. Evans, Inc. Evans and Evans, and Evans & Evans, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, Evans Sheet Metal, and Ronald E. Evans, Inc. Evans and Evans, and Evans & Evans, Inc. are alter egos of each other.

4. The collective-bargaining agreement between Evans Sheet Metal and the Union automatically renewed and continues in full force and effect.

5. The Respondent failed to adhere to the terms and condition of the collective-bargaining agreement with the Union by, among other things, failing to employ union members, failing to pay union wages, and failing to make required benefit fund payments since June 1998 in violation of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Having found that the Respondent has failed to adhere to the terms and conditions of the collective-bargaining agreement with the Union by, among other things, failing to employ union members, failing to pay union wages, and failing to make required benefit fund payments in violation of Section 8(a)(5) and (1) of the Act, the Respondent shall: recognize and, on request, bargain with the Union; reinstate and abide by the terms and conditions of the collective-bargaining agreement with the Union; make all contributions to the union funds from the date of its unlawful action, including any additional amounts due to the

funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979), with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); and make whole all employees who have worked for the Respondent since June 1998 for any losses they may have suffered because the Respondent failed to adhere to terms and conditions of the collective-bargaining agreement. Loss of wages shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest to be computed in the manner prescribed in *New Horizons for the Retarded*, supra. Loss of benefits associated with the failure to make required contributions shall be computed as prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).

[Recommended Order omitted from publication.]