Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc. ***and*** **United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO** ***and*** **Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO.** Cases 6-CA-12800, 6-CA-13716, and 6-CA-13914

February 11, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 27, 1981, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief and Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, filed exceptions and a brief in opposition to exceptions filed by Respondents.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondents, Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc., Harrisburg, Pennsylvania, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

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[1] Respondents except to the Administrative Law Judge's Decision as being tainted with bias, hostility, and prejudice. We find these allegations to be without merit. While we believe some of the statements made by the Administrative Law Judge at the hearing may have been ill-chosen, upon our full review of the record and the Decision of the Administrative Law Judge, we perceive no evidence that he prejudged the case, made prejudicial rulings, or demonstrated bias, hostility, and prejudice towards Respondents' counsel. We further find no evidence of partiality in the Administrative Law Judge's examination of Respondents' witnesses or his analysis and discussion of the evidence. Given this ruling, we deny Respondents' request for the Board to listen to the tapes of this proceeding.

At fn. 2 of his Decision, the Administrative Law Judge admonished Respondents' counsel for moving the Administrative Law Judge to rescue himself in their post-hearing brief rather than before the "appropriate reviewing authority." The Administrative Law Judge erred. Sec. 102.37 of the Board's Rules and Regulations requires the party requesting an administrative law judge to disqualify himself to do so before the administrative law judge files his decision. Further, Sec. 102.41 of the Board's Rules and Regulations provides that an objection to the conduct of the hearing may be included in the record.

Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We agree with the Administrative Law Judge's finding that ABI and Harrisburg Drywall are single employers under the Act. We further agree that the employees of ABI and Harrisburg Drywall constitute an appropriate unit. However, we do so solely because these employees share a sufficient community of interest based on the following findings: The firms provide subcontracting services of an identical nature in a segment of the construction industry; the employees perform similar work and possess common skills; the management, supervision, and control of labor relations of the employees is centralized; and there is a high incidence of temporary interchange of employees between the two firms.

We agree with the Administrative Law Judge that deferral to the arbitrator's award which was introduced into evidence is inappropriate in the instant case. In so doing, we find that the arbitrator expressly declined to resolve the statutory issue before us. Thus, in his decision the arbitrator expressly stated that the "basic question before the Arbitrator is whether Harrisburg Drywall is a 'subsidiary' or 'subsidiary building construction company' of Al Bryant, Inc. . . ." within the intendment of the contract. He specifically stated that his role was limited to interpreting the terms of the agreement and did "not extend to enforcing the provisions of the Labor Management Relations Act." The arbitrator then found that the NLRB and court cases cited to him by the Union were not enlightening as to the definition of a "subsidiary" and thus he relied on dictionary definitions. Based on the tenor of the arbitrator's entire decision, it is clear he did not consider the statutory issue. It is also clear that the arbitrator did not have the same evidence before him as in the instant case. For example, he had neither the employment rosters of Harrisburg Drywall nor any information that Bryant signed bids for Harrisburg Drywall.

Having found for the above reasons that deferral is unwarranted, we find it unnecessary to pass or rely on the Administrative Law Judge's discussion and conclusion that the arbitrator's decision was repugnant to the policies of the Act.

[3] In "The Remedy" section of his Decision, the Administrative Law Judge recommended that Respondents be ordered to apply their collective-bargaining agreement with United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO (Western) "retroactively without time limit . . . ." However, our normal remedy for violations of this nature is limited to the 10(b) period. We see no reason to extend the remedy beyond that period in this case. Accordingly, we shall order Respondents to apply their collective-bargaining agreement with Western retroactive to April 3, 1979, the beginning of the 10(b) period.

The Administrative Law Judge also recommended that Respondents be ordered to reimburse the trust funds provided for in the collective-bargaining agreements and to remit contributions it failed to make on behalf of unit employees of Harrisburg Drywall and Al Bryant Associates "with interest." Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question whether Respondents must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Company*, 240 NLRB 1213 (1979).

1. Substitute the following for paragraphs 2(a), (c), and (d):

"(a) Recognize United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, as the exclusive representative of the employees of Harrisburg Drywall and Construction Corporation in the aforesaid unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and apply the terms of the appropriate collective-bargaining agreement negotiated by CPSA and said labor organization retroactive to April 3, 1979."

"(c) Jointly and severally make the employees within said unit of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc., who are represented by Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, whole for any loss of earnings or other compensation they may have been denied since March 19, 1979, by the refusal to apply the terms of the collective-bargaining agreement to them, and reimburse the appropriate trust funds provided therein for those contributions which it has failed to make on behalf of said employees, in the manner set forth in the section of this Decision entitled 'The Remedy,' as modified."

"(d) Jointly and severally make the employees within said unit of Harrisburg Drywall and Construction Corporation, who are represented by United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, whole for any loss of earnings or other compensation they may have been denied since April 3, 1979, by the refusal to apply the terms of the collective-bargaining agreement to them, and reimburse the appropriate trust funds provided therein for those contributions which it has failed to make on behalf of said employees in the manner set forth in the section of this Decision entitled 'The Remedy,' as modified."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain with United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, as the exclusive representative of our employees in the appropriate unit described below by refusing to recognize and to apply the terms of the applicable collective-bargaining agreement with said labor organization to employees of Harrisburg Drywall and Construction Corporation. The appropriate unit is:

All journeyman carpenters, layout men, and apprentices employed within the geographic jurisdiction of United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, by employer members designating CPSA as their collective-bargaining representative (including Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc.), but excluding all other craftsmen, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively with Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive representative of our employees in the appropriate unit described below by refusing to recognize and to apply the collective-bargaining agreement with said labor organization to employees of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc. The appropriate collective-bargaining unit is:

All journeyman carpenters, layout men, and apprentices employed within the geographic jurisdiction of Keystone District Council of United Brotherhood of Carpenters and Joiners of America, AFL-CIO, by employer-members designating the Central Pennsylvania Subcontractors Association as their bargaining representative (including Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, Al Bryant Associates, Inc.),

but excluding all other craftsmen, guards and supervisors as defined in the Act.

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

WE WILL recognize United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, as the exclusive representative of the employees of Harrisburg Drywall and Construction Corporation in the appropriate collective-bargaining unit described above with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and WE WILL apply the collective-bargaining agreement with said labor organization to those employees of Harrisburg Drywall and Construction Company, retroactively to April 3, 1979.

WE WILL recognize Keystone District Council of United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive representative of the employees of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc., in the appropriate unit described above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and WE WILL apply the collective-bargaining agreement with said labor organization to such employees of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc., retroactively to March 19, 1979.

WE WILL jointly and severally make our employees within said unit of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc., who are represented by Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, whole for any loss of earnings or other compensation they may have been denied since March 19, 1979, by the refusal to apply the terms of the collective-bargaining agreement to them, and reimburse the appropriate trust funds provided therein for those contributions which we have failed to make on behalf of said employees.

WE WILL jointly and severally make our employees within said unit of Harrisburg Drywall and Construction Corporation, who are represented by United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, whole for any loss of earnings or other compensation they may have been denied since April 3, 1979, by the refusal to apply the terms of the collective-bargaining agreement to them, and reimburse the appropriate trust funds provided therein for those contributions which we have failed to make on behalf of said employees.

AL BRYANT, INC., HARRISBURG DRYWALL AND CONSTRUCTION CORPORATION AND AL BRYANT, ASSOCIATES, INC.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard by me in Harrisburg, Pennsylvania, on December 10, 11, and 12, 1980, and January 28 and 29, 1981, upon an initial unfair labor practice charge filed on August 10, 1979, in Case 6-CA-19417, and further charges, resulting in separate complaints, alleging that Respondents violated Section 8(a)(1) and (5) of the Act by refusing to recognize the Charging Parties and to apply the terms of the latter's subsisting collective-bargaining agreements to employees of Harrisburg Drywall and Al Bryant Associates.[1] In its answers, Respondents denied that any unfair labor practices were committed, and set forth certain affirmative defenses. Following the close of the hearing, briefs were filed on behalf of Respondents,[2] the General Counsel, and the Charging Parties.

Upon the entire record in this proceeding,[3] including my observation of the witnesses while testifying and their demeanor, and after consideration of the post-hearing briefs, it is hereby found as follows:

FINDINGS OF FACTS

I. JURISDICTION

Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc., are Penn-

[1] The original complaint in Case 6-CA-12800 issued on May 30, 1980, was amended on September 26, 1980, and was again amended on November 24, 1980. The original complaint in Case 6-CA-13716 was issued under Case 4-CA-10437 on April 30, 1980, and, after transfer to Region 6 of the National Labor Relations Board, was amended on September 26, 1980, and joined with Case 6-CA-13914 in a second amended complaint, which issued on November 21, 1980. The above proceedings were consolidated by an initial order dated August 20, 1980, and a further order consolidating cases issued on November 21, 1980.

[2] Respondents, on December 10, 1980, at the close of the first day of the hearing, charged me with assuming the role of an advocate and conducting myself in a manner manifesting a lack of impartiality. At that time, and again in response to a "Motion to Recuse," which was made at the outset of the continued hearing on December 11, 1980, I responded on the record to the accusations and charges made by co-counsel for Respondents. The aforesaid motion was denied. Respondents' post-hearing brief to me includes some 15 pages iterating its position that I denied Respondents a fair and impartial hearing. Curiousity is aroused that such a tact would be adopted, and such matters addressed to me directly at a time when I was considering the merits, rather than the more appropriate and relevant course of deferring such matters to the appropriate reviewing authority.

[3] Certain errors in the transcript are hereby noted and corrected.

sylvania corporations, engaged in construction of ceilings, floors, and drywall, with their principal office and place of business located at 2311 Hummingbird Lane, Harrisburg, Pennsylvania. It is alleged by the General Counsel that the foregoing, at all times material, have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy affecting employees of said operations; have shared common premises and facilities; have provided services for and interchanged personnel with each other;[4] and that, as such, they "constitute a single integrated business enterprise and a single employer within the meaning of the Act."

At the hearing it was stipulated that, in the course and conduct of said operations, services valued in excess of $50,000 were performed by Harrisburg Drywall in 1979, a representative period, for the Commonwealth of Pennsylvania. It further was stipulated that Respondents annually purchase goods and services exceeding $50,000 in and from sources beyond the Commonwealth of Pennsylvania.

The jurisdictional issue, as it affects Respondents, being predicated solely on facts pertaining to Harrisburg Drywall, depends vitally on the alleged single employer status of all three firms. That issue is also critical to the refusal to bargain allegations pertaining to Harrisburg Drywall and Al Bryant Associates. The latter, having been treated in subsequent sections of this Decision, and it having been concluded that consistent with the allegations in the relevant complaints, that these three firms constitute a single integrated enterprise and a single employer for purposes of the Act, I find that Respondents are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The complaints allege, the parties stipulated, and I find that United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, herein called Western, and Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called Keystone, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement*

This consolidated proceeding once again raises questions concerning the propriety under the Act of so-called double breasted operations in the construction industry, whereby distinct legal entities with common proprietary and managerial attributes function separately, with one utilized exclusively on a union basis and the other, or others, nonunion. The central figure in this inquiry is Albert Bryant, who, apparently for a number of years, has been a factor in the drywall, ceiling, and flooring industry in Pennsylvania. The General Counsel claims that Al Bryant, Incorporated, herein referred to as ABI, a firm owned wholly by Bryant and his wife, was party to collective-bargaining agreements covering "carpenters," negotiated between the Central Pennsylvania Subcontractors Association, herein called CPSA, and Keystone and Western, respectively. ABI was, at all times material, a contractor engaged in the construction of ceilings and floors and the hanging of drywall, and functioned as a "union contractor" paying union scale and fringes and honoring the terms of applicable collective-bargaining agreements with Keystone and Western. On behalf of the General Counsel, it is further asserted that Bryant utilized separate corporations, namely, Harrisburg Drywall Construction Corporation, herein call Harrisburg Drywall, and, commencing on January 1, 1980, Al Bryant Associates, Inc., herein called ABA, to bid on and perform identical construction work on a nonunion or open-shop basis. It is claimed that ABA and Harrisburg Drywall, together with ABI, constitute a single integrated enterprise with ABI, that all three were, therefore, through ABI's membership in CPSA and the latter's authority to negotiate on behalf of ABI, bound to CPSA's contracts with Keystone and Western.

Respondents, by way of defense, raise a myriad of procedural and substantive issues. It is asserted that, inasmuch as Keystone and Western both acquired knowledge that Harrisburg Drywall and ABA were functioning on a nonunion basis more than 6 months prior to the filing of any unfair labor practice charge, the complaints issued on their behalf were time-barred by virtue of Section 10(b) of the Act. Furthermore, in connection with the claims registered on behalf of Keystone, Respondents point to the fact that the issue of whether Harrisburg Drywall was bound to any agreement with that labor organization was submitted to arbitration in 1979, with a hearing held before Arbitrator James M. Harkless, on July 6 and 7, 1979, wherein the Union's grievance in quest of such determination was denied. On behalf of Respondents, it is asserted that said award is entitled to binding force pursuant to the *Spielberg* doctrine.[5]

With respect to the merits, Respondents deny that ABI was ever bound as a signatory or party to any agreement reached between CPSA and Keystone and Western. It is further asserted, again in the alternative, that ABI, Harrisburg Drywall, and ABA were independent firms having independent existence and lacking in any interrelationship which would confer single employer or *alter ego* status so as to permit enforcement of the National Labor Relations Act in a manner which would deem them responsible for any agreements reached by ABI.

B. *Background*

ABI was formed in 1967 by Albert Bryant. Since its inception, Albert Bryant has owned 90 percent of its stock, and his wife, Marjorie, the remaining 10 percent. At times material, that firm maintained its principal offices at 2311 Hummingbird Lane, Harrisburg, Pennsylvania, and functioned as a *union* contractor engaged in the

[4] See G.C. Exh. 1(tt).

[5] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

hanging of drywall, the insulation of ceilings, and the laying of floors.

Insofar as the instant record discloses, the relationship between ABI and the Carpenters' Union dated back to 1972 when an agreement was signed, at the request of Al Bryant, with the International Brotherhood of Carpenters. That document provided as follows:

Agreement

AGREEMENT between AL BRYANT INC. herein referred to as the Company, and the United Brotherhood of Carpenters and Joiners of America.

The Company agrees to recognize the jurisdictional claims of the United Brotherhood of Carpenters and Joiners of America, to work the hours, pay the wages and fringe benefits and observe the lawful working conditions (including lawful union shop agreements) established or agreed upon by the United Brotherhood of Carpenters and Joiners of America and the recognized agency of the locality in which any work of the Company is being done, with respect to journeymen carpenters employed by the Company.

No change is to be made in the hours, wages and other conditions established or agreed upon in any locality.

The Company will not subcontract any work within the jurisdiction of the United Brotherhood of Carpenters and Joiners of America which is to be performed at the job site except to a contractor who holds an agreement with the United Brotherhood of Carpenters and Joiners of America or one of its subordinate bodies, or who agrees in writing, prior to or at the time of the execution of his subcontract, to be bound by the terms of this Agreement.

In consideration of the foregoing the United Brotherhood of Carpenters and Joiners of America agrees to furnish competent journeymen selected for reference to jobs upon a non-discriminatory basis, such furnishing to be made upon request of the Company and with the Company retaining the right to reject or accept the applicants for employment.

The United Brotherhood of Carpenters and Joiners of America agrees that the District Council or Local Unions having jurisdiction in the respective areas of the performance of work will maintain appropriate non-discriminatory facilities for the registration and referral of persons possessing the skills required for the performance of work by the Company. The Company agrees to use said facilities in filling job vacancies on all projects.

In the event that no such facilities are maintained or that the facility maintained is unable to fill requisitions for employees within a 48-hour period, the Company may employ applicants directly at the job site on a non-discriminatory basis. In such event the Company will notify the union of the names and classifications and the dates of such hirings.

There shall be no strike or lockout pending any dispute being investigated and all peaceable means taken to bring about a settlement.

The Company will post in places where notices to employees and applicants for employment are customarily posted all of the provisions relating to the above hiring arrangements.

Company: Al Bryant, Inc.	United Brotherhood of Carpenters and Joiners of America
By [s]	By [s]
Albert I. Bryant	General President
President	

Prior thereto, a sole proprietorship, Harrisburg Drywall & Construction, was operated in the same field by an individual, Geno Premici. The latter, through his firm, had been engaged in drywall insulation and finishing on a nonunion basis. At some point, Premici sought Bryant's assistance with his financial problems. In consequence, in 1971, Harrisburg Drywall was incorporated, with Bryant retaining control as majority stockholder, and Premici becoming president and remaining the principal functionary of the business. Premuci's association with the new corporation lasted only about a year, and in 1972 his stock was redeemed by Harrisburg Drywall and Al Bryant retained ownership of all outstanding shares. Commencing in 1972, ABI, which had leased space at 2311 Hummingbird Lane from Al Bryant and his wife, subleased space to Harrisburg Drywall.[6] Later, Al Bryant, apparently, designated Charles May to be president of Harrisburg Drywall in November 1975. Bryant became vice president of that firm and its secretary. Harrisburg Drywall at no time signed any agreement or authorized any entity to negotiate with the Carpenters Union or its affiliates on behalf of its employees. Harrisburg Drywall engaged in the same construction activity as ABI but operated on a nonunion, open-shop basis.

In addition to the International agreement, considerable evidence was adduced reflecting on ABI's obligations pursuant to agreements negotiated by CPSA with Western and Keystone, respectively. Apparently, in 1974, another employer association, Keystone Building Contractors Association, herein called KBCA, jointly with CPSA, negotiated a collective-bargaining agreement with Keystone for a term running from May 1, 1974, through April 30, 1977.[7] Prior to expiration, that agreement was supplemented on April 18, 1977, by agreement between Keystone and CPSA and extended for a term from May 1, 1977, through April 30, 1982.[8] ABI was a member of CPSA, and Al Bryant was at the time of the hearing, and for many years before, a director of that association. Indeed, when the 1977 supplement was negotiated, Al Bryant was both the president and the sole spokesman and negotiator for CPSA and it

[6] As there was no written lease between ABI and Harrisburg Drywall, this apparently was pursuant to verbal understanding.

[7] See G.C. Exh. 4

[8] See G.C. Exh. 5.

was Bryant who executed that document on behalf of CPSA. Notwithstanding Al Bryant's involvement in the 1977 negotiations it is contended that ABI was at no time bound by the results of multiemployer negotiations for "carpenters."[9]

Like Keystone, Western had also negotiated a series of contracts with CPSA. In the 1975 negotiations, Nancy Linn Shaffer was the chief spokesman for CPSA. She furnished Western with a list of employers for whom CPSA was authorized to negotiate. That list included ABI.[10] Three years later, and 1 year after Bryant negotiated the 1977 supplement with Keystone, Western, in 1978, commenced contract renewal negotiations with CPSA. Orin Remsnyder was the chief spokesman for CPSA. At the outset of said negotiations, Western requested and Remsnyder provided a list of contracting employers. Once more, the list included ABI.[11]

While the 1977 Keystone supplement and the 1978 agreement with Western were in effect, ABI adhered to the terms thereof when operating within the geographic jurisdiction of each of these respective labor organizations. Harrisburg Drywall operated nonunion and failed to honor said agreements.

Beginning in 1977, Keystone began to receive complaints from carpenters employed by Harrisburg Drywall concerning their retention at less than union scale. However, no legal recourse was sought until March 19, 1979, when Keystone filed a grievance against ABI under the basic agreement, seeking to bind Harrisburg Drywall to the terms of the subsisting agreement. Arbitrator Harkless issued his award on October 29, 1979, denying Keystone's grievance.

While the proceeding before the arbitrator was pending, unfair labor practice charges were filed on August 10, 1979, by Keystone in Case 4-CA-10417,[12] charging ABI with 8(a)(1), (3), and (5) violations for utilizing a nonunion subsidiary and refusing to recognize the Union as representative of the employees employed by Harrisburg Drywall. On October 3, 1979, in Case 6-CA-12800, similar charges were filed by Western in connection with Harrisburg Drywall's performance of a job in Venango County, Pennsylvania.

During the pendency of these charges, but prior to the issuance of complaints thereon, a third corporation, ABA, was formed. This time Al Bryant relinquished ownership control. Thus, ABA was capitalized on the basis of Bryant's contribution of all of the outstanding stock of Harrisburg Drywall, and the contribution of $20,000 cash by Jean Hoffman and Larry McClain.[13] Al Bryant's interest in ABA was that of a 30-percent shareholder. He held the offices of vice president in charge of sales and treasurer. Hoffman and McClain each retain 35 percent of the remaining outstanding shares.

ABA beginning in 1980, like ABI and Harrisburg Drywall, operated as a contractor engaged in the construction of ceilings and floors and the hanging of drywall. As was true of Harrisburg Drywall, ABA functioned exclusively on an open shop nonunion basis and did not adhere to the CPSA bargaining agreements.

Thereafter, on October 6, 1980, an unfair labor practice charge implicating ABA was filed by Keystone in Case 6-CA-13914. The charges, as amended, alleged, *inter alia*, that ABI, ABA, and Harrisburg Drywall refused to bargain with Keystone as representative selected and designated by an employee majority.

C. *Concluding Findings*

1. The 10(b) issue

The threshold question is whether the 10(b) defense was raised by Respondents in a timely fashion. Respondents failed to affirmatively raise the 10(b) defense in its various answers. It, nevertheless, sought dismissal on that ground prior to the conclusion of the General Counsel's case. Based thereon, at that time, the General Counsel and the Charging Parties were apprised by me that they would be afforded latitude in meeting that defense during the hearing. Accordingly, any possible prejudice in consequence of belated injection of the 10(b) issue was removed, and I ruled that the defense was viable and a proper subject for litigation.[14]

The General Counsel and the Charging Parties seek reconsideration of this ruling. However, contrary to their view, those asserting the 10(b) defense assume no obligation that it be pleaded affirmatively. It is sufficient that the matter be raised in a timely fashion. See, e.g., *Vitronic Division of Penn Corporation*, 239 NLRB 45 (1978). In this instance, the matter was raised at a time and under conditions which permitted litigation of the matter without prejudice to the parties, and without undo prolongation of the proceeding. The ruling made in this regard at the hearing is reaffirmed.

Section 10(b) of the Act precludes the maintenance of a complaint upon conduct occurring "more than six months prior to the filing of the charge." Harrisburg

[9] The enabling rules of CPSA were not introduced. However, parole testimony was offered to the effect that employer-members of CPSA are not bound to collective-bargaining agreements negotiated by said association absent prior, written authorization to that effect. Apparently because of differences between the strict carpentry craft and the work of "floor layers," a separate agreement is negotiated by CPSA for "floor layers." The dispute in this case centers on members of the carpentry craft rather than floor layers. ABI concedes that CPSA was authorized to bargain on its behalf with respect to the floor layers, and that it was bound to CPSA's contract covering them. ABI denies that it had effected such an authorization with respect to the "carpenters."

[10] See G.C. Exh. 25.

[11] See G.C. Exh. 496.

[12] By action of the General Counsel on August 15, 1980, Case 4-CA-10417 was transferred to Region 6 of the National Labor Relations Board and redesignated Case 6-CA-13716.

[13] Hoffman and McClain at the time were key employees of ABI. In addition, Hoffman was an officer and director of both ABI and Harrisburg Drywall.

[14] Having ruled in Respondents' favor in this regard, Respondents later moved to amend its answers to this effect. I ruled that such action was unnecessary, as a matter of substance, in view of the ruling set forth in the above text and also improper in the circumstances. Respondents also contended that under the Federal Rules of Civil Procedure, pleadings may be amended to conform with respect to issues tried "by express or implied consent of the parties . . . ." In this respect, Respondents rely on the fact that as evidence supporting the 10(b) defense was elicited without objection by either the General Counsel or the Charging Parties, this constitutes "implied consent." Although the issue need not be reached, I find no merit in this view. I am not convinced that the facts in question were introduced under conditions conveying knowledge, appreciation, understanding, or suspicion, that they might be seized on later to support the 10(b) defense.

Drywall plainly was engaged in operations well in advance of the 10(b) period. However, the onus was on Respondents to demonstrate that the Charging Parties were aware that ABI was engaging in actionable conduct through Harrisburg Drywall more than 6 months before the filing of the charges herein. In this connection, undenied evidence establishes that Harrisburg Drywall was operating nonunion and that Keystone was aware Western suspected this fact more than 6 months before filing the charges that formed the predicate for this proceeding. Thus, with respect to Keystone the initial charge herein was filed on August 10, 1979. Robert Getz, the secretary-treasurer of Keystone, testified in the arbitration proceeding on July 6, 1979, that in 1977 a union member, Ortega, complained about wages he was receiving from Harrisburg Drywall and that Bryant was operating an open shop.[15] Getz acknowledged that this was confirmed through his investigation in January 1979 of health and welfare records reflecting contributions of union members that he knew to be working full time under Bryant's aegis but were not receiving full-time credits. He further testified that, on questioning the members as to the amount of hours they were working, he learned that they had been working part time for Harrisburg Drywall.[16]

With respect to Western, the initial unfair labor practice charge was filed on October 3, 1979. Insofar as this record discloses, Western acquired knowledge of Harrisburg Drywall in connection with a subcontract awarded by the State of Pennsylvania to that firm on the Polk Center located in Venango County, Pennsylvania, a site within the geographic jurisdiction of the latter. Respondents point to the testimony of George Garfield, a business representative of Western, in this connection. Garfield testified that he noticed from a "Dodge Report"[17] that Harrisburg Drywall had the job at Polk. He telephoned the number appearing and the person answering the phone identified himself as Al Bryant. Bryant was asked if he would need union personnel on the job, and replied that he would not, because he was doing the job under Harrisburg Drywall. Garfield indicated that the job should be performed under Western's contract with CPSA. According to Garfield, Bryant did not "seem to agree." According to Garfield, it was not until June 1979, and subsequent to this conversation, that work on the Polk Center job actually commenced. On cross-examination, Garfield placed the telephone conversation with Bryant as preceding visits to the jobsite which occurred approximately in January 1979.

Garfield's testimony must be considered together with that of Robert Argentine, Western's executive manager. Argentine testified that Garfield reported that the Polk job was being performed by Al Bryant doing business as Harrisburg Drywall. Because Argentine was informed by Garfield that "he hadn't been able to do much with him" toward the end of May, on or about May 23, 1979, he spoke with Bryant on the telephone. Argentine advised that he expected him to honor the contract at Polk Center and was informed that Bryant had let the job to Harrisburg Drywall. Argentine expressed that this was in violation of the contract, and threatened to "push it to any extreme . . . to see that our contract was enforced." When Argentine observed that the prevailing rate had to be paid on the job anyway, and appealed that it be performed consistent with the contract, Bryant allegedly responded, "I'll get back to you." Bryant never again contacted Argentine, who prior to the filing of the charges made several unsuccessful attempts to reach Bryant.

With respect to Western, the evidence does not substantiate that the latter was apprised of actionable unfair labor practice until within the 10(b) period. The 10(b) cutoff date with respect to this the Charging Party was April 3, 1979. The record does not permit a firm finding that Harrisburg Drywall commenced work at the Polk job as of that date. Obviously, no arguable unfair labor practice would inure until such time as Harrisburg Drywall conmenced operations under employment terms distinct from those in the CPSA contract with Western. The declaration by Bryant of his intention to perform that job on a nonunion basis was not an actionable unfair labor practice and hence did not activate the 6-month limitation.[18] Furthermore, the indication by Bryant in the May telephone conversation with Argentine that he would get back to him, at a very minimum, conveyed to Western the possibility that there would be further consideration of its demand with respect to the Polk job. In sum, it is concluded that Respondent has failed to meet its burden of proving that Charging Party Western was put on notice of any unfair labor practices committed by ABI through Harrisburg Drywall on or before April 3, 1979.

Unlike the situation with Western, however, it is clear that Harrisburg Drywall had performed on a nonunion basis within the geographic jurisdiction of Keystone and that Keystone representatives were aware, thereof, more than 6 months prior to the filing of its unfair labor practice charge. In the face of the foregoing, the General Counsel contends that Section 10(b), nonetheless, does not constitute a substantial defense, inasmuch as the violation was a continuing one, and the facts within Keystone's knowledge did not constitute clear and unequivocal notice inasmuch as Keystone was not aware of all the elements establishing that Harrisburg Drywall and ABI constituted a single employer, and indeed had been misled with respect to such matters by Al Bryant himself.

It is also noted that Bryant testified that after Ortega had complained to Keystone he received a visit from Keystone Representatives Martz and Getz. What transpired on that occasion was related by Bryant as follows:

[15] In addition to the foregoing, Richard W. Martz, a business agent for Keystone, testified before the arbitrator on July 6, 1979, that he first learned that Bryant was operating two shops when Ortega registered his complaint in 1977.

[16] George Gulliver, the son-in-law of Getz, testified that he was hired by ABI in August 1978 and further confirmed that on November 19, 1978, after receiving his first paycheck from Harrisburg Drywall, he informed Getz that he had worked for Harrisburg Drywall, and that, from this discussion, it was evident that Getz already knew that Harrisburg Drywall was nonunion.

[17] The "Dodge Report" is a publication, identifying contractors and subcontractors on contracts let in the construction industry.

[18] See, e.g., *City Roofing Co.*, 222 NLRB 786, fn. 1 (1976), and *California School of Professional Psychology*, 227 NLRB 1657, fn. 1 (1977).

> All right, they came to my office and said that they had a complaint from a Mr. Ortega that he was paid less than scale by Harrisburg Drywall.
>
> I explained to them that I had nothing to do with Harrisburg Drywall, they said well, you own it, and I said yes, I do own it but I don't run it, I have nothing to do with it.
>
> They ended up the discussion with me saying okay he [Ortega] has nothing to complain about if he was working for an open shop company, then he has no valid claim that he was paid less than union scale, because Harrisburg Drywall is not affiliated and went back and as they told me they were going to tell him that he was not entitled to any additional funds and that there was no complaint against Al Bryant, Incorporated but would I please do what I could as the owner of Harrisburg Drywall to see that it did not use union—members of the union on their work.

This representation by Bryant, if true, would tend strongly to exonerate Harrisburg Drywall from any bargaining obligation under the Act or any unfair labor practices in continuing to operate nonunion. "The Board has pointed out that common ownership, by itself is not sufficient . . . [to establish single employer status]." See *United Constructors and Goodwin Construction Company*, 233 NLRB 904 (1977). Furthermore, as shall be seen, Bryant had far more to do with the operations of Harrisburg Drywall than his own testimony indicates that he conveyed to union officials in connection with the Ortega matter. Furthermore, the evidence does not disclose that more accurate information regarding Bryant's involvement came into the hands of Keystone prior to the 10(b) cutoff date. Relevant to the question presented is the Board's statement in *Don Burgess Construction Corporation d/b/a Burgess and Donald Burgess and Verlon Hendrix d/b/a V & B Builders*, 227 NLRB 765, 766 (1977), to the effect that:

> It has long been recognized that when a party "has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered. . . .'"

On balance, however, I am not convinced that such an extension is warranted here. Prior to the 10(b) cutoff date, Keystone was mindful that its members had been employed by Harrisburg Drywall; that Harrisburg Drywall had performed work covered by the CPSA contract; that Harrisburg Drywall had not adhered to the terms of that contract, and that Al Bryant owned Harrisburg Drywall. Those facts were in no way influenced by any representation made by Bryant, and objectively viewed would strongly have suggested possible illegality in Harrisburg Drywall's operations.[19] Anomaly would result if Section 10(b) were interpreted as tolling the limitation on the basis of an exculpatory statement by the perpetrator of unfair labor practices. For example, in virtually a discriminatory discharge cases, the employer represents to the discriminatee that the discipline imposed was for a legitimate reason. The fact that this is later shown to be pretextual and false could not possibly serve to neutralize Section 10(b) without eliminating completely the 6-month limitation in most discharge cases. The representation attributed to Bryant is no more egregious, and I find that it did not rise to the level of fraud which would warrant rejection of the 10(b) defense.

Nonetheless, the inquiry does not end here, for the General Counsel contends in the alternative that the abnegation of obligations by an employer or labor organization under a collective-bargaining agreement constitutes a continuing violation for purposes of Section 10(b). Under this approach, though statutory relief will not extend beyond the 10(b) cutoff date, the fact that initial repudiation of the agreement occurred prior thereto does not absolve a respondent from the unfair labor practices which inure from its continuing failure within the 10(b) period, on demand, to execute or formally abide by such agreement. See, e.g., *Torrington Construction Company, Inc.*, 235 NLRB 1540, fn. 2 (1978). In the instant case, by letter dated March 19, 1979, Keystone, through its attorney, informed Bryant that Harrisburg Drywall was covered by the applicable agreement, and that it was obligated to adhere to the terms thereof.[20] By virtue thereof, and Bryant's failure to satisfy the demand, I find that the alleged violations, to the extent predicated upon events on and after March 19, 1979, were within the 10(b) period and are actionable in this proceeding.

2. ABI's obligation under CPSA agreements

The crucial predicate for the allegations in the instant complaints is that ABI was contractually bound to CPSA agreements with Western and Keystone. Respondents deny this to have been the case and if that view is valid no violations would inure even if ABI, Harrisburg Drywall, and ABA constituted a single, integrated employer within the meaning of the Act.

As indicated, Keystone and Western both enjoy a bargaining history on a multiemployer basis with employers who negotiate through CPSA as their agent for such purposes. With respect to Keystone, CPSA executes separate agreements for "carpenters" and other members of the carpenters' union who are engaged in the apparently less skilled "floor layer" classification. As to Keystone, Al Bryant conceded that he authorized CPSA to bargain on behalf of ABI with respect to soft floor layers, but not the "carpenters" on whose behalf this proceeding is being maintained. Bryant went on to testify that although ABI is a "union contractor," functioning within the geo-

[19] No precedent is called to my attention requiring the offended party to be aware of all factual elements substantiating an unfair labor practice before the 10(b) period begins to run. All that is required is that the "act" giving rise to unlawful conduct be known. To require more would reduce 10(b) to the meaningless. Seldom does an aggrieved party comprehend what is and what is not determinative of a cause. Furthermore, experience shows that dispositive elements of an unfair labor practice often first emerge at the hearing. Absent clear precedent, in such circumstances, an otherwise meritorious assertion of 10(b) shall not be overridden because critical elements of unlawful conduct are unknown to the moving party.

[20] See G.C. Exh. 9.

graphic jurisdiction of Keystone and Western, ABI had never become bound to either labor organization's contract with CPSA covering "carpenters."

Undisputed, believable evidence establishes that CPSA is an organization which includes as members subcontractors in the construction industry as well as others who are not engaged directly in construction work but who have interests in that industry. The responsibilities of CPSA include, but are not limited to, negotiating collective-bargaining agreements with various crafts represented by building trade unions. Although undocumented, I find that CPSA's negotiations with various labor organizations were binding only upon those of its employer-members who had afforded prior, written authorization of their intention to be bound. Although ABI, at least since 1972, had been a member of CPSA, Bryant claims that he at no time executed such an authorization with respect to the carpentry craft as represented by either Keystone or Western. For the reasons set forth below, I discredit Bryant's testimony in this regard.

Bryant admitted that ABI was a proper party to and bound by CPSA's negotiations with respect to soft floor layers. Though he acknowledged that ABI utilized both soft floor layers, and "carpenters," and indeed used the same individuals to perform both types of work, paying the rates under the appropriate CPSA contract as the work of these individuals shifted between the jurisdictional coverage of the agreements, no explanation was offered as to why ABI would have authorized CPSA as to one but not the other.

More critical, however, is Bryant's admitted role in the affairs of CPSA as they related to Keystone. At the time of the hearing, Bryant was a director of CPSA and had occupied that position "a couple of years." He was president of CPSA when CPSA on April 18, 1977, executed a memorandum agreement with Keystone, renewing the terms of an existing contract to April 30, 1982. Al Bryant was not only spokesman for CPSA at the time, but alone negotiated the agreement binding upon certain CPSA employer-members. Thus, Bryant, in his testimony in this proceeding, portrays himself as having used his position within CPSA to negotiate an agreement binding upon organized competitors, but not his own firm. Prior to the execution of that document, Bryant, by letter dated April 15, 1977, wrote Robert Getz, secretary-treasurer of Keystone, pertaining to those negotiations, requesting a minor change, which was justified in Bryant's own words, as follows:

> Bob, as I explained, we as subcontractors can not sign an agreement stipulating that we will perform "all the work" in view of the fact that we have no control over the distribution of all the work. We can, however, agree to perform and/or subcontract that work which we obtained, which is all the work we actually control.
>
> If this meets with your approval, please call me and we will arrange to sit down and execute the new agreement.[21]

[21] See G.C. Exh. 6. In all, the first person plural was used seven times by Bryant in this passage.

Following execution of the agreement, Orin Remsnyder, the executive director of CPSA, by letter dated May 12, 1977, informed Keystone of the employer-members bound both to the "carpenter" and "floor layer" agreements.[22] Al Bryant, Inc., was listed in both categories. Bryant acknowledged having received a copy of this letter.

The Remsnyder letter is of course highly material to Respondents' denial of any contractual commitment with respect to the "carpenter" agreement. Suspicion was hardly allayed by Bryant's reaction when he was asked to identify this document at the hearing. At that time the following colloquy took place:

> Q. (By Mr. Franckiewicz) I'm showing you what's been marked General Counsel's Exhibit 7, would you tell us what that is please?
>
> This is a letter which Orin Remsnyder of C.P.S.A., sent to Mr. Getz, with a copy to you, is that correct?
>
> MR. BECKLEY: Objection to the form of the question, it presupposes a true statement.
>
> THE WITNESS: I have no record.
>
> * * * * *
>
> Q. (By Mr. Franckiewicz) This a copy you received of a letter signed by Mr. Remsnyder is that correct?
>
> MR. BECKLEY: Objection to the form of the question.
>
> JUDGE HARMATZ: Why don't you ask him to identify it.
>
> Q. (By Mr. Franckiewicz) What is this?
>
> A. It appears to be a letter from Mr. Remsnyder to Mr. Getz, listing those people that are in signed agreement for the Carpenters and the Soft Floor Layers.
>
> Q. Okay, and you will notice the carbon copy to Al Bryant at the bottom?
>
> A. I notice it, but I have no record of having received it.
>
> Q. All right, at the arbitration proceeding, did you testify about this letter?
>
> A. I didn't, no.
>
> Q. Let me see if I can refresh your memory. As a matter of—
>
> JUDGE HARMATZ: Let him show you the transcript.
>
> THE WITNESS: Yeah, okay.
>
> Q. (By Mr. Franckiewicz) Now, on General Counsel's exhibit 7, you will notice that I have scratched out Union exhibit 3, this was Union exhibit 3 at the arbitration?
>
> A. Right.
>
> Q. And you were asked—
>
> MR. BECKLEY: Would you tell us please, what your are referring to?
>
> MR. FRANCKIEWICZ: Page 58.

[22] See G.C. Exh. 7.

Q. (By Mr. Franckiewicz) You were asked if you got a copy of that letter marked Union exhibit 3, that shows a cc at the bottom?

A. Yes.

Q. And you testified yes?

A. Right.

MR. BECKLEY: He's doing it again, sir, let the witness read on with the testimony.

MR. FRANCKIEWICZ: I'm willing to go on with the rest of the page, I will read it from the record.

MR. BECKLEY: Yes, please do that this time.

MR. FRANCKIEWICZ: All right, and the witness was then asked, "You did receive a copy of that?"

A. I assume so.

Q. (Continuing) Do you notice Al Bryant's name listed?

A. Yes, I do.

Q. On both Soft Floor and for Carpenters?

A. Yes.

Q. Did you ever object to that?

A. Yes.

Q. When?

A. To Mr. Remsnyder, when I received the letter.

Any further that you want me to go? I think I've covered it all.

MR. BECKLEY: I think we could have it xeroxed, and the rest of it put in.

MR. FRANCKIEWICZ: Well, it's already in, I offer General Counsel's exhibit 7.

JUDGE HARMATZ: You couldn't have been mistaken that you had objected to the name of your firm appearing on that letter?

THE WITNESS: No, that I couldn't have been mistaken.

JUDGE HARMATZ: Okay, and it was the fact that your firm was listed in that letter, that made you object?

THE WITNESS: That's correct, sir.

JUDGE HARMATZ: So you must have received a copy of that letter?

THE WITNESS: Well, that's why, as the conversation started, I started to say something that I remembered a discussion about it, but then I didn't know whether I was going to be talking about the wrong thing, very frankly.

JUDGE HARMATZ: Now, with the refreshing of your recollection,—

THE WITNESS: Yes, sir.

JUDGE HARMATZ: You are positive that you received a copy?

THE WITNESS: I'm positive I received it.

JUDGE HARMATZ: What is marked as General Counsel's 7?

THE WITNESS: Yes, sir.

JUDGE HARMATZ: Okay, so be it.

As indicated in the above extract from the transcript, Bryant claimed that when he received a copy of Remsnyder's letter, he immediately protested, not to Keystone, but to Remsnyder. Bryant further testified that Remsnyder was instructed to notify the Union that CPSA lacked authority to bargain for ABI and that Remsnyder assured Bryant that he would do so.

In assessing the credulity of this explanation it is of interest that Bryant himself had been involved in the process of responding to Keystone's requests for the very information that was contained in the Remsnyder letter. Thus, by letter dated April 18, 1977, Bryant wrote Keystone as follows:

> Attached is a signed copy of the new Agreement between CPSA and the Keystone District Council of Carpenters. As you know, CPSA is signing on behalf of those employers who have given us bargaining rights. Since I do not have a copy of the bargaining rights in my office, I will send you a list of the contractors and a photocopy of the bargaining rights as soon as Orin Remsnyder returns from the convention in California (next week).
>
> cc: CPSA Office

Bryant obviously chose not to inform Keystone of the status of ABI at that time.

Remsnyder, in an attempt to corroborate Bryant, testified that at the time he prepared his subsequent May 12 letter he was very new on the job, and did not understand the nature of Keystone's "repeated" requests for a listing of CPSA members bound to the new agreement. He claims not to have really known how to respond to Keystone. Remsnyder claimed to have obtained this information, not from Bryant, the president of CPSA, who himself had testified that he alone negotiated the contract,[23] but from Marlin Slough, a director and member of CPSA.[24]

Remsnyder further testified that having forwarded a copy of the May 16 letter to Bryant he received a telephone call from the latter. Bryant assertedly informed "that he had not given CPSA his bargaining authorization at that time."[25] whereupon, Remsnyder claimed to have searched CPSA's files and found no bargaining authorization from Bryant. Beyond that, Remsnyder initially testified that he "thought" that Bryant asked him to inform the Union of this fact, and that he "thought" that he did contract Getz as directed.[26]

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[23] As indicated, a copy of Bryant's April 18 letter to Keystone concerning such a listing was sent to "CPSA office." See G.C. Exh. 8.

[24] Remsnyder testified that the 1977 negotiations were conducted on behalf of CPSA by Chief Negotiator Marlin Slough. His testimony in this regard conflicts with Bryant's own acknowledgement that he alone negotiated the 1977 agreement with Keystone. Slough did not testify. I did not believe Remsnyder, and regard it as somewhat extraordinary that he would consult in preparing the list with anyone other than Bryant himself, who as president of CPSA alone had negotiated the agreement and who had written the Union that submission of this very list would be deferred until Remsnyder's return.

[25] Remsnyder testified that, though he had been employed by CPSA since July 1976, he had not known previously information that bargaining authorizations were required before any employer-member could be bound to the results of CPSA's negotiations with various labor organizations.

[26] Getz denied ever having received such information from any source. I credit Getz over Remsnyder in this regard. Remsnyder did not impress as having independent recollection of such matters, and in any event he was regarded as an unreliable witness.

A further fact casting doubt on the veracity of Remsnyder in this respect emerges from Respondents' claim that CPSA had not been authorized by ABI to bargain with respect to "carpenters" with any labor organization, including Western. Unexplained is the fact that Remsnyder, who would have me believe that he made a critical error in 1977 by including ABI in the list of employers bound to the Keystone negotiations, apparently repeated that mistake in 1978, when a similar list was delivered by Remsnyder to Western in connection with CPSA's negotiation with that labor organization. Again ABI was listed as among the contractors having authorized CPSA to bind them with respect to a contract covering carpenters.[27] Unlike what transpired a year earlier, Remsnyder affords no explanation as to why ABI was included on the 1978 listing, or whether not he cleared this matter with Al Bryant before doing so.

With respect to Western, the denial by Bryant that ABI had duly authorized CPSA to bind itself is totally lacking in corroboration. According to the uncontradicted testimony of Robert Argentine, Western's executive manager, CPSA first negotiated on behalf of its employer-members with Western in 1972. Subsequent negotiations in 1975 and 1978 produced renewal agreements with the most recent expiring in 1981. Nancy Linn Shaffer was the chief spokesman for CPSA in 1975. At the request of Western in 1975, Shaffer provided a list of the contractors represented by CPSA at the time. ABI was listed among the "employers who have granted bargaining authorizations to CPSA for the 20 county District Council Carpenters of Western Pennsylvania Agreement."[28] During the 1978 negotiations, Orin Remsnyder was the chief spokesman on behalf of CPSA. In the course of negotiations, a list of the contracting firms represented by CPSA was requested by Western and provided by CPSA. ABI was included on that list.[29] No claim was registered herein that ABI was included on the 1975 and 1978 listings erroneously.[30] Nor is there evidence that ABI had ever notified CPSA or Western that it had not designated CPSA to bargain in its behalf with that labor organization.[31]

While I reject as unbelievable the testimony of Bryant and Remsnyder to the effect that CPSA held no written authorization to bind ABI to negotiated bargaining agreements with Keystone and Western pertaining to conditions of work of "carpenters," the assertion that ABI was bound to such agreements is maintainable on other grounds as well. Thus, under settled Board authority, an employer may be deemed bound by results of multiemployer negotiations, even though express authorization of bargaining authority be withheld, and the employer had not signed the contract, if the employer's conduct manifested an intention to be bound.[32] The instant cause presents a strong context for application of that principle. Al Bryant, the president of ABI, who together with his wife owned all stock of the firm, considered ABI to be a "union contractor." While asserting that his status was voluntary and not based on contractual commitment, he concedes that ABI's operations were marked in their entirety by adherence to the terms of contracts negotiated by CPSA including the payment of required fringe benefits and observance of union-security and dues-checkoff provisions.

In addition to his adherence to the terms of those agreements, Bryant, beginning in 1976, attended and even hosted joint labor management meetings through which members of CPSA sought relief from their adverse competitive position with nonunion subcontractors. Furthermore, pursuant to separate contracts negotiated by CPSA with seven craft unions in the building trades, including the Carpenters union, a trust fund was established, which was jointly administered by labor-management representatives. At least since March 1, 1977, Al Bryant has been a trustee of said fringe programs and hence presumably was in a position to influence the administration of benefits of craftsmen covered by the CPSA agreements including "carpenters." Finally, as indicated, Bryant's positions as director, president, and negotiator on behalf of CPSA would unmistakably convey that he was situated identically to ABI competitors that had duly effected bargaining authorizations to CPSA. As Bryant conceded that he had not informed Western or Keystone that ABI was not bound to the agreements negotiated with those labor organizations by CPSA, and other testimony as to the existence of such notification has been rejected, I find additionally that ABI through the conduct of its principal owner and functionary Bryant manifested an unequivocal intention to be bound to CPSA contracts with Western and Keystone to the point of raising an estopple against denial of that fact. "An employer who, through a course of conduct or otherwise, signifies that it has authorized the group to act in its behalf will be bound by that apparent creation of authority." *Joseph McDaniel, an Individual Proprietorship d/b/a Custom Colors Contractors*, 226 NLRB 851, 853 (1976). That is precisely what occurred here.[33]

[27] See G.C. Exh. 26.

[28] See G.C. Exh. 25.

[29] See G.C. Exh. 26.

[30] In the circumstances, I find the entries on G.C. Exhs. 25 and 26 to be binding on Respondents. Uncontradicted evidence establishes that CPSA delivered the listings in question to Argentine in the course of CPSA's negotiations with Western in 1975 and 1978. With respect to the 1978 negotiations, Remsnyder's own testimony confirms that, as of that time, he would have been aware of the significance of listing an employer that had failed to authorize CPSA to bargain on its behalf. Furthermore, Remsnyder was available to testify to any circumstances beclouding the authenticity of G.C. Exh. 26. A circumstantial chain exists which is corroborative, through inference, of the accuracy thereof. Furthermore, as CPSA negotiates agreements binding upon employers executing proper written authorizations as a regular part of its operations, one might rightfully assume that G.C. Exh. 26 found its origin in business records regularly maintained by CPSA in support of that function. See Fed. R. of Evid., Rule 803-806.

[31] It will be recalled that Remsnyder testified that he notified Keystone that ABI had not authorized CPSA to bargain on its behalf. Though this testimony was not believed, it is noted that Remsnyder did not testify that any such communication was ever forwarded to any representative of Western.

[32] See, e.g., *Fitzpatrick Electric, Inc.*, 242 NLRB 739 (1979).

[33] Based on the foregoing, it is unnecessary to pass upon the legal consequences of ABI's execution of the International agreement in 1972. See G.C. Exh. 4. With respect to Respondents' references to Sec. 8(f), it is noted that, while an employer would assume no enforceable obligation under such an agreement, that consequence does not obtain in the case of

Continued

3. The single employer issue; the Keystone arbitration

No claim is registered in the instant proceeding that ABI, as a separate entity, failed to adhere to the terms of the CPSA agreements. The gravamen of the complaints is addressed to the operations of Harrisburg Drywall and ABA, which admittedly operated on a nonunion basis, but which according to the consolidated complaints constituted a single employer with ABI and hence are bound to the contractual obligations of the latter.

Harrisburg Drywall evolved from a sole proprietorship operated under that name by one Geno Premici. In 1971, at Premici's request, Bryant invested in Harrisburg Drywall, after the firm was incorporated and Bryant was permitted to retain controlling ownership. In late 1972, Premici's stock was purchased by the Corporation, Premici parted company, and Bryant became sole owner of the outstanding corporate shares.

At all times since the incorporation of Harrisburg Drywall, it was headquartered at the Hummingbird Lane facility, also utilized by ABI. Said facility is owned by Al Bryant and his wife. Until December 31, 1979, those premises were leased to ABI. Since 1972, ABI has subleased space to Harrisburg Drywall. However, this was apparently accomplished orally for there is no written lease memorializing the terms thereof.

During the years of its operations it appears that the only assets of a corporeal nature retained by Harrisburg Drywall were a single, 1974 vintage van, and some office equipment inherited from Premici's firm. In other respects, Harrisburg Drywall utilized on and offsite construction equipment, including trucks, hoists, forklifts, and saws owned by ABI. Office equipment owned by ABI was also utilized in connection with operations of Harrisburg Drywall. Harrisburg Drywall had no warehouse, engineering, sales, or clerical force, but individuals employed by ABI served the former's needs in these areas. All utility costs, including gasoline, electricity, and telephones, incurred by Harrisburg Drywall and ABI were paid by ABI.

No written agreements existed evidencing the "housing" arrangement as between ABI and Harrisburg Drywall or the former's provision of equipment, administrative support, and expenditures for overhead costs. Compensation of ABI in these areas was pursuant to an accounting system devised by the accountant, selected by Al Bryant, on behalf of both conpanies to allocate costs as between the two firms. Thus, at the end of annual accounting periods, such costs were shared by ABI and Harrisburg Drywall in proportion to the gross volume of business done by each. This arrangement was hardly indicative of "arms length" dealing. While the pooling of administrative and clerical resources may be accomplished in other areas by indisputably separate entities, I reject any notion that in such cases the costs of such services are deferred and not borne with a degree of immediacy. Here, ABI bore all expenses for a 12-month period, a burden tantamount to an interest-free, extension of credit to Harrisburg Drywall. Along the same line, Bryant testified that there was no established rental charge for ABI's equipment. As the latter entails a nonrecurrent, capital expenditure, this charge off would not be suitable to allocation in the same manner as items whose cost accumulates continuously with use. Bryant explained that ABI was compensated as to equipment by allocation of depreciation as between the firms. As a general proposition, annual depreciation on capital assets would be something less than fair rental value.

The foregoing portrays Harrisburg Drywall as a operational shell with no independent administrative capacity and little in the way of capital assets. As shall be seen below, this was complemented by integration of ABI resources upon the operations of Harrisburg Drywall at every level, from management to craftsmen who performed on the jobsite.

From the standpoint of management, the nominal head of Harrisburg Drywall was Charles May. Bryant in 1975 selected May to "run" Harrisburg Drywall.[34] May was a craftsman, whose employment as a "carpenter" dated back to 1959. According to Bryant, he together with May jointly decided to operate Harrisburg Drywall as a nonunion company.[35]

May engaged substantially in providing field supervision at various jobsites and worked from time to time with his own tools on jobs. From direct observation, and his testimony, May impressed me as more at home in that capacity than as a manager. For example, May could not identify the accountant of Harrisburg Drywall, did not know who purchased office supplies for that firm, did not know whether Bryant dealt with Harrisburg Drywall customers, and had no comprehension of the overtime system applied to the latter's employers. May acknowledged that he had nothing to do with the financial end of Harrisburg Drywall and hence did not know whether ABI and Harrisburg Drywall loaned money to each other. Since May declared that he had no role in the financial end of Harrisburg Drywall, obviously this area was subject to exclusive control of ABI functionaries.[36]

a successor agreement, or where, since execution, the Union had acquired majority status among the employees. No evidence exists warranting a finding that the CPSA agreements in question were 8(f) contracts, nor does it appear that, if they were, ABI's responsibility pursuant thereto was unenforceable. See *Williams Enterprises, Inc.*, 212 NLRB 880 (1974), *Authorized Air Conditioning Co.*, 236 NLRB 131, 134 (1978). Furthermore, the collective-bargaining agreements negotiated between CPSA and Western and Keystone define the unit in a manner consistent with what generally is recognized as appropriate in scope in the building and construction industry. No facts have been presented rebutting the presumption that Western and Keystone continued to represent a majority of said employees at all times material herein.

[34] The record does not disclose that Harrisburg Drywall was operational during the period between the 1972 departure of Premici and 1975. The possibility of dormancy of that firm was suggested by Bryant's threat in 1976 or 1977 at the "Compete Meetings" to utilize another firm to perform on a nonunion basis.

[35] I did not believe that May had any role in this decision. There, obviously, would have been no need to reactivate or utilize Harrisburg Drywall for any other purpose. It is plainly inferrable on this record that the "open shop" market was the sole reason for this firm's existence. There is no evidence that that firm ever operated in any other market.

[36] Marvin Rosenbaum, a certified public accountant, whose accounting firm provides accounting services to Respondents, testified that a general entry on G.C. Exh. 39(e) indicates that in 1978 ABI charged Harrisburg $30,000 for "management services." See G.C. Exh. 36(e). Rosenbaum tes-

Continued

Apart from my doubts as to whether May exercised authority on behalf of Harrisburg Drywall beyond that of a supervisor, with power to hire, fire, and supervise jobs, it is clear that he had no separate identity with Harrisburg Drywall. Thus, Charles May is shown as a direct payroll employeee of ABI, in 1977 for in excess of 1,400 hours,[37] in 1978 for some 80 hours, and in 1979 for some 170 hours. It is fair to assume that during these periods May had been engaged by ABI to perform field supervision on the latter's jobs. Uncontradicted evidence establishes that May, while serving in that capacity, engaged in hiring on behalf of ABI.[38] In addition, it was his responsibility to assure that those jobs were completed properly and to instruct employees to that end. May also kept the time records of ABI employees on such jobs.

Because Harrisburg Drywall had little in the way of administrative resources, and perhaps, since May often worked in the field for both firms, its administrative and managerial functions were performed by ABI personnel. Larry McClain, who at no time was on the payroll of Harrisburg Drywall, but an employee of ABI, admittedly performed work for Harrisburg Drywall. His tasks in this regard included coordination of phases of the Harrisburg Drywall operations, the preparation of job estimates, submitting bids, and purchasing in connection with that firm's jobs. In addition, carpenters employed by Harrisburg Drywall would communicate with McClain and receive instructions as to whether and where they were to work the next day.

Bryant was also involved to a considerable extent in the affairs of Harrisburg Drywall. While admitting that he controlled the fiscal affairs of Harrisburg Drywall, Bryant denied involvement with either office or field personnel. As to fiscal matters, Bryant selected Harrisburg Drywall's accountant, the bank it uses, and periodically reviewed, together with Jean Hoffman, also an employee of ABI, Harrisburg Drywall's accounts receivable to assure against discrepancies. He also admittedly on a frequent basis negotiated and signed contracts on behalf of Harrisburg Drywall, and executed lien waivers on behalf of that firm.[39] Bryant has signed the paychecks issued to Harrisburg Drywall employees.[40] In connection with the Polk Center job, a job performed by Harrisburg Drywall during 1979 and 1980, Al Bryant signed the bid[41] and was the contact man because, as he explains it, the size of the job, and the fact that May was out working other jobs, rendered it necessary that Bryant serve in that capacity.

Bryant's denial that he had any involvement in hiring on behalf of Harrisburg Drywall was refuted by specific testimony, which otherwise was left to stand uncontradicted to the effect that Bryant, together with McClain, interviewed and hired a former ABI employee for Harrisburg Drywall,[42] and that on another occasion Bryant met with a number of ABI carpenters, advising them that union work was insufficient to keep them busy, while offering them work with Harrisburg Drywall.[43] Other testimony indicates that Bryant entertained grievances of Harrisburg Drywall's employees. Thus, George Gulliver, while employed by Harrisburg Drywall, requested a raise of Bryant, which he received under circumstances, permitting inference that Bryant had approved the increase. It also appears that a grievance concerning travel pay was addressed to Bryant by Gulliver while on Harrisburg Drywall's payroll. Bryant said he would check with McClain. Later Gulliver received travel pay.

McClain denied that he hired for Harrisburg Drywall, testifying that May had done so. However, in a brief filed on behalf of Al Bryant, Inc., in the arbitration proceeding, over the signatures of Thomas A. Beckley and James P. Collins, Esqs., the following appears: ". . . Larry McClain . . . did and does the hiring for Harrisburg Drywall."[44] Further, according to testimony afforded by Bryant, under oath in the arbitration proceeding, Larry McClain did the hiring for Harrisburg Drywall.[45] As heretofore indicated, McClain was also involved in a layoff of Harrisburg Drywall employees, and advised employees where and when to report for work.

While the foregoing amply attests to the intervention of ABI in the labor relations of Harrisburg Drywall, the integration of the two entities is further evidenced by the frequent and seemingly at-random interchange of craftsmen as between Harrisburg Drywall and ABI. In several instances, carpenters would work for both firms during the same workweek. This occurred in excess of 50 times in 1979, on 30 times in 1978, and in excess of 80 times in 1977. On at least two occasions, the same employee worked for both firms in a single day. Carpenter Gulliver testified that the only way he could tell which firm he was working for was the designation on the payroll check.[46] The lack of separate identity of the respective work forces of Harrisburg Drywall and ABI is indicated by the fact that in 1977 10 of the 14 employees on the payroll of Harrisburg Drywall had also worked for ABI; in 1978, 8 Harrisburg Drywall employees had worked for ABI; while in 1979, 6 Harrisburg Drywall employees had also appeared on the payroll of ABI.

Harrisburg Drywall as a nonunion subcontractor does not normally bid on the same jobs as ABI. However, on at least two projects, Harrisburg Drywall was replaced

tified that the amount of this fee was determined by the client. No evidence exists on this record as to the basis for this charge as against Harrisburg Drywall.

[37] See G.C. Exh. 36(gg-14).

[38] See the testimony of George Gulliver.

[39] See G.C. Exh. 13.

[40] Normally it is the function of Jean Hoffman, an ABI employee, to sign the paychecks of Harrisburg Drywall personnel. In her absence, Bryant performs this function.

[41] See G.C. Exh. 15.

[42] See the testimony of Ronald Myers.

[43] See the testimony of Oscar Acri. Note also that David Seace testified that Bryant offered him work on a nonunion job in Reading in 1977, which Seace declined.

[44] See G.C. Exh. 21(b), p.4.

[45] See Resp. Exh. 1(a), p.28. See also the testimony of Donald Myers. The above discrepancy was among a number of factors which hardly inspired confidence of Respondents' witnesses.

[46] Leroy Curtier testified that in connection with the Gem Building job he was employed by ABI, but later, without notice, transferred to the payroll of Harrisburg Drywall, a fact he discovered only after his paycheck reflected that he was working for the latter at a lower rate of pay. Another carpenter, Richard Grundon, testified to a similar experience on the same jobsite.

by ABI.[47] According to Bryant, on at least one of these jobs, Harrisburg Drywall "subcontracted" to ABI because it took the job on misinformation that it was an open shop, when in fact it was a union job. When union contractors protested the presence of Harrisburg Drywall, the job was completed by ABI.

Under established Board policy, the test of whether two separate entities are to be regarded for purposes of the Act as a single employer turns upon the relationship of the two firms in terms of common ownership, common management, interrelation of operations, and common control of labor relations.[48] I am convinced that, upon analysis of the credible facts of record herein in the light of those standards, Harrisburg Drywall and ABI may not be regarded as separate employing entities.

Both firms were subject to common ownership, with Bryant owning all outstanding stock in one, 90 percent of the other, with the remaining 10 percent held by his wife. Both firms performed the same services, in the same market, with the only distinction being that Harrisburg Drywall operated on an open-shop basis, while ABI functioned under auspices of collective-bargaining agreements with the Charging Parties. However, Harrisburg Drywall's existence operationally was almost entirely dependent upon facilities, equipment, administrative, engineering, sales, and clerical support available through ABI. The absence of written leases or agreements, and the expense allocation system, as heretofore indicated, warrants the conclusion that the two firms did not deal with each other on an "arms length" basis. Considering the nature of its assets, and its dependency upon ABI for basic support in virtually every aspect of its affairs, the instant record portrays Harrisburg Drywall as possessed of no greater autonomy than is necessarily entrusted to crews completing particular jobs. While Albert Bryant was a dominant factor with respect to all aspects of ABI, he controlled the fiscal affairs of Harrisburg Drywall. His imprint was also felt upon Harrisburg Drywall's labor relations, through involvement in the hiring process and condonation, if not authorization, of the utilization of ABI personnel to handle Harrisburg Drywall's payroll, to interview and hire employees of that firm, and to assign work to the latter. Furthermore, temporary interchange of rank-and-file and supervisory personnel within the two firms was so substantial as to suggest that it was a function of management convenience, more in the nature of assignment and transfer within a common labor pool, than termination and rehire by separate employing entities. I am convinced that it was Albert Bryant, who, in 1976, during the course of the compete meetings, threatened to utilize Harrisburg Drywall to compete against union contractors to have been the driving force behind activation of that firm for that purpose. Considering my impression of Charles May as a craftsman and foreman, more at home on a jobsite than in an office, together with his limited comprehension of major aspects of Harrisburg Drywall's operations, I am convinced on the basis of inference and plain record fact that labor relations policy of the latter was dominated by ABI personnel, including Albert Bryant. Based on the foregoing, I find that Respondents ABI and Harrisburg Drywall constitute a single employer and that Harrisburg Drywall was the *alter ego* of ABI.[49]

It is also concluded on the instant record that the employees of Harrisburg Drywall constitute a natural accretion or share a sufficient community of interest with employees of ABI to render the former's employees a part of the appropriate unit in which ABI's employees had been historically represented. As has already been made clear, both firms hold themselves out to provide subcontracting services of an identical nature in a segment of the construction industry. Considering the functional integration of the operations, the similarity of the work performed and common skills of the employees, the extent of centralized management and supervision, the high incidence of temporary interchange, as well as centralized control of labor relations including the hiring and assignment of employees between jobs and firms, I find that a unit consisting of the "carpenters" employed by ABI and Harrisburg Drywall at all times material constituted a single appropriate grouping and part of the overall multiemployer unit within the meaning of Section 9(b) of the Act.[50]

Having found that ABI was at all times material bound through CPSA, to the latter's agreement with Western, I find that by refusing, upon request, to extend that agreement, on request, to employees engaged on projects discharged by Harrisburg Drywall within Western's geographic jurisdiction, Respondents' Harrisburg Drywall and ABI violated Sections 8(d) and 8(a)(5) and (1) of the Act.[51]

I have also found that ABI was similarly committed with respect to collective-bargaining agreements between CPSA and Keystone. Though the single employer finding extends with equal force to the operations of Harrisburg Drywall waged within the geographic jurisdiction of Keystone, Respondents urge the 1979 arbitration award[52] as a bar to any relief as to the unit represented by Keystone.

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[47] On the Acciavatti jobsite, Thomas Fick was simply transferred from the Harrisburg Drywall payroll to that of ABI, when the latter replaced the former on that job.

[48] *Radio & Television Broadcast Technicians Local Union 1264, International Brotherhood of Electrical Workers, AFL-CIO, et al. v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965).

[49] See, e.g., *Edward J. White, Inc., and its alter ego, Repairs, Inc.*, 237 NLRB 1020, 1025 (1978). That case, in my opinion, furnishes a closer analogue to the facts at hand than the fact pattern on which the Board reached a contrary result in the earlier case of *United Constructors and Goodwin Construction Company*, 233 NLRB 904 (1977). In any event, the more recent Decision in *Edward J. White, Inc.*, in the event of conflict would control as the more recent pronouncement on the issue. See also *Local No. 627, International Union of Operating Engineers, AFL-CIO (South Prairie Sons' Construction Company and Peter Kiewit & Sons' Company)*, 518 F.2d 1040 (D.C. Cir. 1975), affd. in material part 425 U.S. 800 (1976).

[50] Cf. *Peter Kiewit and Sons' Co. and South Pacific Construction Co.*, 231 NLRB 76 (1977).

[51] Credible evidence establishes that on various dates between January and May 1979, representatives of Western urged Bryant to perform Harrisburg Drywall's contract on the Polk Center job in accordance with Western's agreement with CPSA. The refusal to bargain became apparent when Harrisburg Drywall commenced work on that project on an open-shop basis in June 1979.

[52] Contrary to Respondents, participation in the 1979 arbitration does not suffice to establish that it *fully* met its statutory obligations to bargain in good faith. That factor is irrelevant to the violations with which Respondents are charged specifically in this proceeding.

In this respect, it is argued on behalf of Respondents that the rights asserted in this proceeding by and on behalf of Keystone were submitted by the latter to binding arbitration and the award rendered by the arbitrator denying Keystone's grievance should be deemed conclusive under Board authority. In this connection, a close question is presented in connection with the doctrine enunciated by the Board in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), and its progeny. By virtue of *Spielberg*, the Board indicated that it would yield to the arbitral process and afford binding weight to the results thereof, *if* said proceeding appeared to have been fair and regular, if all parties had agreed to be bound thereby, and if the decision of the arbitrator was not "clearly" repugnant to the purposes and policies of the Act. In subsequently elaborating on these standards, the Board articulated a further requirement to the effect that it would not give binding force to an award unless the arbitrator had considered and decided the unfair labor practice issue.[53] While a number of factors are viewed as relevant to the inquiry herein, first to be considered is whether the arbitrator considered and decided the unfair labor practice issue and, second, if he did so, whether the result he reached was repugnant to statutory policies.[54]

With the foregoing in mind, it is noted that the underlying grievance was originally defined by Keystone's attorney in a letter dated March 19, 1979, and his opening statement at the arbitration hearing as exclusively founded upon contract.[55] However, in its brief to the arbitrator, Keystone went beyond its contractual contention that Harrisburg Drywall, as a subsidiary of ABI, was bound to the CPSA agreement, but argued that, even if the arbitrator were to reject this view, he was impelled to follow precedent of the National Labor Relations Board, and conclude on the basis of the evidence before him that ABI and Harrisburg Drywall were a single employer and hence that as a matter of Federal law the contract was binding upon Harrisburg Drywall. This alternative view was amplified by a thorough recitation of authorities, and concluded with the admonition that "the arbitrator should rule on the statutory issue as well as the contractual one."[56]

Whether the arbitrator carried forth on Keystone's demand is not entirely clear. In denying the grievance in his award of October 29, 1979, the arbitrator stated as follows:

> . . . [t]he Arbitrator is not persuaded by the evidence that the Company has violated the 1974-1977 Agreement or 1977-1982 Supplemental Agreement. The Union presented no evidence of a joint venture between Al Bryant, Inc. and Harrisburg Drywall and Construction Corporation. Therefore, the basic question before the Arbitrator is whether Harrisburg Drywall is a "subsidiary" or "subsidiary building construction company" of Al Bryant, Inc. under Article V, Section 6 of the Agreement or Paragraph C.6 of the Supplement. In the Arbitrator's view, his role is limited to interpreting these terms of the Agreement, and it does not extend to enforcing the provisions of the Labor Management Relations Act. To be sure, it may be appropriate to look to the federal law as an aid to this interpretation. In this context, the Arbitrator has carefully considered the National Labor Relations Board and Court cases which the Union has cited where two or more Companies or corporations have been treated as a "single employer" for the purposes of determining whether the National Labor Relations Board will assert jurisdiction over them.
>
> Here, the parties have not defined what should be considered to be a "subsidiary." Webster's New World Dictionary (College Edition) defines a "subsidiary" in part as:
>
> > a company controlled by another company which owns most of its shares . . .
>
> Black's Law Dictionary, Fourth Edition (revised) 1968 states:
>
> > Subsidiary Corporation. One in which another corporation owns at least a majority of the shares and thus has control. . . .
>
> In this situation, there is no evidence that Al Bryant, Inc. owns any shares of Harrisburg Drywall. Therefore, it would not ordinarily be considered a subsidiary of Al Bryant, Inc. in the usual sense of that term. It is true that Mr. Al Bryant owns most of the shares of both companies, but technically his ownership as an individual would not be sufficient for Harrisburg Drywall to be considered a subsidiary of Al Bryant, Inc. Moreover, there is absolutely no evidence that Mr. Bryant acquired Harrisburg Drywall, or operates it, as a subterfuge to divert business which would otherwise be available to Al Bryant, Inc. to a non-union operation. To the contrary, the record shows that Harrisburg Drywall was an existing company; that Bryant was asked to assist it financially; and that he did so by forming it into a corporation in which he had 51% control. Although there is a suggestion in the record that the Companies share some equip-

[53] See, e.g., *Raytheon Company*, 140 NLRB 883 (1963).

[54] Keystone contends that the *Spielberg* criteria were not met because ABI took positions before the arbitrator signifying that it had no intention to be bound by the results of arbitration. While it is true that ABI adopted a stance that it was not contractually bound to CPSA bargaining agreements, issue was joined on this matter, and there is nothing to signify that ABI had not submitted to the arbitrator's jurisdiction to render a final and binding determination in that respect. Contrary to Keystone, this defense to the grievance was not the equivalent of a repudiation of the arbitrator's authority to issue a final and binding award.

[55] See G.C. Exh. 9. Among the contractual provisions cited was the following as contained in the memorandum agreement negotiated and signed by Albert Bryant on behalf of CPSA, for a term of May 1, 1977, to April 30, 1982:

> 6. The employers, during the life of this agreement, will not establish or operate any subsidiary building construction company unless such company performs and or subcontracts all work within the craft and geographic jurisdiction of the Union pursuant to the terms of this contract. The obligations of paragraph 5 shall apply to such a subsidiary company. This paragraph 6 shall be null and void in the event the Union fails in the obligations under paragraph 1, 2, and 3.

[56] See G.C. Exh. 21(a), pp. 8-24.

ment and office staff, it appears that they operate independently from one another; that there is no commingling of funds or common supervision of "field" employees. For the reasons given, therefore, the Arbitrator is unable to conclude that the Company has violated the Agreement as the Union contends. In view of this conclusion, the Arbitrator finds it unnecessary to rule on the other contentions of the parties.

DECISION

For the reasons stated above, the grievance is denied.

October 29, 1979

[s]
James M. Harkless
Arbitrator

Consistent with the contention of the General Counsel, the above is susceptible to interpretation that the arbitrator declined to pass upon the statutory issue, ruling only that he was "unable to conclude that the Company has violated the agreement as the Union contends." The question of whether Harrisburg Drywall was a "subsidiary" within the intendment of the contract differs from the statutory single employer issue and disposition of the former would not necessarily require full treatment and consideration of the latter. The Board's most recent pronouncement concerning the assignment of proof responsibility in this area was set forth in *Suburban Motor Freight, Inc.*, 247 NLRB 146, 147 (1980),[57] wherein it stated as follows:

> The Board can no longer adhere to a doctrine which forces employees in an arbitration proceeding to seek simultaneous vindication of private contractual rights and public statutory rights, or risk waiving the latter. Accordingly, we hereby expressly overrule *Electronic Reproduction* and return to the standard for deferral which existed prior to that decision. In specific terms, we will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator. In accord with the rule formerly stated in *Airco Industrial Gases*, we will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions. In like accord with the corollary rule stated in *Yourga Trucking*, we shall impose on the party seeking Board deferral to an arbitration award the burden to prove that the issue of discrimination was litigated before the arbitrator.

In *Atlantic Steel Company*, 245 NLRB 814, 815 (1979), the Board articulated that latitude would be extended to those urging arbitral bars, stating as follows:

> In *Ratheon Conpany*,[58] . . . the Board added the requirement to *Spielberg* that, in order for the Board to defer, the arbitrator must have considered the unfair labor practice in his decision. Since that time, there has been little discussion by the Board as to what this requirement means. Must the arbitrator actually discuss the unfair labor practice, or is it sufficient that he or she considered all of the evidence relevant to the unfair labor practice in determining whether the discharge was lawful under the contract? A review of the decisions shows that, while it may be preferable for the arbitrator to pass on the unfair labor practice directly, the Board generally has not required that he or she do so. Rather, it is necessary only that the arbitrator has considered all of the evidence relevant to the unfair labor practice in reaching his or her decision.

In this instance, the arbitrator's statement that his authority "does not extend to enforcing the provisions of the Labor Management Relations Act," beclouds his entire award. In addition, serious questions exist as to whether the statutory issue arose in the context of an evidentiary presentation enabling full and fair consideration of the statutory issue in the arbitral forum. The single employer issue generally entails assessment of a number of factors, many of which are beyond common knowledge but reposed peculiarly within that of the employer. Illustrative thereof is the following statement made by Mr. Beckley, counsel for Respondents, before Arbitrator Harkless:

> The only evidence he [Keystone's attorney] can put in as to the Harrisburg Drywall and Al Bryant, Inc. would be coming from a witness employed by and knowledgeable of those corporations.[59]

Consistent therewith, before the arbitrator, Keystone had subpenaed a number of documents relative to operations of ABI and Harrisburg Drywall. Respondents moved to quash that subpena,[60] and pursuant thereto strong suggestion appears that important information regarding Harrisburg Drywall, including a listing of its employees, was never produced for consideration by the arbitrator. Whether legitimately maintained, the withholding of evidence highly material to the unfair labor practice issue casts considerable doubt upon whether any resolution of that issue was made on a fairly constituted record.

A question also exists as to whether the award, if incorporating a disposition of the statutory issue, was sufficiently consonant with statutory policy to warrant deferral. The General Counsel in contending that the arbitrator's award was repugnant to the Act[61] relies chiefly

[57] See also *The Motor Convoy, Inc.*, 252 NLRB 1253 (1980).

[58] 140 NLRB 833 (1963), enforcement denied 326 F.2d 471 (1st Cir. 1964).

[59] Resp. Exh. 1(b), p. 91.

[60] See Resp. Exh. 1(a), pp. 8–11, 49; Resp. Exh. 1(b), pp. 78–88, 105, 143, and 146.

[61] Keystone urges that the award be disregarded since a representation issue is involved of the type solely within the province of the Board. There is no merit in this view. The single employer issue is the premise for an 8(d) violation, which would if substantiated call into play Board remedies to enforce said contract as against Harrisburg Drywall. The merits of that issue and the remedy only tangentially bear on and fail to relate directly to a question concerning representation.

upon the view that upon proper assessment of the various factors recognized by the Board as relevant to the single employer determination, "it becomes apparent that the companies do comprise a single employer and part of the same bargaining unit."[62] Thus, it is argued that because the arbitrator reached the wrong result his award should be dishonored. Under precedent, the question of what is meant by repugnant to the policies of the Act involves a qualitative case-by- case assessment of just how much error will be permitted before an award is rejected. Recent Board majorities have suggested that, absent "indisputable factual error,"[63] the Board will not dishonor awards because factually discrepant.[64] Furthermore, legal conclusions embodied in such awards have been endorsed where they evidenced "reasonable" determinations of statutory issues even though the Board, on considering the merits, might have applied the law differently,[65] or where the arbitrator's reasoning did "no substantial violence" to Board policy.[66]

The "single employer" issue in this proceeding raises the spectre of an employer's evasion of collective-bargaining obligations through the utilization of deceptive corporate forms. Thus critical policy interests are involved affecting the balance of competitive interests in the market served by Respondents together with those of employees denied contractual benefits. Close scrutiny of arbitral decisions in such a context seems necessary to vindicate statutory policy. For example, an employee's outright repudiation of key sections of a collective-bargaining agreement has led the Board to decline to defer to arbitration, on the following reasoning:

> The jurisdiction granted us under the Act clearly encompasses not only the authority but the obligation to protect the statutory process of collective bargaining against conduct so centrally disruptive to one of its principal functions—the establishment and maintenance of a viable agreement on wages.[67]

In sum, I find that the award of Arbitrator Harkless is entitled to no weight in the instant proceeding. In so finding, I rely on no single standard under *Spielberg*, but rather a combination including: (1) strong indication that the arbitrator expressly declined to resolve the statutory issue, (2) serious question as to whether positions taken by Respondents at the arbitration hearing barred full and fair evidentiary consideration of that issue, and (3) the fact that the arbitrator, if he had resolved the statutory issue, did so in a critical area of statutory policy, while reaching a result at odds with a proper application of the law on a fully developed record. For the above reasons, it is found that ABI and Harrisburg Drywall constitute a "single employer" within the meaning of the Act, that both were bound to CPSA's agreements with Western and Keystone, and that Respondents violated Sections 8(d) and 8(a)(1) and (5) of the Act by Harrisburg Drywall's failure to adhere to the terms thereof.

Remaining for consideration are the like allegations in Cases 6-CA-13716 and 6-CA-13914, with respect to ABA, a third corporation established after initial unfair labor practice charges were filed herein naming ABI and Harrisburg Drywall. ABA commenced operations as a new corporation on January 1, 1980. Prior thereto, the original charge in Case 6-CA-10417 (formerly 4-CA-10417) was filed on August 10, 1979, by Keystone and charges had been filed by Western in Case 6-CA-12800 on October 3, 1979.

Bryant testified that the new corporation came into existence in November 1979. The directors of ABA were Al Bryant, Larry McClain, and Jean Hoffman. Larry McClain became its president, Al Bryant, vice president in charge of sales, and Jean Hoffman, vice president in charge of administration. These positions have been held since January 1, 1980. Bryant also is the treasurer and Jean Hoffman, the secretary.

Stock ownership in ABA was held as follows:

McClain	35 percent
Hoffman	35 percent
Al Bryant	30 percent

ABA functioned as a subcontractor or contractor affording the same services as provided by Harrisburg Drywall and ABI. Like Harrisburg Drywall, it operated on an open-shop basis.

Al Bryant testified as to the genesis of ABA. He related that in the fall of 1979 for both personal reasons and because of the unfair labor practice charges and lawsuits filed against him by Keystone, he decided to reduce his involvement in the industry by phasing out Harrisburg Drywall, and reducing ABI's work. He claimed that McClain and Hoffman, as long term, key employees, were informed of his intentions in approximately September 1979. At that time, Bryant informed Hoffman and McClain that he was giving them advance notice, so that they would have full opportunity to obtain new employ-

[62] The General Counsel cites *Local Freight Drivers Local No 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and Line Drivers Local No. 224, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Borrego Freight Lines, Inc.)*, 219 NLRB 821 (1975). In that case, the Administrative Law Judge had refused to honor an award of a joint board, finding that two employers were one and the same, both on grounds that one employer had not received notice of the proceedings, and further on the basis of her findings that the employers were separate entities. However, the value of that ruling is diminished by the fact that a Board majority ultimately dismissed the case on the merits, and, having done so, reduced the *Spielberg* issue to the academic.

[63] See *Pincus Brothers, Inc.—Maxwell*, 237 NLRB 1063 (1978) (Members Jenkins, Murphy, and Truesdale).

[64] See, e.g., *American Bakeries Co., Inc.*, 249 NLRB 1249 (1980) (Members Penello and Truesdale, with Member Jenkins dissenting), and *The Kansas City Star Company*, 236 NLRB 866 (1978) (Members Penello and Murphy, with Member Truesdale concurring; Chairman Fanning and Member Jenkins dissenting).

[65] See *Arnold Junior Fenton, Inc.*, 240 NLRB 202 (1979) (Chairman Fanning and Members Jenkins and Penello); *The Associated Press*, 199 NLRB 1110, 1114 (1972) (Chairman Miller and Members Kennedy and Penello).

[66] See *Pacific Southwest Airlines, Inc.*, 242 NLRB 1169 (1979) (Members Penello and Truesdale, with Chairman Fanning dissenting).

[67] *Oak Cliff-Golman Baking Company*, 207 NLRB 1063, 1064 (1973). Although the Board there was involved with a question of prearbitration deferral pursuant to *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971), the above matter is of relevance insofar as it reflects upon the statutory significance of the issue involved here.

ment.[68] Shortly thereafter, according to Bryant, McClain and Hoffman asked if they could purchase Harrisburg Drywall. Bryant claimed to have discouraged this, indicating that he "didn't think that was a very good idea because Harrisburg Drywall was in the middle of a series of labor problems at that point." Later, McClain and Hoffman, as Bryant related, returned, requesting his assistance in enabling them to start their own business as long as Bryant was getting out. This led to a series of meetings, out of which evolved the creation of ABA.[69]

ABA was capitalized on the basis of cash contributions from McClain and Hoffman of $20,000 each.[70] Bryant contributed all the outstanding stock of Harrisburg Drywall, the net worth of which at the time was $40,000. Thus, Bryant invested an amount equal to one-half of the capitalization of ABA, but received only 30 percent of that firm's stock.

With respect to compensation, Al Bryant, pursuant to a 10-year "consulting agreement" with ABA, is to be paid by ABA, at least for the first 2 years, the sum of $40,000 annually. McClain, the president of ABA, could not recall with certainty the amount of his salary. He estimated that it was in the neighborhood of $20,000. When questioned as to Hoffman's salary with ABA, here again, McClain was unsure, but entimated that it was between $15,000 and $16,000.

With the establishment of ABA, it appears that various administrative and warehouse employees, formerly on the payroll of ABI, became employees of ABA. Thus, the ABI payroll record for the week ending December 26, 1979, lists the following:

Larry V. McClain
Albert I. Bryant
R. Victor Hendrickson
Jean E.F. Hoffman
Wayne T. Lutz, Jr.
Andrea R. Mumma
Ronald L. Hinkelman
Frank Krautheim
Catherine Sebacius[71]

It is noted that Hendrickson and Lutz were salesmen. Mumma and Sebacius were clericals. Hinkelman was an engineer and draftsman. Krautheim was a warehouseman.

At the same time the payroll journal for ABA for the period ending January 9, 1980, listed the following:

Albert Bryant
R. Victor Hendrickson
Jean E.F. Hoffman
Frank A. Krautheim
Wayne T. Lutz, Jr.
Larry V. McClain
Andrea R. Mumma
Catherine R. Sebacius[72]

Thus, unlike the relationship between Harrisburg Drywall and ABI, upon the inception of ABA, ABI no longer retained independent capability in the sales, clerical, and administrative areas, but said functions were now harbored by ABA. Under the new arrangement, ABI, at the end of the regular accounting periods, compensated ABA on the basis of the same pro rata charge based on the relative gross income of each firm, utilized as between ABI and Harrisburg Drywall.[73] Nevertheless, the same employees performed the clerical, sales, and warehouse functions for ABA and ABI.

Apparently, ABI, in 1980, no longer paid for telephone service, gasoline, and utilities. The responsibility for such payments presumably was assumed by ABA, with the same charge-back procedures utilized to secure ABI's share of such overhead items. As heretofore indicated, under said allocation system, the balance due was not paid until each June. Accordingly, a form of interest-free credit was involved. Looking at the clericals, for example, prior to the actual allocation, said employees were on the payroll of one company which financed their employment for an entire year before compensation was afforded by the other sharing their use.

With respect to tools and equipment, a document dated *April 1, 1980*, signed by Al Bryant on behalf of ABI and addressed to Al Bryant Associates, Inc., recited as follows:

> This is to confirm our willingness to *continue* rental of the office furniture and office equipment (including the computer), to you at a monthly rent of $1,000 through March 31, 1981. [Emphasis supplied.]
>
> It will be your responsibility to pay for all maintenance, services, and supplies. At the end of the rental period, the equipment should be in first class operating condition less normal wear and tear.

Another written agreement between ABI and ABA provided for the lease of scaffolding at the rate of $300 monthly. Beyond that no provision existed in writing with respect to the rental of vehicles, tools, or equipment as between the two firms.

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[68] Charlie May, the president of Harrisburg Drywall, was not included in these conversations, because, according to Bryant, he was confronted with serious personal problems at the time.

[69] McClain testified that in September or October 1979, Al Bryant informed himself and Hoffman that he was going to reduce the work at ABI, slowing down to a level where Bryant and a secretary could handle all the work. Bryant went on to explain that he would no longer need the services of McClain and Hoffman and that they should make suitable arrangements to obtain other employment. Hoffman did not testify.

[70] The record indicates that the $20,000 cash payment was not made by Hoffman until March 26, 1980. (See Resp. Exh. 10.) In addition, because of the delay in this payment, Hoffman paid ABA on the same date the sum of $460.32 in interest. McClain made his contribution on the basis of five separate payments. Two were made on December 4, 1979, for a total of $1,000. The balance was paid off on January 2, 1980 ($4,000), January 7, 1980 ($5,000), and February 25, 1980 ($10,000). It does not appear that McClain made any interest payments to ABA with respect to the deferred portion of his contribution.

[71] See G.C. Exh. 32 *ff*

[72] See G.C. Exh. 29(a). From the payroll records it appears that ABA did not employ field personnel until the week ending February 20, 1980. During that week Hinkelman was added to the ABA payroll. See G.C. Exh. 29(g).

[73] As was true between ABI and Harrisburg Drywall, no written agreement existed, evidencing the charge-back procedure between ABA and ABI.

It does not appear that occupancy by ABA of the Hummingbird Lane facility was pursuant to written lease. As of January 1, 1980, Al Bryant and wife changed the basis for rental that previously existed. Thus, ABA was to pay Al Bryant and wife $2,000 monthly, and the rent paid by ABI in the past was reduced by some $1,250 a month. In this latter connection, it is noteworthy that ABA did not actually make rental payments for January, February, and March 1980 until June 10 of that year. See Respondent's Exhibits 8 and 9. It does not appear that interest was charged with respect thereto. It is also significant that the rental check in question named ABI as the payee, rather than Al Bryant personally.

Like its administrative staff, ABA drew substantially from its predecessors in developing management and on-the-job capability. Charles May who had performed field supervision on jobs for both Harrisburg Drywall and ABI continued to perform in that capacity on behalf of ABA, and was the sole employee who regularly furnished field supervision on behalf of ABA. Bryant and Hoffman continued to sign checks on behalf of ABA as had been the practice with ABI and Harrisburg Drywall.[74] McClain continued to provide the same services for ABA as he did for ABI and Harrisburg Drywall. Obviously, since ABA continued in the same business as Harrisburg Drywall and ABI, it utilized the same crafts and skills as the latter. Thus, the former warehousemen employed by ABI became the warehousemen at Associates. They continued to do warehouse work for ABI, though no longer on the payroll of that Company.

With respect to the carpenters, Bryant and McClain met with office personnel and carpenters employed by ABI and Harrisburg Drywall to inform them of the formation of ABA. At that time, employment was offered with the new firm by McClain.[75] McClain testified that almost all the ABI personnel were retained by ABA. The payroll records in evidence indicate that field employees were first employed by ABA during the payroll period ending February 13, 1980.[76] All seven within this initial group had been on the payroll of Harrisburg Drywall in each prior payroll period in 1980.[77] Of this group, four worked for ABI in 1979 and all appear on the Harrisburg Drywall payroll for that year. All in all, the 1980 payrolls of ABA show a total of 21 employees apparently in nonsupervisory field categories. Of this group, only eight had no employment history with ABI or Harrisburg Drywall.[78]

With respect to ABI's somewhat abbreviated 1980 operations, only four field personnel were utilized during that period. According to my analysis, the total manhours expended by ABI in 1980 were 377.5. Of those, only 8 hours were worked by employees not on the 1980 payroll of ABA.

It is concluded that ABA was the *alter ego* of Al Bryant, ABI, and Harrisburg Drywall. It was formed with knowledge of the labor difficulties and unfair labor practice charges confronting ABI and Harrisburg Drywall, and continued with an identical business purpose and objective. Administrative, managerial, sales, engineering, warehousing, and clerical employees were simply removed from the payroll of one firm 1 day and appeared on the payroll of the other the next. For the first 5 months of its existence, ABA drew exclusively from the Harrisburg Drywall blue collar work force. Like Harrisburg Drywall, it utilized the equipment of ABI and shared administrative and clerical support with that firm. I am also convinced that management of ABA continued to function as it had with respect to ABI and Harrisburg Drywall. McClain who, though president of ABA, could not recall his own salary, or that of Hoffman, and other details concerning the operation of ABA, is deemed to have continued with ABA, as he had before in the operational duties of assigning employees to jobsites, preparing bids and estimates, and engaging generally in troubleshooting of an operational nature as he had for Harrisburg Drywall and ABI. Control of the clericals remained the responsibility of Hoffman. Charles May continued to provide field supervision for ABA as he had with respect to ABI and Harrisburg Drywall. The functions of Hendrickson, the engineer, as well as salesmen presumably continued as previously while they were on the payroll of ABI. With respect to Al Bryant, himself, who was considered by me on many counts to be an unreliable witness, I am convinced that he continued to function as the principal source of ABA policy and executive authority utilizing his contacts and expertise in all areas of the drywall industry to justify his $40,000 annual salary, a sum which apparently exceeded that earned by both Hoffman and McClain.[79] Bryant ad-

[74] It is noted in this regard that Bryant even signed checks compensating himself under the so-called consultant agreement with ABA.

[75] See the testimony of Donald Myers, who had previously worked for ABI and Harrisburg Drywall, and was among those that accepted employment with ABA.

[76] See G.C. Exh. 29(f).

[77] See G.C. Exhs. 31(a), (b), (c), (d), and (e).

[78] The names of the eight new hires and the initial payroll period in which they first appear are as follows:

Gerald Clemson	May 28, 1980
Roy Shana Felter	June 25, 1980
John Anthony	June 25, 1980
Gary Eugene Cupp	August 13, 1980
Dennis B. Shade	August 13, 1980
Luke K. Kine	September 10, 1980
Jay Fred Mark	September 17, 1980
Samuel Varney	September 24, 1980

[79] In 1980, according to the payrolls in evidence, ABI was reduced to slightly above inactive status. The demands upon Bryant personally as a result of those operations would only have been minimal. Although Bryant was ABA's vice president in charge of sales, that firm retained ABI's two salesmen to discharge that function. Despite the foregoing, Bryant admittedly spent 3 to 5 days at the facility occupied by ABI and ABA. Most suspect were his denials of knowledge as to certain operational aspects of ABA. This included an implicit denial of: (1) where ABA obtained its employees, (2) in what capacity ABA employed Frank Krautheim or how the latter got on the payroll of ABA, (3) who purchased supplies for ABA, and (4) who instructed clericals of ABA to work on behalf of either ABA or ABI. Bryant also denied knowledge as to whether records were kept as to the amount of time that ABI trucks were used by ABA, did not know whether ABA carpenters were hourly paid, and could not identify who prepared bids on behalf of ABA or whether ABA completed work left incomplete by Harrisburg Drywall as of January 1, 1980. I am convinced that Al Bryant was far more active in the affairs of ABA, at every level, including its inception, than he would have me believe.

mittedly continued to sign checks for ABA as well as contracts on behalf of that entity.

Based on the foregoing, including Bryant's own expressed reasons for the demise of Harrisburg Drywall and the reduction of ABI's volume, and as Hoffman and McClain were fully aware of the unfair labor practice charges pending against Harrisburg Drywall and ABI at the time of their apparent investments in ABA, I find that the reshuffled capitalization of ABA did not suffice to disassociate ABA from its prececessor firms nor to preclude an inference on the substantial evidence presented that it was merely a "disguised continuance" or *alter ego* through which contractual obligations to Keystone and Western and putative statutory remedies were to be avoided.[80] Accordingly, I find that Respondents violated Sections 8(d) and 8(a)(5) and (1) of the Act by ABA's failure to honor the CPSA contract when performing with the geographic jurisdiction of Keystone.

CONCLUSIONS OF LAW

1. Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc., together constitute a single employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Al Bryant Associates, Inc., is the *alter ego* of and a disguised continuance of Al Bryant, Inc., and Harrisburg Drywall and Construction Corporation.

3. United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, and Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

4. (a) All journeymen, layout men, and apprentices employed within the geographic jurisdiction of Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, by employer-members designating CPSA as their collective-bargaining representative (including Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc.), but excluding other craftsmen, guards and supervisors as defined in the Act, constitute an appropriate collective-bargaining unit within the meaning of Section 9(b) of the Act.

(b) All journeymen carpenters, layout men, and apprentices employed within the geographic jurisdiction of Carpenters' District Council of Western Pennsylvania of the United Brotherhood of Carpenters and Joiners of America by employer-members designating CPSA as their bargaining representative (including Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc.), but excluding all other craftsmen, guards and supervisors as defined in the Act, constitute an appropriate unit within the meaning of Section 9(b) of the Act.

5. (a) Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is now, and at all times material herein has been, the exclusive bargaining representative of all the employees described in paragraph 4(a) above for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

(b) United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, is now, and at all times material herein has been, the exclusive bargaining representative of all the employees defined in paragraph 4(b) above for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

6. Respondents have violated Section 8(a)(5) of the Act by refusing to recognize Keystone as the representative of the employees in the unit described above in paragraph 4(a) and by, since March 19, 1979, refusing to abide by the terms of the collective-bargaining agreement negotiated on their behalf by CPSA with respect to said employees on the payroll of Harrisburg Drywall and by, since January 1, 1980, refusing to abide by the terms of said contract with respect to said employees on the payroll of Al Bryant Associates, Inc.

7. Respondents violated Section 8(a)(5) and (1) of the Act by, since June 2, 1979, failing and refusing to recognize Western as representative of employees in the unit described above in paragraph 4(b) and by failing and refusing to apply the terms of the contract negotiated on their behalf by CPSA to said employees on the payroll of Harrisburg Drywall and Construction Corporation.

8. The aforesaid unfair labor practices have an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices within the meaning of Sections 8(d) and 8(a)(1) and (5) of the Act, it shall be recommended that they cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It having been concluded that the appropriate bargaining units include employees of Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc., and that said Respondents commencing at various times refused to bargain collectively with the Unions by refusing recognition and to apply the collective-bargaining agreement to their employees in the appropriate unit: Respondents shall be ordered to recognize Western and Keystone and to apply the appropriate collective-bargaining agreement negotiated by CPSA to its employees retroactive to March 19, 1979, in the case of Keystone, and retroactively without time limit in the case of Western and jointly and severally make unit employees of Harrisburg Drywall and Al Bryant Associates whole for any loss of earnings or other compensation they may have suffered by the unlawful refusal to apply the appropriate collective-bargaining agreement to them and to reimburse the trust funds provided for in the collective bargaining and to remit contributions it has failed to make on behalf of the unit employees of Harrisburg Drywall and Al Bryant Associates, thereunder, with in-

[80] *N.L.R.B. v. Triumph Curing Center*, 571 F.2d 462, 468 (9th Cir. 1978), enfg. 222 NLRB 627 (1976); *Southport Petroleum Company v. N.L.R.B.*, 315 U.S. 100, 106 (1942); *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartender's International Union, AFL-CIO*, 417 U.S. 249, 259, fn. 5 (1974).

terest as authorized by *Florida Steel Corporation*, 230 NLRB 651 (1977).[81]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[82]

The Respondents, Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc., Harrisburg, Pennsylvania, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, as the exclusive representative of employees in an appropriate unit described below, by refusing to recognize and to apply the collective-bargaining agreement with said labor organization to the unit employees of Harrisburg Drywall and Construction Corporation. The appropriate unit is:

> All journeymen, carpenters, layout men and apprentices employed in the geographic jurisdiction of United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, by employer-members designating CPSA as their collective-bargaining representative (including Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc.), but excluding other craftsmen, guards and supervisors as defined in the Act.

(b) Refusing to bargain collectively with Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, by refusing to recognize and apply the terms of the governing collective-bargaining agreement to the employees of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc., in the appropriate unit. Said unit is:

> All journeymen, carpenters, layout men, and carpenter apprentices employed in the geographic jurisdiction of Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, by employer-members designating CPSA as their collective-bargaining representative (including Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc.), but excluding all other craftsmen, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Recognize United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, as the exclusive representative of the employees of Harrisburg Drywall and Construction Corporation in the aforesaid unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and apply the terms of the appropriate collective-bargaining agreement negotiated by CPSA and said labor organization retroactively.

(b) Recognize Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive representative of the employees of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc., in the aforesaid unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and apply the collective-bargaining agreement with said labor organization to said employees, retroactive to March 19, 1979.

(c) Jointly and severally make the employees within said unit of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc., who are represented by Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, whole for any loss of earnings or other compensation they may have been denied since March 19, 1979, by the refusal to apply the terms of the collective-bargaining agreement to them, and reimburse the appropriate trust funds provided therein for those contributions which it has failed to make on behalf of said employees, in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Jointly and severally make the employees within said unit of Harrisburg Drywall and Construction Corporation, who are represented by United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, whole for any loss of earnings or other compensation they may have been denied by the refusal to apply the terms of the collective-bargaining agreement to them, and reimburse the appropriate trust funds provided therein for those contributions which it has failed to make on behalf of said employees in the manner set forth in the section of this Decision entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due under the terms of this Order.

(f) Post at its Harrisburg, Pennsylvania, facility, copies of the attached notice marked "Appendix."[83] Copies of

[81] *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[82] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[83] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by

Continued

said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondents' authorized representatives, shall be posted immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

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."