

M&J Supply Co., Inc. t/a Robert G. Andrew, Inc., and its alter ego, West End Transport, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO Local 251

Building Supply Acquisition Co., Inc. t/a M&J Supply Co., Inc. and Local 251, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Cases 1-CA-25221, 1-CA-25743, and 1-CA-25596-2

September 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On September 18, 1989, Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel and Respondents West End Transport, Inc. (West) and Building Supply Acquisition Co., Inc. (BSA) filed exceptions and supporting briefs.

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

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

The judge found, inter alia, that Respondents M&J Supply Co. (M&J) and West were alter egos, and that Respondent BSA was their successor, pursuant to *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 174-185 (1973).¹ He therefore found, pursuant to *Burns*, that BSA was obligated to bargain with the Union and, pursuant to *Golden State*, that it was properly held jointly and severally liable for remedying the unfair labor practices of West and M&J. Notwithstanding the latter finding, the judge's recommended remedy and Order limits BSA's remedial liability to a period commencing on April 13, 1988, the date of the closing on M&J's sale of the operation to BSA.

Respondent BSA does not challenge the findings that M&J and West violated the Act. It excepts, inter alia, to the judge's finding that it had sufficient knowledge of unfair labor practices committed by M&J and West to be held liable as a successor under *Golden State*, supra.² The General Counsel excepts to the

judge's failure to hold BSA liable for remedying the unfair labor practices committed by M&J and West prior to April 13, 1988. For the reasons that follow, we reject BSA's claim that it lacked sufficient knowledge to be a *Golden State* successor and we find merit in the General Counsel's exception to the limitation on BSA's remedial liability and amend the recommended Order accordingly.

In *Golden State Bottling Co. v. NLRB*, supra, the Supreme Court held that an employer who acquires substantial assets of a predecessor and who continues without substantial change the predecessor's business operations, can be required to remedy the predecessor's unremedied unfair labor practices if it is on notice of the predecessor's unlawful conduct. It is now settled that, once the General Counsel establishes an employer's successorship status, the burden is on that successor to show that it lacked knowledge of its predecessor's unfair labor practices. *Blu-Fountain Manor*, 270 NLRB 199, 210 (1984), enfd. sub nom. *NLRB v. Jarm Enterprises*, 785 F.2d 195 (7th Cir. 1986). Accord: *NLRB v. South Harlan Coal Co.*, 844 F.2d 380, 384 (6th Cir. 1988); *Cumberland Nursing & Convalescent Center*, 263 NLRB 428, 434 (1982). Furthermore, in determining whether the successor has made that showing, the Board is not bound by a successor's denials of knowledge. It may conclude that the successor had the requisite knowledge if reasonable inferences from the record as a whole support such a finding. *Golden State Bottling Co. v. NLRB*, supra, 414 U.S. at 172-174. Finally, evidence that a successor was aware of the conduct that the Board ultimately found unlawful may suffice to show notice; it is not necessary that the successor have seen particular charges or complaints. *NLRB v. St. Mary's Foundry Co.*, 860 F.2d 679, 681-682 (6th Cir. 1988).

In the present case, there is virtually no dispute that BSA was a successor to M&J. Respondent BSA admitted in its answer to the complaint, and the judge reasonably found, that after BSA purchased M&J's building supply distribution business on April 13, 1988, it continued, without a hiatus, to operate that same business, under the same name, at the same location, with the same equipment, supervision, and leased employee

chase, whether or not to hire its predecessor's employees." Second, BSA contends that the Union failed to make an adequate bargaining demand to trigger a bargaining obligation on the part of BSA. We find no merit in these contentions.

Although *Burns* holds that an employer that purchases another's business is free, absent unlawful motivation, to choose employees from any source, BSA did not avail itself of that option by hiring its own new work force at the outset. Instead, it simply took over M&J's operation (including M&J's work force); and because it also was on notice of its predecessor's unfair labor practices, that work force included the unreinstated unfair labor practice strikers who had made unconditional offers to return to work. See *Proxy Communications*, 290 NLRB 540 (1988), enfd. 873 F.2d 552 (2d Cir. 1989). As to the existence of the requisite bargaining demand, we agree with the judge that the Union adequately notified BSA of its demand to bargain through a letter that was served on all Respondents on June 24, 1988.

¹ On April 13, 1988, M&J changed its corporate name to Robert G. Andrew, Inc. (RGA). Other than the name change, RGA is the same corporation as the former M&J. The judge found, therefore, that any liability attaching to M&J extends to RGA.

² BSA also disputes the finding of a bargaining obligation under *Burns* on two grounds. First, it contends that the judge improperly found it to have taken over M&J's leased workforce, including the unrecalled unfair labor practice strikers who had been employees of West and M&J as alter egos. BSA argues that this finding improperly denies it the "opportunity to determine, upon pur-

complement.³ The burden thus shifts to BSA to show that it lacked notice of the unfair labor practices committed by M&J and its alter ego, West. Respondent BSA has not carried that burden. Indeed, as explained below, there is ample warrant in the record to support the judge's affirmative finding that BSA knew the substance of the charges brought against its predecessor prior to April 13, 1988, the date on which the sale of M&J to BSA was closed.

The unfair labor practices committed by M&J/West prior to that date consisted in part of the following actions taken in an effort to avert unionization of the M&J drivers: threatening to discharge employees who strike; promising to increase wages of unit employees; granting such a wage increase; promising to review wages at a future date; and failing to recall strikers after November 17, 1987, when they made unconditional offers to return.⁴ Respondent M&J also sought to avoid unionization by creating an alter ego company (West), from whom it leased employees formerly on its own payroll; but the creation of the alter ego was not alleged in itself to be a violation.⁵ Notwithstanding the foregoing unlawful conduct, the Union won a Board election as the drivers' representative on December 7, 1987. The judge found that M&J/West committed the following violations following the election in an effort to avoid dealing with the Union: subcontracting the unit work to Aldworth and thereby terminating the employment of the M&J/West drivers (a violation of Sec. 8(a)(3) because of the unlawful motive and a violation of Sec. 8(a)(5) because it was done without giving the Union notice and an opportunity to bargain); failing to bargain over the effects of the subcontracting decision; failing to notify the Union of the decision to sell the business to BSA, and failing to bargain over the effects of that decision.⁶

³BSA took over the employees by adopting M&J's contract with Aldworth. It was able to take over the corporate name because, as indicated in fn. 1 above, M&J changed its name to Robert G. Andrew, Inc. on the day of the closing. BSA also retained Robert Andrew, M&J's former owner, as a consultant for 1 year.

⁴The judge found that the strike, although originally conceived as a strike for recognition, was converted to an unfair labor practice strike at its outset as a result of the wage increase promise the day before the strike and the threat to terminate strikers, made on the morning they walked out. The complaint did not allege that the threat (which was made by M&J Foreman Frank Palombo) amounted to an unlawful constructive discharge of the strikers, nor was the case litigated on this theory. Therefore, we do not adopt the judge's finding, in sec. III,K of his opinion, that the strikers were fired at the strike's outset. We note, in any event, that the judge's recommended backpay order, which begins the backpay period for the strikers from the date on which they made unconditional offers to return, does not reflect that finding, so our failure to adopt it does not necessitate any change in the recommended Order.

⁵West was owned and ostensibly operated by Joyce Andrew, the wife of Robert Andrew, owner of M&J.

⁶As noted above, BSA has not challenged any of these unfair labor practice findings. Because M&J filed no exceptions at all, the only exception to these findings is West's objection to the finding that it violated the Act by virtue of the unilateral subcontracting of unit work to Aldworth and the failure to give notice and an opportunity to bargain over the effects of the sale of M&J to BSA. West appears to argue that, although it does not take issue with the finding that West and M&J are alter egos, it should escape liability for those violations because its president, Joyce Andrew, had not been informed by her

The record shows that BSA—by virtue of facts made known to its owner and president, Louis Simonini, or his attorney, Joseph Tutalo, or both—was on notice of the unfair labor practices committed by M&J/West. Simonini testified that Robert Andrew, the president of M&J whom Simonini retained as a consultant after the purchase of the business, had told him prior to the purchase about the Union's organizing campaign and had also told him "a long story" about the circumstances in which M&J subcontracted the drivers' work to Aldworth. In particular, Andrew told him that he had originally contracted with West to provide trucking services and had not long thereafter terminated that contract and entered into the agreement with Aldworth. Simonini also admitted he knew about the strike.

With respect to Board filings and proceedings regarding those events, Simonini testified that negotiations for the purchase of BSA began sometime in "the middle to the end of January" 1988, and continued through February and March. At some point during those negotiations, according to his testimony, he became aware that there were unfair labor practice charges pending against M&J. He asked his attorney, Tutalo, to check this out. Simonini further testified that Tutalo, after conferring with Robert Andrew's attorney, Vincent Piccirilli, reported to Simonini that there was a charge pending and that "at some time in the future after I owned the company, I would have to deal with that charge." Indeed, Simonini admitted that Tutalo had stated that "if the charge were to be proven," Simonini "might have to recognize the Union."

Around the time when the negotiations for the purchase began, there was a pending charge, Case 1-CA-25178, filed on December 16, 1987, alleging that West had violated Section 8(a)(3) and (1) of the Act by failing to recall the strikers; that charge had been amended on January 18, 1988, to add M&J as a respondent. On January 20—around, or shortly after, the time of the first meeting to negotiate the purchase—the Union filed a second charge, Case 1-CA-25221; and it filed an amendment to that charge on February 19. The latter charge as amended alleged, *inter alia*, unlawful promises and grants of benefits to defeat the union campaign, the unlawful subcontracting of unit work, and refusals to meet and bargain with the Union over mandatory subjects. A complaint based on the charge

husband that he was planning to sell M&J to BSA. Under those circumstances, it contends, Joyce was justified by entrepreneurial considerations, in continuing to bargain with the Union while concealing from it the fact that the arrangement by which West's drivers worked for M&J had been terminated. She reasonably hoped, West contends, that M&J might renew the arrangement in the future; thus, keeping the Union in the dark about the termination was a proper way of keeping her business afloat in the meantime. We find no merit in this exception. It is doubtful that concealment of past events affecting employees can be justified as an entrepreneurial prerogative. Even if it could be, however, having failed to attack the alter ego finding, West cannot rely on an argument predicated on any alleged lack of communication between it and officers of M&J.

in Case 1-CA-25221 was issued against M&J and West on March 25, 1988. The charges in both Cases 1-CA-25178 and 1-CA-25221 and the complaint based on the latter were duly served on M&J and its attorney, Piccirilli.

Although Simonini's attorney Tutalo did not testify, a reasonable inference from the record is that when, on Simonini's instructions, he asked Piccirilli about pending unfair labor practice charges, Tutalo learned about both charges and their amendments. Such an inference is supported both by Tutalo's description of the pending charge as possibly entailing an obligation Tutalo's description of the pending charge as possibly entailing an obligation to bargain with the Union and by the unlikelihood that Piccirilli would tell Tutalo about only one of the charges. Since Tutalo was Simonini's legal representative during these purchase negotiations, notice to him was notice to BSA, regardless of how much or how little he told Simonini about Piccirilli's explanations. See *NLRB v. Jarm Enterprises*, supra, 785 F.2d at 205 (imputing notice to employer through its attorney).

BSA's principal ground for contending that it lacked knowledge of its predecessor's unfair labor practices is the fact that only the charge in Case 1-CA-25178 is mentioned in the purchase and sale agreement executed on March 29, 1988, and that at the closing on April 13, Attorney Piccirilli showed Simonini and Tutalo a letter from the Regional Office stating that the charge in Case 1-CA-25178 had been "withdrawn without prejudice" by the Union. Because of all the evidence set out above regarding knowledge gained by Simonini and his counsel concerning the unfair labor practices committed by M&J/West and charges filed by the Union,⁷ we find this incident inadequate to show lack of knowledge under the applicable test.

We also agree with the judge that BSA's argument is undermined by Simonini's own testimony about uncertainties concerning the letter that were knowingly left unresolved when he closed on the purchase of the business. Simonini testified that Piccirilli told those present, "I think the charge has been dropped, but I'm not absolutely sure; I'll find out." No attempt to find out was made, however, before the parties closed on the contract. Thus, in response to a question at the hearing whether "even though there was at least a question in Piccirilli's mind as far as you knew as to what was happening to the unfair labor practice charges, you still went ahead and signed the documents," Simonini testified, "I did." As the judge

⁷In making our finding regarding knowledge under *Golden State*, we do not rely on Simonini's correspondence with the Regional Office after he purchased the business or, indeed, on any event occurring after April 13, 1988.

aply reasoned: "As Respondent BSA was willing to proceed with the closing before it was sure as to the meaning of the letter, it must bear the consequences of that action."

Finally, like the judge, we find that holding BSA jointly and severally liable for its predecessor's unfair labor practices comports with the policies of *Golden State*. The rights of victimized employees are protected without undue hardship to BSA, a beneficiary of its predecessor's unfair labor practices who had sufficient knowledge to take that potential liability into account when negotiating the contract price and to obtain an indemnification clause. See *Golden State Bottling Co. v. NLRB*, supra, 414 U.S. at 184-185.⁸

We shall therefore modify the judge's recommended remedy and Order so as to direct BSA not only to recognize the Union, terminate the subcontract for unit work, and offer reinstatement to the former M&J/West employees to available positions, but also, with respect to the make-whole remedy, to be jointly and severally liable for all backpay owing the employees as a consequence of unfair labor practices committed by BSA and the other Respondents, i.e., backpay for losses incurred both before and after April 13, 1988.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, M&J Supply Co., Inc. t/a Robert G. Andrew, Inc., and its alter ego, West End Transport, Inc., and Successor Respondent Building Supply Acquisition Co., Inc. t/a M&J Supply Co., Inc., Providence, Rhode Island, their officers, agents, successors, and assigns, shall take the action set forth in paragraphs 1 through 5 of the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Failing and refusing to cease subcontracting work and reinstate unit employees to the positions they previously held or, if these positions no longer exist, to substantially similar positions."

2. Substitute the following for paragraph 4(c).

"(c) Make whole the unit employees for any losses they may have suffered by Respondent's predecessor's unlawful actions and by its continuation of those unlawful actions in the manner set forth in this decision."

3. Substitute the attached notice for that of the administrative law judge.

⁸Sec. 7(c) of the purchase and sale agreement (not sec. 1(j) as stated by the judge) provides that M&J will indemnify BSA for all claims and liabilities.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to fire our employees if they engage in a strike.

WE WILL NOT promise our employees a wage increase and other benefits and implement a wage increase during a union organizing campaign.

WE WILL NOT fail and refuse to recall striking employees after their unconditional offer to return to work was made on November 17, 1987.

WE WILL NOT fail and refuse to bargain in good faith with Local 251, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO as the exclusive representative of our employees in the following unit:

All full-time and regular part-time drivers, helpers, warehousemen and yardmen employed at our Providence, Rhode Island facilities, but excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to notify and bargain in good faith with Local 251 concerning the decision to subcontract unit work and the effects of that decision.

WE WILL NOT fail and refuse to notify Local 251 of our decision to sell our business and fail and refuse to bargain in good faith with the Union concerning the effects of the decision to sell and subsequent sale.

WE WILL NOT subcontract unit work and terminate the employment of nonstriking unit employees.

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

WE WILL extend recognition to the Union as the exclusive bargaining representative of all employees in the appropriate unit set out above and, on request, bargain in good faith with the Union and, if an understanding is reached, embody it in a signed agreement.

WE WILL terminate our subcontract for unit work and offer reinstatement to unit employees, by seniority, to the positions they previously held, or to substantially equivalent positions.

WE WILL make whole the unit employees for any losses they may have suffered by any unlawful actions against them, with interest.

WEST END TRANSPORT, INC.

Ronald S. Cohen, Esq., for the General Counsel.
Vincent J. Piccirilli, Esq., of Cranston, Rhode Island, for Respondent Robert G. Andrew, Inc.
Albert Ciullo, Esq., of Warwick, Rhode Island, for Respondent West End Transport, Inc.
Vincent P. Santaniello, Esq., of Westerly, Rhode Island, for Respondent Building Supply Acquisition, Inc.
Richard M. Peirce, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. On January 20, 1988, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 251 (Union) filed an unfair labor practice charge in Case 1-CA-25221 alleging that M & J Supply Co., Inc. (Respondent M & J) had engaged in certain unfair labor practices affecting commerce. On February 19, 1988, the Union filed a first amended charge in Case 1-CA-25221 alleging that Respondent M & J and West End Transport, Inc. (Respondent West End) had engaged in certain unfair labor practices affecting commerce. Pursuant to the charge and the first amended charge in Case 1-CA-25221, the Acting Regional Director for Region 1 issued a complaint and notice of hearing on March 25, 1988, alleging that Respondent M & J and Respondent West End were alter egos and a single employer within the meaning of the National Labor Relations Act (Act), and further alleging that these Respondents had violated Section 8(a)(1), (3), and (5) of the Act.

On April 1, 1988, Respondent M & J filed an answer to the complaint admitting, inter alia, service of the charge and first amended charge in Case 1-CA-25221, jurisdiction as to Respondent M & J, the labor organization status of the Union, the supervisory and agency status of Robert Andrew, Joyce Andrew, Frank Palombo, and Karen Cabral; and that from on or about October 20, 1987, to on or about November 17, 1987, certain employees of Respondent M & J and Respondent West End ceased work concertedly and engaged in a strike, but denying the remaining allegations of the complaint and the commission of any unfair labor practices.

On April 8, 1988, Respondent West End filed an answer to the complaint admitting, inter alia, service of the first amended charge, the labor organization status of the Union, that Joyce Andrew was Respondent's president and sole stockholder, that certain of its employees ceased work concertedly and engaged in a strike from on or about October 20, 1987, to on or about November 17, 1987, that on or about November 17, 1987, certain employees who had engaged in said strike made an unconditional offer to return to their former positions of employment, the appropriate unit,

the status of the Union as the certified exclusive collective-bargaining representative of Respondent M & J's and Respondent West End's employees employed in said unit, but denying the remaining allegations of the complaint and the commission of any unfair labor practices.

On June 16, 1988, the Union filed an unfair labor practice charge in Case 1-CA-25596-2 alleging, *inter alia*, that Building Supply Acquisition Co., Inc. (Respondent BSA) was a successor employer to Respondent M & J and Respondent West End, who purchased Respondent M & J and Respondent West End with knowledge that these Respondents had committed the above mentioned unfair labor practices. The charge further alleged that Respondent BSA was, therefore, liable to fully remedy these unfair labor practices. Pursuant to the charge filed by the Union in Case 1-CA-25596-2, the Regional Director for Region 1 issued an order consolidating cases, an amended consolidated complaint, and notice of hearing on August 9, 1988, alleging that Respondents M & J, West End, and BSA had violated Section 8(a)(1), (3), and (5) of the Act.

In August 17, 1988, Robert G. Andrew, Inc. (Respondent RGA) filed an answer to the amended consolidated complaint¹ admitting, *inter alia*, service of the charges and first amended charge in Case 1-CA-25221, jurisdiction over Respondent RGA when it did business as M & J Supply Co., Inc., that on or about April 13, 1988, Respondent BSA purchased the business of Respondent M & J Supply Co., Inc., that on or about April 13, 1988, Respondent BSA commenced to do business under the trade name of M & J Supply Co., Inc., the labor organization status of the Union, the supervisory and agency status of Robert Andrew, Frank Palombo, and Karen Cabral, and that from on or about November 17, 1987, certain employees of Respondent M & J and Respondent West End ceased work concertedly and engaged in a strike, but denying the remaining allegations of the amended consolidated complaint and the commission of any unfair labor practices.

On August 25, 1988, Respondent BSA filed an answer to the amended consolidated complaint admitting, *inter alia*, that the charge in Case 1-CA-25596-2 was filed on June 16, 1988, that since on or about April 13, 1988, it commenced to do business under the trade name of M & J Supply Co., Inc., that since April 13, 1988, it has continued to operate the business of M & J Supply Co., Inc. in basically the same unchanged form, the labor organization status of the Union, the supervisory and agency status of Louis Simonini, and that it contracts out its trucking operations to Aldworth Co., Inc. (Aldworth), but denying the remaining allegations of the amended consolidated complaint and the commission of any unfair labor practices.

On August 30, 1988, Respondent West End filed an answer to the amended consolidated complaint admitting, *inter alia*, service of the first amended charge in Case 1-CA-25221, the jurisdictional amounts alleged in subparagraphs 4(a) and (b) of the amended consolidated complaint, the labor organization status of the Union, that Joyce Andrew was its president and sole stockholder, that from on or about October 20, 1987, to on or about November 17, 1987, certain employees of Respondents M & J and West End ceased

work concertedly and engaged in a strike, that these employees made an unconditional offer to return to work on November 17, 1987, the appropriate unit,² the status of the Union as the certified and exclusive collective-bargaining representative of Respondents M & J's and West End's employees employed in the unit, but denying the remaining allegations and the commission of any unfair labor practices.

On August 24, 1988, the Union filed an unfair labor practice charge in Case 1-CA-25743 alleging that Respondent RGA and Respondent West End had engaged in certain unfair labor practices. On October 3, 1988, the Union filed an amended charge in this case alleging that Respondents M & J, West End and RGA had engaged in unfair labor practices. Pursuant to the charge and amended charge filed in Case 1-CA-25-743 and those filed in Cases 1-CA-25221 and 1-CA-25596-2, the Regional Director issued a second order consolidating cases, second amended consolidated complaint and notice of hearing on October 13, 1988, alleging that Respondents M & J, West End, RGA, and BSA had violated Section 8(a)(1), (3), and (5) of the Act.

On October 27, 1988, Respondent BSA filed an amended answer to the second amended complaint and October 28, 1988, Respondent West End filed an amended answer to this pleading. On March 7, 1989, the Regional Director issued an amendment to the second amended consolidated complaint alleging further violations of the Act.

On March 14, 1989, a hearing was held in Boston, Massachusetts, and was thereafter continued on March 15, 16, 17, 22, 23, 24, and April 10, 1989, in Providence, Rhode Island. Briefs were subsequently received from General Counsel and Respondents BSA and West End.

The issues to be decided in this proceeding are as follows:

- (1) Whether Respondents M & J and West End were alter egos and/or a single employer?
- (2) Whether the Union has waived its right to allege the alter ego and/or single employer status of Respondents M & J and West End?
- (3) Whether Respondent RGA is jointly and severally liable to remedy the alleged unfair labor practices?
- (4) Whether Respondents M & J and West End threatened to fire the striking employees in violation of Section 8(a) (1) of the Act?
- (5) Whether Respondents M & J and West End violated Section 8(a) (1) of the Act by promising employees wage increases?
- (6) Whether the subcontracting of unit work to Aldworth violated Section 8(a)(3) of the Act?
- (7) Whether the decision to subcontract unit work to Aldworth was a mandatory subject of bargaining?
- (8) Whether Respondents M & J and West End failed to notify and bargain with the Union concerning the decision to subcontract unit work and the effects of that decision?

²The following named employees of Respondents constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

All full-time and regular part-time drivers, helpers, warehousemen and yardmen employed at Respondent's Providence, Rhode Island facilities, but excluding office clerical employees, guards and supervisors as defined in the Act.

¹Respondent M & J sold its name and business to Respondent BSA in April 1988. Respondent M & J then changed its legal name to Robert G. Andrew, Inc.

(9) Whether Respondents M & J and West End violated Section 8(a)(5) of the Act by failing to notify the Union of the decision to sell the business to Respondent BSA and of the sale of the business?

(10) Whether Respondents M & J and West End have been dilatory and evasive in their response to Union bargaining requests and whether by their overall conduct, they have failed and refused to bargain in good faith with the Union?

(11) Whether Respondents M & J and West End unlawfully failed and refused to reinstate employees?

(12) Whether a valid offer of reinstatement was made to the employees?

(13) Whether Respondent BSA is jointly and severally liable with its predecessor for remedying the predecessor's alleged unfair labor practices?

(14) Whether Respondent BSA had an obligation to recognize and bargain with the Union and whether it has failed and refused to bargain with the Union?

Based on the entire record, and on my observation of the demeanor of the witnesses, and in consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent M & J, a corporation, with an office and place of business in Providence, Rhode Island, has at all times material to this proceeding been engaged in the retail and wholesale distribution of building supplies and related products. Respondent West End, a corporation with an office and place of business in Providence, Rhode Island, has at all times material to this proceeding been engaged in the provision of personnel to Respondent M & J Supply. Since on or about April 13, 1988, Respondent BSA, a corporation, has engaged in business as the successor of Respondent M & J, utilizing M & J's trade name and facilities in Providence, Rhode Island. On or about April 13, 1988, Respondent M & J changed its corporate name and commenced doing business under the trade name and trade style of Robert G. Andrew, Inc. Respondents have admitted the jurisdictional allegations of the consolidated complaint and I find that Respondents M & J (and as RGA), West End, and BSA are now, and have been at all times material to this proceeding, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

It is admitted and I find that the Union is now, and has been at all times material to this proceeding a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Whether Respondents M & J and West End Were Alter Egos and/or a Single Employer?

An alter ego relationship may be found when two nominally separate entities share substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership. *Advance Electric*, 268 NLRB

1001, 1002 (1984); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Unlawful motivation is an additional factor frequently considered in determining whether alter ego status exists. See *Gilroy Sheet Metal*, 280 NLRB 1075 fn. 1 (1984), enfd. Docket No. 86-7485 (Apr. 28, 1987). In *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), the Board described the pertinent factors as: "common management and ownership; common business purpose, nature of operations and supervision; common premises and equipment; common customers, i.e., whether the employers constitute the 'same business in the same market;' as well as the nature and extent of the negotiations and formalities surrounding the transaction; (and) . . . whether the purpose behind the creation of the alleged alter ego was legitimate or whether instead, its purpose was to evade responsibilities under the Act." The evidence of record bearing on the alter ego issue is set out below together with my conclusions as to its meaning with respect to factors bearing on a finding of an alter ego relationship.

M & J was formed in 1976 by Robert Andrew and his nephew, Richard Puerini, for the purpose of engaging in the sale of building materials, including their delivery, as a wholesale distributor. These two men ran the Company together with Puerini being primarily responsible for the operational aspects of the business and Andrew responsible for the financial aspects. By 1978, it had grown sufficiently to begin acquiring real property, purchasing real estate located at 775 Potters Avenue in Providence, Rhode Island. This acquisition was made by a commonly owned corporation named Investment Realty Corp (IRC), which prior to 1978 had been owned by Andrew and his wife, Joyce Andrew, and used for ownership of rental properties. At the time of the Potters Avenue purchase, Mrs. Andrew had, in effect, turned her stock in the then dormant corporation over to Puerini with her husband retaining his shares. Later, Respondent M & J acquired other real property located at 138 and 140 Atwood Street in Providence. The Potters Avenue property was utilized for office space, showroom and warehouse facilities. The property at 140 Atwood is a large building used as a warehouse. Located at 138 Atwood is a small structure, which housed files and provided space for two bookkeepers on the payroll of Respondent M & J.

By 1980, M & J had acquired two trucks for use in its business. In that year IRC purchased those trucks and others and leased them to M & J, and to M & J Kitchen Supply and M & J Supply of Connecticut, two other companies in which Robert Andrew held an ownership interest. This number reached its peak in 1986-1987, when IRC owned about 15 vehicles which were leased to the companies named above. By 1986, M & J employed a number of persons, including 12 truckdrivers and one warehouse employee. In 1986, the Union conducted a campaign among these employees, which resulted in an election won by the Company in October of that year. Prior to this time and going back to about 1980, Andrew had unsuccessfully attempted to persuade Puerini to get out of the trucking aspect of the business and concentrate his efforts on its other aspects. Andrew testified that after the 1986 election, he continued to desire to contract out the trucking, but did not pursue it with

Puerini because Puerini was in a state of declining health, ending with his death in June, 1987.³

On May 12, Andrew read an article about employee leasing companies which prompted him to begin discussions on this subject with his wife.⁴ Until his death, Puerini had been the partner in charge of overseeing the trucking end of the business. Andrew testified that he did not want to assume this responsibility upon the death of Puerini. Andrew testified that upon reading the article, Mrs. Andrew said that employee leasing was a business she would like to get into. Thereafter, the two had some passing conversations on the subject, but did not seriously discuss it again until mid-September after all the legal matters resulting from Puerini's death had been handled.⁵ Andrew testified that these conversations generally involved his telling his wife that if she entered the business, it would have to be run by her without assistance from him. In late August or early September 1987, Mrs. Andrew set up appointments with her attorney and accountant to pursue the start up of the business. She utilized the same attorney and accountant utilized by all of Andrew's companies, including M & J. To this point in time, Mrs. Andrew's business experience involved bookkeeping for a family company some 15 years prior to 1987 and managing IRC when it was involved in rental properties. Her duties with IRC did not call for dealing with employees as the corporation had none. Mrs. Andrew characterized starting West End as "this is a way of getting my foot in the door and starting to learn a business."

Andrew testified that in late September 1987, he gave Mrs. Andrew a list of M & J's truckdrivers and a list of employee rules and regulations. He testified that Mrs. Andrew asked him how many drivers were involved, their pay scale and benefits and other questions of that nature. She relied on his judgment that the drivers were good employees and accepted them as her employees without ever interviewing them or meeting with them. Andrew also testified that shortly there-

³ All dates in this section dealing with a determination of alter ego status are in 1987 unless otherwise noted.

⁴ This article appeared in the May 12 edition of the Providence Journal. In the article, the author sets out perceived advantages of leasing employees from an employee leasing company rather than employing persons directly. It asserts that from the lessee's standpoint, it eliminates the need to perform the functions necessary to prepare a payroll and determine benefits, requiring only that the lessee write one check a payroll period, with a tacked on service fee of between 20 and 30 percent. The article points out that leasing companies are often able to acquire benefit packages more cheaply than their customers because they employ more people. It also notes, "Leasing companies have been used by some employers as a tactic to keep out labor unions. Employers argue that since they don't have employees, they can't have a union. But some labor leaders say it's doubtful that that tactic will work for long and predict that the leasing companies themselves will eventually become targets for unionization." I believe that this latter reason is the one that was most important to Andrew. A review of the evidence set out in this section of my decision will clearly reveal that by using West End's services, none of the other benefits mentioned in the article were obtained. M & J still supervised the drivers, still kept their hours, still prepared the payroll in the same manner as it always had and actually still paid them in virtually the same way it had before West entered the picture. Moreover, M & J agreed to pay a service charge of 50 percent rather than the 20 to 30 percent mentioned in the article as the going industry charge. Aldworth, the successor to West End, only charged 8 percent as a service charge. West End could not offer the advantage of reduced benefit costs as it employed no more employees than had M & J previously.

⁵ At a representation hearing held before the Board on November 17, 1987, Andrew testified that his wife did not become a shareholder in M & J upon the death of Puerini because their accountant advised that she would have to purchase the cash value of a life insurance policy the corporation carried on Andrew and other complications.

after, just before going on a trip to California in early October, he posted a notice at 775 Potters Avenue to the effect that all drivers employed by M & J⁶ would be employed by West End effective October 12, 1987.⁷ No one had told the drivers that they were going to be put on the payroll of West End.

Prior to and after the transfer of drivers from M & J to West End, they were supervised by Frank Palombo and all but the two who worked at M & J Kitchen Supply worked out of the Potters Avenue location. They continued to report to this location after the transfer until the strike. None of the drivers' terms and conditions of employment or duties changed until the strike. M & J's customers remained the same after the transfer and prices charged to customers were not affected by the transfer. The trucks used by M & J and driven by West End drivers continued to be leased by M & J from IRC. M & J was still responsible for the unloading and loading of trucks, ensuring that deliveries were made, hiring casual labor, and dealing on a daily basis with the drivers. Andrew testified that the business of M & J did not change in any way from the time West End entered business until the time M & J was sold to BSA.

This lack of change in operation is perhaps reflected most clearly in certain of the testimony of Mrs. Andrew. When asked to whom at M & J her driver employees reported, she answered, "I don't have the slightest idea." She went on to testify that M & J determined who the drivers reported to, determined under what rules they would operate, determined the wages and benefits the drivers would receive and determined all terms and conditions of employment of the drivers. Although Mrs. Andrew testified that she had planned to have a meeting with her employees at some unspecified time to discuss various aspects of the new operation, she said the strike prevented the meeting. On the other hand, she held no meeting with the drivers who crossed the picket line and worked during the strike. The only contact she had with these employees during the period West End was providing drivers to M & J was when one brought wood to her home and when another picked up a vehicle left at her home during the strike. When asked whether she had discussed wages or other working conditions with her employees, Mrs. Andrew answered, "No, absolutely not. Positively no. It was none of my business. The more they paid him, whatever company he worked for, the better off I was."

West End's start up capital of \$3500 was obtained by Mrs. Andrew writing one check for \$1000 and another for \$2500 on the Andrew's joint checking account.⁸ The only agreement between M & J and West End was an oral one, with no fixed term and apparently terminable at will. It purportedly called for the payment by M & J to West End of the total drivers' payroll plus a service charge of 50 percent. At

⁶ This list also included two drivers, Thomas Rosenfield and Stephen Frongillo, who were paid by Respondent M & J, but actually worked at M & J Kitchen Supply.

⁷ Although West End evidently commenced operations on October 12, it was not legally incorporated until on or after October 22.

⁸ Mrs. Andrew characterized the \$2500 as a loan from Robert Andrew. No payments were made on this loan until December 10, after Andrew had decided to terminate the services of West End. The Andrew's attorney prepared a promissory note to secure the loan 18 days after Mrs. Andrew borrowed the \$2500. Under the terms of the note, no regular payments had to be made on the loan and no payments ever had to be made unless Andrew demanded them to be made.

the underlying representation proceeding held November 17, Andrew testified that M & J was also obligated to pay West End 30 cents per mile, though this payment was not part of the formula given at the hearing in this proceeding. The formula was arrived at by mutual agreement of the Andrews after consulting with their accountant, James Sisco. It was intended to cover all charges made with respect to the payroll including FICA, TDI, Blue Cross, and Workmens' Compensation. Although drivers were transferred to West End's payroll on or about October 12 and received a West End paycheck for the payroll period ending October 17, M & J made no payments to West End until December 10, 1987.

Prior to the formation of West End, payroll checks for M & J's employees, including the drivers, M & J Kitchen Supply's employees, and the employees of M & J of Connecticut were prepared by Fleet National Bank and the funds to pay the checks drawn from Respondent M & J's account with that bank. These checks would reflect the various employers' names. Respondent M & J would then be reimbursed by the other two companies for the amount of the payroll attributable to them. From the time West End commenced business in October until December 10, a similar situation existed. That is, West End drivers were paid with checks bearing West End's name which had been prepared by Fleet National Bank and funded from M & J's account. The information necessary to process the payroll was supplied to the bank by M & J.⁹ West End did not reimburse M & J for the payroll monies advanced by M & J until December 15, after Andrew had decided to terminate West End's services. Although Andrew characterized the advances a mistake made by the bank, I believe that he intended them to be made. I base this belief on the timing of his stopping the practice and on the fact that West End did not have any money to cover the payroll, a fact within his knowledge. M & J did not make any payments to West End until on or about December 10. West End provided drivers for M & J Kitchen Supply until December 24 although it had no agreement with that corporation.¹⁰ Respondent M & J handled the payroll for these drivers as it did for drivers provided to it.

According to Andrew, West End was to pay to M & J rent of \$125¹¹ monthly for what space it might need at 138 Atwood Street where it was to set up its office. M & J paid an unapportioned monthly rental of \$2000 per month to IRC for both properties located on Atwood Street. In determining that \$125 per month would be a fair rental for a portion of the building at 138 Atwood, Andrew did not examine any

phone, utility, or other bills associated with that property. Mrs. Andrew confirmed that there was no attempt made to break the rent down to determine its reasonableness. The figure arrived at, whether \$125 or \$150, was just an amount that seemed reasonable to the Andrews. No rental payments were made by West End until after December 20, and a West End check for rent dated December 21, reflects that rent was paid to IRC, not M & J. A sign erected on this property bearing West End's name was ordered by M & J's office manager and paid for by a check drawn on M & J's account. At a later date, Andrew made a notation in the M & J checkbook with regard to this payment, "Loan to West End Transport Co., Inc." As matters turned out, Mrs. Andrew, the only officer of West End never used the office and what work she performed for West End she did at home.

General Counsel introduced into evidence or exhibited to the Andrews most, if not all, of the financial records reflecting dealings between M & J and West End. Two things about this documentation are striking. The first is that Mrs. Andrew had only the vaguest idea of the transactions represented by the documentation.¹² The second is that virtually all of the transactions took place after Andrew decided to drop the services of West End and use another provider of drivers, Aldworth. The documentation itself reflects extreme sloppiness in the parties dealings, involving overpayments (through deductions Mrs. Andrew could not explain) by West End to M & J for the repayment of the \$2500 loan and then a seeming \$4800 "catch up" check issued to West End by M & J which exceeds overpayments by several hundred dollars.

As noted above, Andrew left for California in the first week of October and returned to the offices of M & J on October 19. The trip was a planned one and was for family business reasons. He testified that until that date he had not heard anything concerning any organizational effort being made among his employees.¹³ On October 19, Andrew was visited by Union Representative Charles Hankinson who demanded M & J recognize the Union as the representative of its drivers and warehousemen. Andrew declined and Hankinson left saying he would return. Andrew then sent his office manager to the Atwood Street warehouse where she told the two warehouse employees there to report to Potters Avenue and locked the building for security reasons. Andrew testified that he had the warehouse shut because Hankinson had threatened to strike if recognition was not granted and he did not want two unsupervised warehousemen at Potters Avenue if a strike started. He also testified that later that afternoon, he was explaining to the two warehousemen why he had transferred them when the three were approached by driver-employee Joseph Tabishesky. Tabishesky told Andrew

⁹Mrs. Andrew testified that she did not know by whom or how the hours were kept that formed the basis of her employees' payroll. Admitting she did not know what M & J did in this regard, she said, "Whatever they did was their own business." It must be noted that ridding itself of this chore was one of the reasons given by Andrew for M & J using an employee leasing company. Moreover, not only did M & J not rid itself of this matter of preparing the drivers' payroll, it added a step to the process because M & J's office manager was required to deliver the payroll information to Mrs. Andrew at her home so Mrs. Andrew could take it to the bank or her accountant. During the period of the strike, the office manager also delivered the payroll to the bank for Mrs. Andrew.

¹⁰In this regard Mrs. Andrew testified that M & J, M & J Kitchen Supply, and IRC were all corporations that worked together "under one umbrella." Evidently this is correct as Mrs. Andrew signed a legal document for M & J Kitchen Supply as one of its officers though she was not an officer of the corporation and later purported to offer reinstatement to some of West End's laid of drivers to positions at M & J Kitchen Supply.

¹¹Mrs. Andrew testified that the rent was \$150 per month.

¹²In fairness to Mrs. Andrew, she testified that her accountant, also M & J's accountant, handled all financial affairs for West End, including preparation of checks.

¹³Although he may not have heard anything about a renewed organizational effort by the Union, I firmly believe the timing of the start up of West End was controlled by Andrew's fear of renewed union activity at the expiration of the 1-year period following the October 1986 election which the Company had won by one vote. There was no other believable reason advanced for the starting date of October 12. Similarly, no good reason was advanced for starting the operation while Andrew was in California and not in a position to see if the transition went smoothly. As noted above, the trip was not of an emergency nature and the dates of the trip were known in advance. A driver/warehouseman for M & J, Norman Carreiro, testified that efforts to again organize M & J's employees started around August and were lead by another employee. Carreiro signed an authorization card on September 28.

that the other drivers wanted to meet with him and he agreed to a meeting when they came in. Andrew did not mention that the drivers were at this time working for West End. What happened at this meeting is material to other issues to be decided and will be discussed in detail at the point in this decision dealing with those issues.

On the morning of the next day, October 20, a strike commenced that lasted until the striking employees made an unconditional offer to return to work on November 17. Four drivers crossed the picket line and continued to work for M & J on West End's payroll. At least two other drivers remained on West End's payroll and worked at M & J Kitchen Supply. M & J did not hire any replacement drivers during the strike, though it did substantially increase the use of casual help. Without giving any specifics, Andrew testified that during the strike M & J's business fell off substantially. The business of M & J was seasonal, with the winter months being the slack season. The Company had not laid off drivers in the past because of the seasonal business slump; instead it made work for them so that no one would be laid off or have short workweeks. None of the striking drivers were recalled by West End after the offer to return to work was made.

There was a representation hearing held at the Board's Regional Office in Boston on November 12 and 17. As a result of this hearing, the Union's petition for an election was amended to show West End as the employer rather than M & J and an election was set for December 7. Also as a result of this hearing, one employee of West End was transferred back to the M & J payroll and a warehouseman, Richard Santos, was transferred from M & J's payroll to that of West End. The Union won the certification election and was certified as the exclusive representative of West End's employees in the appropriate unit. West End's observer at the election was Karen Cabral, M & J's office manager.

After the election, Andrew testified that he became very concerned with the driver labor costs. He testified that if the employees had not selected the Union he may or may not have decided to seek out a different labor contractor, depending on how well West End performed. Up until December 7 or 8, he testified he was satisfied with the service of West End. On or about December 8, Andrew, through a business associate, sought a bid proposal from Aldworth Company, Inc. for the provision of driving services for M & J. Aldworth responded with a proposal on December 10. On December 14, Aldworth and M & J entered in a written contract for the provision of driving services. Andrew testified that he selected Aldworth based on representations made by his business associate and after being sold on Aldworth by that company's vice president. Under the Aldworth proposal, Frank Palombo and the warehouse employees would be on Aldworth's payroll in addition to drivers. Under the arrangement with West End, Palombo had stayed on M & J's payroll. Andrew testified that he made a mental calculation to determine the difference in cost between using Aldworth versus West End, but was unable at the hearing to state what that difference was. Andrew did not discuss the hiring of his former drivers with Aldworth, though he had recommended to Mrs. Andrew that she hire them.

Andrew testified that he notified Mrs. Andrew of his cancellation of West End's services on December 23. He arrived home that day to find Mrs. Andrew and their attorney going

over papers. When they were finished, he told them, "I want to let you both know that as of tomorrow, the close of business tomorrow, and tomorrow being December 24th, is the last day that I will be requiring the services of West End Transport." In response to his wife's expression of amazement, Andrew said, "I said, business is business. I have to do what's best for the company. I said, I told you from the beginning, sink or swim." Mrs. Andrew added that Andrew said "it was going on too long," meaning that "nothing seems to be going on over here." "All these indictments, letters piling up and up and up." She also testified that her husband indicated, in her words, that things were "muddled and sticky," and she could not tell him what her costs would be in the future as negotiations with the Union were then ongoing. Although Mrs. Andrew indicated that her husband considered negotiations to have gone on too long, in fact, only 2 weeks had passed since the election when he terminated his agreement with West End. He also testified that the decision to seek another supplier of drivers had been made the day following the election. I would note that Andrew, on behalf of M & J, did not have to worry about what the costs might be until an agreement was reached. Assuming he was satisfied with West End's service, as he testified, he would have no need to seek out a new supplier of driving services until an agreement was reached and he could compare West End's negotiated costs with those of another supplier.

I believe the facts which I have found above clearly demonstrate that Respondents M & J and West End were alter egos and constituted a single employer. Set out below under appropriate subheadings is a brief discussion of the facts and the factors the Board has held are required to make such a finding.

1. Common ownership and management

A finding of common ownership may be made where, although the same individuals are not shown to be owners of each corporation, the corporations are solely owned by members of the same family. *Kenmore Contracting Co.*, 289 NLRB 336 (1988); *Watt Electric Co.*, 273 NLRB 655, 658 fn. 17 (1984). Granting that the existence of a close family relationship between owners of two companies will not always establish the common ownership element in an alter ego inquiry, the Board in *Kenmore*, supra, found no impediment to such a finding where there is a showing of financial dependence and less than arm's length dealings between the owners of the two companies.

M & J is wholly owned by Robert Andrew and West End by his wife, Joyce Andrew. It is apparent from the evidence that Mrs. Andrew was dependent on Andrew and the other members of management of M & J to operate her company. Andrew and/or M & J effectively selected West End's driver-employees, then decided the terms and conditions of their employment, their day-to-day schedules, their wages and benefits, and it provided all supervision for these employees. For her part, Mrs. Andrew never met her employees, did not use her office and left the only part of her business in which she was required to participate, the financial aspect, to her accountant, also M & J's accountant. Mrs. Andrew admitted her lack of business experience in managing employees and characterized her new venture as a learning experience.

Mrs. Andrew and West End were equally dependent on Robert Andrew and/or M & J from a financial standpoint. M

& J provided the start up capital for West End and thereafter paid West End's employees in virtually the same manner it had paid these drivers when they were on M & J's payroll. This practice continued until after M & J had decided to terminate the services of West End. Only then did it begin to pay West End directly for its "services." Until this time, some 2 months after operations commenced, West End was financially unable to pay its employees as its total capital amounted to \$3500, of which \$1000 was not useable under law. The net of the first two payrolls "paid" by West End exceeded its capital. Any assertion that the funding of the payroll by M & J was a mistake or was unintended, I believe is a fabrication. Mrs. Andrew made no provisions for capital to cover the payroll, and did not complain when her company was not paid for its services. I believe the only plausible explanation for this situation is that it was what the Andrews intended. Again, it was only after the union election and Andrew's almost immediate decision to drop West End that the two Companies made any attempt to act like separate entities.

One can also consider the manner of operating set out above when determining whether the dealings between the Companies were arm's length or something less. Did M & J pay Aldworth's payroll for 2 months after it commenced service or alternatively fail to pay Aldworth for its services for 2 months. Obviously not. It also had a written contract with Aldworth which spells out employee wages, benefits, and details what each party can expect from the other. With West End, M & J purportedly had an oral agreement which, as far as I can discern from the evidence, only made provision for a formula for paying West End (a formula which changed from the representation proceeding to this one) and for the payment of rent (which was either \$125 or \$150 a month depending on whether Andrew or Mrs. Andrew is correct) by West End to M & J or IRC. Additionally, as noted earlier, the payment formula agreed to by M & J called for a service charge of 50 percent of payroll, whereas it only paid Aldworth 8 percent and the article which prompted the creation of West End mentions 20- to 30-percent charges. The rental fee was just picked out of the air and was not shown to have any negotiated basis. M & J made no attempt to investigate alternate suppliers of contract labor and compare costs or service before entering into its oral agreement with West End. For an obviously experienced businessman like Andrew to make such an arrangement can only mean to me that he was going to remain in total control of the situation.

One can also only wonder what M & J expected for the 50-percent service charge it agreed to pay West End. M & J continued to provide every service with respect to the drivers it had prior to the creation of West End, and in addition, found it necessary to have one or more of its employees take the payroll information it gathered for the drivers to Mrs. Andrew. This delivery service was necessary as Mrs. Andrew never used the office for which West End paid rent. The loan of start up capital was not evidenced by a promissory note until well after it had been made, and no payments on the note were made until after the decision to terminate. No rental payments were made until about the same time. Looking at the question of arm's length dealing from Mrs. Andrew's and/or West End's standpoint, there were no payments made by M & J for 2 months after operations com-

menced. Mrs. Andrew, as noted, did not complain. I also find it significant in this area of inquiry that Mrs. Andrew and/or West End at every juncture used the same attorney and accountant as did M & J. I certainly do not mean in any way to question the propriety of this arrangement, but it does not appear that arm's length dealing is taking place when no independent legal or accounting advice is sought. Moreover, in all the years of M & J's operation until 1987, it continued to employ its full complement of drivers even though business slacked off in late fall and winter, the Company finding or making work for these employees. Though Mrs. Andrew was fully aware of this past practice, she made absolutely no attempt to persuade M & J to follow this practice after the November 17 offer to return to work was made. This is true even though she acknowledged that her income was dependent on the level of the driver payroll.

In conclusion, I find that Mrs. Andrew and/or West End was operationally and financially dependent on Mr. Andrew and/or M & J and that virtually all of their dealings with one another were less than arm's length dealings. Thus, I find the evidence with respect to ownership and management to support a finding that an alter ego relationship exists between West End and M & J.

2. Business purpose, common customers, supervision, common equipment, and premises

West End and M & J were engaged in essentially the same business activities. The drivers had been a substantial part of M & J's business activity before October 12, 1987, and the same drivers continued to perform the same functions when they were transferred to West End's payroll. Their supervision remained with M & J, and their specific supervisor, Frank Palombo, remained their supervisor. West End, through Mrs. Andrew, had virtually no contact with the drivers. They continued to report to and clock in the same facility with no direction from West End. As noted earlier, all terms and conditions of the drivers' employment, including wages, benefits, work rules, and schedules were determined by M & J and remained the same after the transfer. To the extent there were any changes in working conditions thereafter, they were determined solely by M & J. M & J continued to provide every service with respect to the drivers' payroll after October 12 as it had before, and until December, paid the drivers in virtually the same manner it had when they were M & J employees. The drivers utilized the same equipment after the transfer as before, and the two Respondents share common office space.

The transfer of drivers to West End did not cause any change in M & J's business, its customers, or what its customers were charged. During West End's active relationship with M & J, I cannot find that it did anything to relieve M & J of any duty, responsibility, service, or management function with respect to the drivers. West End, as argued by General Counsel, had no separate existence from M & J other than on paper. Therefore, I find the evidence as it relates to the factors discussed above also support a finding that an alter ego relationship existed.

3. Legitimacy of purpose

I have already found in footnote (13) and elsewhere that the purpose of setting up West End was to avoid the con-

sequences of a union organizing effort which Respondent M & J could expect during October 1987. Given the manner in which M & J and West End chose to operate, none of the other reasons given for West End's existence are plausible. M & J did not escape any payroll costs, work or responsibilities by virtue of transferring employees to West End. It did not escape any supervisory or management duties. On the contrary, it retained every cost and function it had previously experienced with the drivers as its employees and added paperwork burdens by its dealings with West End. As noted earlier, West End would be in a worse position than M & J to obtain benefits packages at lower cost since it had less employees. There was no showing that anyone with either West End or M & J ever explored this as a possibility in any event. West End simply continued every aspect of the terms and conditions of employment for the drivers that had been previously set by M & J.

The timing of the start up of West End also supports my finding that West End was created to avoid unionization of M & J's drivers. Though no cogent reason was advanced for any particular rush in becoming operational, West End took on the M & J drivers at a time when Mr. Andrew was in California on a planned trip and well in advance of the date it was legally incorporated. The only event that could be expected to occur in October 1987, which could create a sense of urgency was the likelihood of organizational activity. Therefore, for the reasons set forth above and at earlier points in this decision, I find that Respondent West End was not established for a legitimate business purpose, but instead owed its existence to the desire of M & J to avoid the consequences of union activity.

In conclusion, having considered the evidence in light of the relevant factors, I find that Respondents West End and M & J are alter egos and constitute a single employer.

B. Whether the Union Has Waived Its Right to Allege the Alter Ego and/or Single Employer Status of Respondents M & J and West End?

The Union has not waived its right to allege the alter ego and/or single employer status of Respondents M & J and West End as argued by Respondents RGA and M & J. These Respondents contend that in the underlying representation proceeding (Case 1-RC-18893), the Union amended its petition for certification and entered into in certain stipulations which effectively removed them from possible liability. The petition had originally named M & J and Robert Andrew, as owner, as the employer. The amendment made at the representation proceeding named Respondent West End. To the extent that the Union's execution of the Stipulated Election Agreement is binding on the Union, it should only be construed as limiting the Union's, and the employees' rights in the representation case vis-a-vis Respondent M & J. Such an agreement should not be extended beyond the representation case to preclude the enforcement of rights guaranteed to employees and the Union under the Act. *American Air Filter Co.*, 258 NLRB 49 (1981).

Nor was there any sort of waiver by the Union in this case. Respondent M & J clearly took the position in the representation case that it was not the employer of the unit employees and attempted to introduce evidence to that effect at

the representation proceeding. That being the case, there cannot be clear and unmistakable waiver.

Moreover, it is clear that the Union, even by executing the stipulation, which names Respondent West End as employer, was not agreeing that Respondent West End was the only employer. Contemporaneously with the execution of the Stipulated Election Agreement, the Union and Respondent West End's attorney of record executed a stipulation concerning an unconditional offer to return to work on behalf of striking unit employees. This stipulation states that the offer is being made "on behalf of the employees of West End Transport Co., Inc., and for the purposes of this case 1-RC-18893, the employees of M & J Supply Co., Inc." Therefore, it is clear that the Union had no intent of relinquishing any rights against Respondent M & J. Since Respondent West End's attorney of record signed this stipulation and it was negotiated by Respondent M & J's attorney of record, Respondents M & J and West End were aware of the above.

The parties also executed a stipulation concerning who would be eligible to vote in the election. One of the employees on the list, Richard J. Santos, was actually on the payroll of Respondent M & J. The parties, however, agreed to put Santos on the voter eligibility list and remove another employee, Kevin Peltier, from the list. Apparently the parties treated Respondent M & J and West End interchangeably. Respondent West End recognized that the unit consisted of Respondent M & J' and West End's employees as it admitted this in its answers filed.

The Union asserts that it entered into all the stipulations on the understanding that unit employees would be recalled.¹⁴ They were not, and their work was subcontracted out to Aldworth shortly after the election. I cannot find from the evidence that there was ever any intent to recall these employees and find that the Union was materially misled into executing the stipulations, and that no waiver could exist for this reason.

C. Whether Respondent RGA is Jointly and Severally Liable to Remedy the Alleged Unfair Labor Practices?

On April 13, 1988, Respondent M & J changed its corporate name to Respondent RGA. This resulted from the sale of Respondent M & J's business to Respondent BSA. Respondent RGA exists solely to collect the moneys due Respondent M & J under the purchase and sale agreement between it and Respondent BSA. Respondent RGA is the same corporation as M & J and is still wholly owned and operated by Robert Andrew. I find that any liability attaching to Respondent M & J as a result of unfair labor practices committed by it remain though its name has been changed.

¹⁴Based on the testimony of Union Representative Hankinson, I find that Respondent M & J's attorney represented to him that the affected employees would be recalled in approximately 2 weeks after the November 17 hearing, when work picked up. Based on an affidavit that Hankinson gave to a Board agent, there is a question as to whether this offer was made before or after the stipulations were signed. I find that the offer was made before the signing based on Hankinson's testimony and the fact that M & J is mentioned as a coemployer in the stipulation relating to recall. M & J's attorney participated in the negotiations which lead to the formulation and signing of this stipulation, the wording of which is entirely consistent with the Union's assertion that an offer to recall was made by M & J's attorney.

D. Whether Respondents M & J and West End Threatened to Fire the Striking Employees in Violation of Section 8(a)(1) of the Act?

Norman Carreiro, a striking employee of West End/M & J testified in this proceeding. Carreiro worked in the warehouse at Atwood Street and occasionally drove a truck for Respondents. His regular supervisor was Karen Cabral, and he was secondarily supervised by Frank Palombo. On the morning of October, 19, 1987, the day before the strike commenced, he was working in the Atwood Street warehouse. Cabral, who worked at the Potters Avenue facility, came in and surprised the witness as well as his coemployee present because she rarely came to Atwood Street facility. According to Carreiro's uncontradicted testimony, Cabral told the two employees to report to Potters Avenue because the company was closing the doors at Atwood Street. Upon being asked why the facility was being closed, Cabral said, ". . . well, you people tried to get a union in here last year and I'll be damned if you try to get the union in again, because we will close the doors and won't let you in." Carreiro also testified that on the 19th, he overheard a conversation between a fellow employee, Kevin Peltier and Andrew, wherein Andrew said "that he would just fold or get rid or sell the company or whatever, before, you know, if we would win or anything to get the union, he would just sell the company or fold it." Andrew acknowledged that he had a conversation with Peltier and Carreiro on this date.

On the next day, Carreiro was waiting at the Potters Avenue gate for Union Representative Hankinson to indicate whether the driver/warehousemen would go to work that day. Carreiro testified that Supervisor Palombo came out of the building and told the assembled employees that they had 5 minutes to come back to work. After 5 minutes, Carreiro testified that Palombo started closing the gates and said, ". . . that was it guys, you are fired."

Former M & J/West End employee John Madeiros testified that on the morning of the 20th Palombo came out to the gate, closed it, and said, ". . . you got five minutes to go in or else don't bother coming in." Palombo testified that on the morning of the 20th, he arrived for work and saw several drivers standing outside the Potters Avenue facility. A couple of drivers came in said there was to be a strike. Palombo reported this to Andrew who told him to give the employees 5 minutes to come back to work if they wanted to come in and then close the gates. He reported this to the drivers and after several minutes, closed the gates. He denies threatening the drivers with being fired if they did not report for work. In his testimony, Andrew characterized Palombo's action as giving the drivers a "warning." I credit Carreiro's version of what Mr Palombo said to the assembled drivers. It is consistent with the earlier threats of Cabral and Andrew. Moreover, if he did not threaten the drivers with termination, what sort of "warning" did he give them? Of course, as pointed out by General Counsel on brief, though no striker was permanently replaced during the strike, they were never recalled and the employees who did cross the picket line were terminated after their work was subcontracted to Aldworth in December 1987. Thus, Respondents M & J/West End did in fact carry out the threat. I find the threat to be in violation of the employees' Section 7 rights and therefore was an unfair labor practice in violation of Section 8(a)(1) of the Act.

E. Whether Respondents M & J and West End Violated Section 8(a)(1) of the Act by Promising Employees Wage Increases and Granting Such Increases?

On October 19, 1987, after the Union had demanded recognition, Robert Andrew met with the unit employees after work. Andrew testified that this meeting was at the request of the employees and four or five of them were present. The employees asked him about a number of matters having to do primarily with benefits, including a \$1.50-per-hour wage increase. At the representation proceeding, Andrew testified that on some items he was able to make a commitment and others were deferred for the future.¹⁵ He told the employees that the request for a wage increase was a fair one and it could be implemented. He also agreed to a wage review to take place in April 1988. At the hearing in the instant proceeding, Andrew denied having made a commitment to give the wage increase or any of the other things sought by the employees. Employee Norman Carreiro, present at the meeting, testified that Andrew said he would give the employees the increase. Employee John Madeiros testified that Andrew directed him to attend this meeting and Madeiros confirmed that Andrew said he would give the wage increase. Based on Andrew's earlier sworn testimony at the representation proceeding and the corroborating testimony of Madeiros and Carreiro, I find that Andrew did indeed promise the drivers and warehousemen a \$1.50-per-hour wage increase.

Within a few days after promising to give this increase, it was implemented by M & J for the West End employees still working.¹⁶ All of these employees were eligible to vote in the December 7, 1987 election. The meeting at which the increases were promised took place on the day the Union demanded recognition and according to Andrew, had as its purpose to see if the differences could be worked out so that a strike would not take place. I find that the timing of the promise of benefits was designed to defuse the union activity and not just the strike. That benefits were actually given after the strike began and before the election supports this finding. Promises of and grants of benefits during an organizing campaign are usually objectionable unless the employer establishes that the timing of the action was governed by other factors. No such showing has been made in this case and I find that the promise of a wage increase, and the April wage review, and the granting of the wage increase to be in violation of Section 8(a)(1) of the Act.

F. Whether the Subcontracting of Unit Work to Aldworth Violated Section 8(a)(1) and (3) of the Act?

The striking unit employees had made an unconditional offer to return to work on November 17, 1987, but had not been recalled to work. Andrew testified that work was slow. However, immediately after the election on December 7, 1987, Andrew decided to seek another provider of labor. He made the decision on December 8, sought out Aldworth and

¹⁵ In passing, I find this meeting, Andrews approach to it and actions thereafter entirely consistent with a finding of alter ego status and entirely inconsistent with the position that the employees were solely the employees of West End. The employees were not told to seek out Mrs. Andrew and discuss grievances as she was their employer. Instead Andrew heard grievances and at least in the case of the wage increase, acted upon it, evidently without consulting with West End.

¹⁶ Kevin Peltier, Galen Bradley, Alfred Bucci, Stephen Frongillo, and Thomas Rosenfield.

had a proposal from that company in hand on December 10, and signed a contract with Aldworth on December 14. The effect of this action was the termination of all striking employees as well as those currently working on the West End payroll. Andrew was well aware that its alter ego West End had no other customers than M & J and its "umbrella" companies. I believe that such action was in violation of Section 8(a) (3) of the Act as it was inherently destructive of employee rights. *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). I cannot conceive of any action which would be more inherently destructive of employee rights. The consequences are far reaching in that the bargaining unit members are terminated, the unit effectively destroyed and the likelihood of any meaningful bargaining with the Union ended. As I have heretofore found, the reason for M & J taking this action was clearly the outcome of the election, and was thus discriminatory. There was no legitimate business reason given in this record for the decision terminate West End and seek out a new subcontractor. I believe that Andrew did not want to deal with the Union and therefore discriminated against the unit employees because of their union activity and participation in the strike. I have heretofore found that Andrew's asserted reason for subcontracting, lack of knowledge of what future labor costs would be because West End had not negotiated a contract, is without merit and I believe is merely an attempt to disguise his true, discriminatory motive. The labor costs for unit employees had remained under his control at all times and would remain there until a contract was negotiated. If, at that time, he were dissatisfied with such costs, he could look for another contractor as M & J's agreement with West End was terminable at will. He testified he was satisfied with West End's service, and further, that if the employees had not selected the Union he may or may not have decided to seek out a different labor contractor, depending on how well West End performed. If, in fact, labor costs were so important, one must wonder why Andrew contracted to pay Aldworth at a minimum over \$1 per hour higher wages per employee than M & J paid at the time the contract was signed. He did not make a wage proposal to the Union, have West End make a wage proposal to the Union, or wait for a union wage proposal before he decided to subcontract.

Under the circumstances described, I find that Respondents M & J and its alter ego, West End, violated Section 8(a)(3) of the Act by subcontracting the unit work to Aldworth.

G. Whether the Decision to Subcontract Unit Work to Aldworth Was a Mandatory Subject of Bargaining?

When Respondent M & J subcontracted unit work to Aldworth all that was involved was the substitution of one group of workers for another to perform that same task in the same location under the ultimate control of the same employer. As noted heretofore, Andrew testified that from October 12, 1987, to the sale of the business, there were no changes in the operation of the business. No capital investment was involved, the driving and warehouse work were an integral part of Respondent M & J's business, and Respondent M & J retained some control over the Aldworth employees under their agreement. Under the Board's analysis in *Collateral Control Corp.*, 288 NLRB 308 (1988), the facts establish that the decision by Respondent M & J to sub-

contract the unit work was a mandatory subject of bargaining.

Further, though I have found Respondent M & J's motive for subcontracting to be discriminatory, the reason advanced by Respondent for this action would itself make the decision to subcontract a mandatory subject of bargaining. Andrew testified that he decided to subcontract because of his uncertainty over labor costs. Labor costs are a subject clearly amenable to resolution through the collective-bargaining process. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964); and *W. W. Grainger, Inc.*, 286 NLRB 94 (1987).

H. Whether Respondents M & J and West End Failed to Notify and Bargain with the Union Concerning the Decision to Subcontract Unit Work and the Effects of that Decision?

No notice was given to the Union concerning Respondent M & J's decision to subcontract the unit work to Aldworth. Even though a negotiating session was held on January 8, 1988, between West End and the Union, well after the decision was announced to Mrs. Andrew, notice was not given. By that date, Aldworth was providing service under its contract with Respondent M & J. At some uncertain date subsequent, the Union's attorneys learned of the subcontracting. However, by then it was clearly a fait accompli. Any request for bargaining by the Union at that time would have been futile and was therefore unnecessary. *W. W. Grainger, Inc.*, supra at 97 fn. 9.¹⁷

I. Whether Respondents M & J and West End Violated Section 8(a)(5) of the Act by Failing to Notify the Union of the Decision to Sell the Business to Respondent BSA and of the Sale of the Business?

The Union was not informed of the sale of M & J Supply Co., Inc. until June 14, 1988. This failure to inform the Union of the sale was apparently purposeful as the attorneys representing Respondents M & J and West End met with the Union's attorney and representative on April 7, 1988, 9 days after the signing of the Sales Agreement and 1 week before closing. An employer has an obligation to bargain in a meaningful manner and at a meaningful time with a union over the effects of the sales of a business. *First National Maintenance Corp. v. NLRB*, supra. An element of meaningful bargaining is timely notice to the union of the decision. Respondents M & J and West End's failure to notify the Union of the decision to sell, and the sale of the business, as well as the concealment thereof, violated Section 8(a)(5) of the Act. *Blu-Fountain Manor*, 270 NLRB 199 (1984).

The Union has not waived any right to bargain as it objected to the failure to notify in a letter, with copies to all Respondents, to the Board dated June 15, 1988, the day after it acquired knowledge of the sale. General Counsel asserts and I agree that this letter, under the circumstances and given the history of dealing between the parties, constitutes a request for bargaining over the effects of the sale.

¹⁷Also, as noted by General Counsel on brief, it would have been futile to request bargaining with Respondent M & J as that Respondent always maintained it had no bargaining obligation.

J. Whether Respondents M & J and West End Have Been Dilatory and Evasive in Their Response to Union Bargaining Requests and Whether by Their Overall Conduct Have They Failed and Refused to Bargain in Good Faith With the Union?

After the election on December 7, 1987, Union Representative Hankinson attempted unsuccessfully to contact West End's attorney to begin bargaining. He did make contact with him around December 18 or 19, and the first bargaining session was held on December 22. At this meeting Hankinson presented the attorney with a proposed contract patterned after an existing contract the Union had with another company. Mrs. Andrew was not present and her attorney expressed lack of knowledge on both their parts with the bargaining process. The parties did review the proposed contract and agreed to certain of its provisions, though no agreement was reached on a number of items, including wages. The next meeting was held on January 8, 1988. After this meeting there were only some minor outstanding differences. At neither of these meetings was the Union informed of M & J's cancellation of its agreement with West End.

The parties again began experiencing difficulties contacting one another and the next time they were in direct communication was in a telephone conference on February 8. By this date, the Union had independently learned of the cancellation of the West End/M & J agreement and expressed a desire to include M & J in future bargaining sessions. After a number of letters and telephone conversations, the next meeting was held on April 7. This meeting was attended by Hankinson, the Union's attorney, West End's attorney, and M & J's attorney. M & J's attorney stated that he was there merely as an observer. He hand delivered a letter to the other parties present which stated that M & J took the position that it had no obligation to bargain with the Union. West End's attorney stated that West End had no work for any unit members. The meeting ended with the Union stating its position that M & J and West End were alter egos and they had jointly committed unfair labor practices. No further negotiating sessions have been held. No notice was given to the Union at this meeting of the impending sale of M & J to BSA. Under normal circumstances the bargaining history given above, especially with respect to the initial meetings, would not in my view constitute bad-faith bargaining. However, by at least the meeting of January 8, West End's attorney knew that West End was effectively out of business. Mrs. Andrew testified that she knew that Andrew was seeking another leasing company prior to the meeting on December 22, 1987. By not informing the Union of this fact in a timely fashion, West End's participation in negotiations became merely a charade. No meaningful negotiations could take place as there were no jobs available at West End and it was not seeking other business. Further, as M & J set all the terms and conditions of employment for West End's employees, no meaningful negotiations could have taken place without its participation and its position was that it had no bargaining obligation.

The complaint alleges a violation of Section 8(a)(5) of the Act because of the dilatory and evasive nature of Respondents' response to the Union's bargaining requests. I do not believe that Respondents were especially dilatory in their response, but evasive is not a strong enough word to describe their concealment of M & J's dropping West End and the

sale of M & J to BSA. This information was crucial to meaningful negotiations and the concealment thereof is clear proof of Respondents' bad faith. I find that the acts of concealment discussed above as well as M & J's refusal to enter into negotiations constitutes bad-faith bargaining in violation of Section 8(a)(5) of the Act.

K. Whether Respondents M & J and West End Unlawfully Failed and Refused to Reinstate Employees?

Although an unconditional offer to return to work was made by the striking employees on November 17, 1987, no employees were ever reinstated by Respondents M & J and West End. Whether the offer to reinstate made in June, 1988, was a valid offer will be discussed in the next section. The strike involved was threatened as one for recognition and that indeed was clearly one of its purposes. However, I believe the strike was also an unfair labor practice strike. As I have found earlier in this decision, Respondent M & J through Andrew unlawfully promised unit employees increased wages the day before the strike and through Palombo, carrying out Andrews order, unlawfully threatened these employees with termination on the morning the strike began. The unfair labor practices discussed above had the effect of converting what would have been an economic strike into an unfair labor practice strike. See *Trident Seafood Corp.*, 244 NLRB 566 (1979); *Blu-Fountain Manor*, supra. Therefore, on the unconditional offer to return to work, the Respondents had the duty to reinstate the strikers. There were no permanent replacements hired during the strike so no need existed to fire them.

I believe Respondents did not reinstate the strikers because it carried through with its unlawful threat to terminate them. I have found that Respondents told the Union that it would bring them back at the representation proceeding, but clearly had no such intention as Respondent M & J attempted to permanently foreclose this possibility by seeking out Aldworth immediately after the election. I find that all of Respondent's actions in this regard were discriminatorily motivated. Robert Andrew testified generally that business fell off during the strike and that there was no business need to recall the strikers. However, at the time of the offer to return to work, M & J had two West End employees working at its facility and two working at M & J Kitchen Supply. When Aldworth began providing employees, it started with three at M & J's facility and three at Kitchen Supply. M & J obviously had a need for at least two more persons than crossed the picket line and did not participate in the strike. The record shows that during and after the strike until Aldworth entered the picture, there was a marked increase in the use of temporary and casual help to do unit work and the use of nonunit M & J employees and supervisors to do this work. Between the first Aldworth payroll for M & J and the time of the sale of M & J some 4 months later, the payroll billings reflect an approximate 50 percent growth, indicating even more people were supplied by Aldworth. And this is in the winter season when business is traditionally slow.

In addition, M & J had never before laid off drivers when business fell off, as it did every year during the winter season. There was not shown to be any plan in existence prior to the strike to lay off drivers in the winter season of 1987-1988. I believe this departure from longstanding past practice was motivated entirely by M & J's intention to punish the

drivers for their union activity. As I have found above, they had been fired at the outset of the strike and I do not believe that M & J had any intention of changing this status. It is impossible to discern with accuracy from the record how many of the striking employees M & J would have needed to recall to perform unit duties as Andrew made a decision to scale down the business and sold some of the trucks. This decision was not made because there was not enough business, but on the contrary, because there was too much business. As this decision was apparently made after the election, Respondents had the unfulfilled duty of informing the Union of the decision and bargaining with it over the decision and the effects of it. *Cook Bros. Enterprises*, 288 NLRB 387 (1988).

For the reasons discussed above, I find that Respondents West End's and M & J's failure and refusal to reinstate the striking employees after their unconditional offer to return to work was in violation of Section 8(a)(3) of the Act.

L. Whether a Valid Offer of Reinstatement Was Made to the Employees?

On June 30, 1988, the attorney representing Respondent West End sent a letter to the Union which stated:

Confirming our telephone conversation of June 30, 1988, West End Transport hereby requests that three (3) employees, as identified in the Eligibility List of November 17, 1987 in the matter of West End Transport Co., Inc. and Local 251 Teamsters, 1-RC-18-893; report to work on Tuesday morning, July 5, 1988 at 8:00 a.m.

These employees will report to Drew Davies at the M & J Kitchen Supply facility located at the Olneyville freightyard in Providence, Rhode Island, wages and fringe benefits will be the same as those in place on October 19, 1987.

At this time we are preparing documentation concerning misconduct on the picket line of one, Joseph Tabigheski.¹⁸ The above offer does not extend to him at the preset time.

At the present time we are prepared to negotiate and bargain toward a collective bargaining agreement.

On July 12, 1988, West End's attorney sent a followup letter to the Union which stated:

As you are probably aware, none of the employees which I requested in my letter to you of June 30, 1988 reported to work on Tuesday morning, July 5, 1988 at 8:00 a.m. at the M & J Kitchen Supply facility located at the Olneyville Freightyard in Providence, Rhode Island.

Consequently, we are making alternate arrangements to supply labor.

On July 14, the attorney for Respondents M & J and RGA wrote a letter to Board Agent Robert Kiel, which in pertinent part stated:

[M]r. Andrew is also a majority shareholder in M & J Kitchen Supply Company. M & J Kitchen have since October 1987 contracted with West End Transportation for the furnishing of employees for its warehouse facility located in the Olneyville freight yard in Providence, RI."¹⁹

During the discussion held between yourself and myself, I, on behalf of Mr. Andrew, indicated the M & J Kitchen would be willing to recognize the Teamsters as a labor organization and would be willing to hire three former employees of West End Transportation to man the warehouse not the freight yard. This would have resulted in M & J Kitchens not utilizing the services of Aldsworth and its employees to man the facility. Since the Teamsters refused this request, M & J Kitchen then contacted West End Transportation and asked West end Transportation to furnish employees to man the facility. It is my understanding that West End Transportation contacted the Teamsters and asked that three of the employees be returned. M & J Kitchen did not want Tabishesky on the premises because of picket line violence. Parathetically, I am in the process of preparing appropriate affidavits from victims of Mr. Tabishesky picket line violence and will present these affidavits to you at the appropriate time.

General Counsel contends the reinstatement offer contained in these letters is invalid for a number of reasons, including: (1) the offer did not identify which three employees were to be offered reinstatement; (2) the offer, which by its terms extended to both striking and nonstriking West End employees, was deficient as it would require the nonstriking employees to accept a \$1.50 per hour pay cut; (3) the offer did not give the Union enough time to contact the unit employees as it was made on June 30 and expired on July 5, with the July 4th holiday intervening; (4) there exists doubt that the offer was genuine and in any event, was confusing as to the identity of the actual employer; (5) it offered warehouse positions, not driving positions, so the drivers would have no obligation to accept the offered positions; and (6) the unit employees' original jobs were still in existence at M & J Supply.

The Board has held that for a reinstatement offer to be valid and toll backpay, it must be specific, unequivocal, and unconditional. *Radio Electric Service Co.*, 278 NLRB 531, 532 (1986); *Pace Motor Lines*, 260 NLRB 1395 fn. 2 (1982). An offer of reinstatement is not valid if it does not afford sufficient time for a discriminatee to give deliberate consideration to it and the offer is conditioned on time. Additionally, an offer is not valid if it does not return the discriminatee to his former or substantially equivalent position. *Cave Springs Theatre*, 287 NLRB 4 (1987). Applying these principles to the offer(s), I find it (them) to be invalid. The offer is not specific as to the identity of the employee offered reinstatement, the position offered is not the same or equivalent position and involves a change in pay for at least some of the employees, and the offer was time conditioned

¹⁸This quoted letter and the two which follow contain misspellings which are not corrected as their text is quoted as written.

¹⁹This statement is in conflict with the testimony of Robert and Joyce Andrew who testified that no agreement existed between West End and M & J Kitchen. As they would be in the best position to know, I credit their testimony in this regard and find the statement in the attorney's letter to be incorrect.

and did not afford sufficient time to consider the offer or for the Union to locate the discriminatees.

M. Whether Respondent BSA is Jointly and Severally Liable with its Predecessor for Remedying the Predecessor's Alleged Unfair Labor Practices?

When an employer acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor, such a successor is required to remedy the unfair labor practices. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 174-185 (1975); *Perma Vinyl Corp.*, 164 NLRB 968, 969 (1967), enfd. sub nom. *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968). Two factors must be present to show a *Golden State* successorship. First, there must be a showing that the successor acquired and continued the business without interruption or substantial change in operation, employee complement, or supervisory personnel. Second, it must be clear that the successor had knowledge of the predecessor's unfair labor practice liability at the time of the sale.

Respondent BSA continued operation of Respondent M & J's business in exactly the same form and manner after the sale as had Respondent M & J prior to the sale. Respondent BSA concedes that it carried on the operation without substantial change in the method of operation and supervisory personnel, but asserts that as it did not employ the unit drivers, there can be no finding that the employee complement continued. I disagree. Respondent took on all the employees of M & J as of the date of sale, including Andrew as consultant. It continued the contract of Aldworth in unchanged form. Clearly, had the involved drivers been on the payroll of M & J, or had West End been providing drivers at the date of sale, Respondent BSA would have taken them on in whatever status they had at the time, either employees or leased drivers from West End. It does not argue otherwise. The only reason Respondent BSA did not employ or otherwise use their services was the commission of unfair labor practices. Therefore, but for Respondent M & J's unlawful refusal to recall the striking drivers and its subsequent unlawful subcontracting of the unit work, the unit employees would have been employed by BSA. Under these circumstances, and as *Golden State* only requires that the successor acquires and operates the business in basically unchanged form, I find that the first *Golden State* requirement has been met.

With respect to knowledge of pending unfair labor practice charges, the purchase and sale agreement executed on March 29, 1988, contained in Section 1(j), an indemnification clause which placed BSA on notice as to charge in Case 1-CA-25178.²⁰ The purchase and sale agreement contained no other references to any unfair labor practice charges. No complaint issued on this charge.

However, on January 20, 1988, the Union filed its charge against M & J and West End in Case 1-CA-25221, and amended that charge on February 19, 1988. Complaint issued

²⁰The charge in Case 1-CA-25178 was filed on December 16, 1987, against Respondent West End and alleged that West End had failed to recall unit employees in violation of an agreement made with the Union on November 17, 1987. This charge was amended on January 15, 1988, to add as a charged employer, Respondent M & J.

on the original and amended charges on March 25, 1988, all before the signing of the agreement. Without question, the attorney for M & J knew of the charges before the agreement was signed and may well have known of the issuance of the complaint by that date. Louis Simonini, owner and president of Respondent BSA, denies gaining knowledge of these charges and the complaint until sometime after the closing of the sale. General Counsel argues that Simonini did have this knowledge before closing. In support of his position, he points to a letter written by Simonini to Board Agent Robert Kiel in response to a letter from Kiel. Kiel's letter specifically refers to the complaint issued in Case 1-CA-25221. Simonini, in his response, stated:

[A]s Mr. Kiel states on p. 4, I was aware of an outstanding complaint against M & J Supply Co., Inc. and that there has been a strike in late fall or early winter.

Admittedly, this would seem to indicate knowledge of Case 1-CA-25221 as it was the only case involving M & J in which a complaint had issued. However, the same letter from Simonini stated, in the very next sentence:

[I] also stated to him (Mr. Kiel) on at least two occasions that, due to various letters sent by the N.L.R.B. and given to me by the previous owner's representatives and which I then shared with my attorneys, I was of the opinion that all charges had been dropped at the time of closing.

The closing of the sale took place on April 13, 1988. Between the execution of the purchase and sales agreement and the closing, there was no amendment made to the Agreement referencing any additional unfair labor practice charges. Simonini testified that 1-CA-25178 was the only charge of which he had knowledge as of the closing date. At the closing, the attorney for M & J presented to Simonini and other bank officials and attorneys present, a letter from the Regional Director for Region one. The letter referenced charge 1-CA-25178 and stated, "This is to advise you that the charge in the above matter has, with my approval, been withdrawn without prejudice." Simonini testified that he understood the letter to mean that the referenced charge was no longer pending. Contrary to the position of the General Counsel, I do not find that Simonini makes careful distinctions between charges and complaints and do find that in his letter to Board Agent Kiel was referring to the charge in Case 1-CA-25178. I believe Simonini's contention that he had no specific knowledge of the other pending charges or the complaint issued against M & J. On the other hand, I agree with General Counsel that Simonini knew of the substance, or at the very least, the consequences which could flow from an adverse decision on this complaint.

Simonini testified that some weeks before the closing, his own attorney told him that there might be a hearing concerning some unfair labor practice charges against M & J Supply at some point in the future. Simonini further testified that his attorney also had told him that, based upon what Respondent M & J's attorney had told him, Respondent BSA might have to recognize the Union if the charge were to be proven. General Counsel argues that since Case 1-CA-25178 only referred to a refusal to recall striking employees in violation of Section 8(a)(1) and (3) of the Act, the only charges being

referred to above had to have been the charges in Case 1-CA-25221, which also allege violation of Section 8(a)(5). Simonini's attorney was not a labor law specialist and the evidence reveals that he relied to a great extent on what M & J's attorney told him with respect to the labor law aspects of the sale. This attorney did not testify and there is no telling on what information he based his statements to Simonini. It is not clear that he understood the difference between the consequences of an 8(a)(3) violation and an 8(a)(5) violation.²¹ However, he did correctly inform Simonini of his potential liability which could result from all of the charges filed.

Respondent BSA thus contends that though it was on notice of Case 1-CA-25178, the letter for the Regional Director put it on notice that the charge had been withdrawn and it cannot be properly charged now with notice of any unfair labor practice allegation pending against M & J. I find this defense lacking in merit. Respondent M & J's attorney presented the letter at the closing. He had certain knowledge that there were outstanding both other charges and a complaint, which were not mentioned in the letter. Simonini admitted that there was some confusion at the closing with respect to the meaning of the letter and M & J's attorney was instructed to write the Board to determine its exact meaning. However, no one at the closing felt the need to wait for this letter to be written and a reply received before proceeding with the closing. As Respondent BSA was willing to proceed with the closing before it was sure as to the meaning of the letter, it must bear the consequences of that action. I find that it is charged with knowledge of the unfair labor practice allegations of Case 1-CA-25178. I also find it is charged with knowledge of the consequences of the 8(a)(5) allegations of Case 1-CA-25221 even though it may not have known specifically of the existence of these charges and the complaint issued in response thereto. Simonini, as noted above, testified that his attorney had told him of his potential bargaining obligation.

Finding that Respondent BSA is a *Golden State* successor does not place any undue hardship on it. The underlying rationale behind imposing liability in a case like this is that the purchaser has become the beneficiary of the unremedied unfair labor practices. Moreover, the potential liability for remedying these unfair labor practices can be reflected in the purchase price or can be secured by an indemnification clause in the sales agreement. See *Perma Vinyl*, supra. In the instant case, Respondent BSA assumed full liability for the unremedied unfair labor practices in Case 1-CA-25178 and was given indemnification for any other claim against, or liability of Respondent M & J. In these circumstances, any balancing of equities would have to favor having the alleged unfair labor practices remedied by the successor BSA rather than having the various discriminatees continue to bear the burden of such practices.

²¹ General Counsel also relies on a statement purportedly given to Board Agent Kiel by Simonini and then related to the Union's attorney. I do not rely on this statement as it again attempts to show that Simonini had a clear understanding of the difference between a charge and a complaint, an understanding which I find he did not have at the time of the purported statement.

N. Whether Respondent BSA Had an Obligation to Recognize and Bargain with the Union and Whether It Has Failed and Refused to Bargain with the Union?

As found above, at the time of the purchase of the business of M & J, Respondent BSA was aware of the pending unfair labor practices, as least insofar as it might require recalling striking drivers and bargaining with the Union. It was aware of the strike and the alleged agreement to reinstate the drivers and thus was aware of the potential liability for remedying the alleged unfair labor practices. The remedy sought, inter alia, includes the reinstatement of the striking employees and the discontinuance of the contract with Aldworth. Given its knowledge, Respondent BSA, by continuing the employing enterprise without any changes whatsoever, effectively stepped into Respondents M & J and, as its alter ego, West End's shoes vis-a-vis the Union. This includes succeeding to M & J's and West End's bargaining obligation. *Proxy Communications of Manhattan*, 290 NLRB 540 (1988); *Blu-Fountain Manor*, supra.

A fair interpretation of the Union's June 15, 1988 letter is that it was asserting not only its collective-bargaining rights against Respondents M & J and West End but also against Respondent BSA. The June 15 letter was expanded on in the union attorney's letter of June 24, 1988, a copy of which was sent to Respondent BSA, wherein he reemphasized that the Union has sought recognition at "M & J Supply" and that the Union was continuing to seek recognition at M & J Supply from the previous owners or the current owners. Respondent BSA never responded to the above or ever met and bargained with the Union. Simonini testified that he never considered Respondent BSA as having any obligation to bargain with the Union since he acquired the business. I find that Respondent BSA has failed and refused to bargain with the Union as it is legally obligated to do in violation of Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. Respondents M & J Supply Co., Inc. and Robert G. Andrew, Inc. were employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act at all times material until April 13, 1988.

2. Respondent Building Supply Acquisition Co., Inc. t/a M & J Supply Co., Inc. has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act since April 13, 1988.

3. Respondent West End Transport, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. Respondent West End Transport, Inc., for the purpose of this proceeding, is the alter ego of Respondent M & J Supply Co., Inc.

5. Respondent Robert G. Andrew, Inc. shares the same liability as Respondent M & J Supply Co., Inc. for the purpose of this proceeding, and all Respondents are jointly and severally liable to remedy the unfair labor practices found to have been committed, with Respondent Building Supply Acquisition Co., Inc.'s liability commencing as of April 13, 1988.

6. Local 251, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-

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

7. All full-time and regular part-time drivers, helpers, warehousemen, and yardmen employed at Respondents M & J Supply Co., Inc.'s and West End Transport, Inc.'s Providence, Rhode Island facilities, but excluding office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

8. Since December 7, 1987, Local 251 has been the exclusive collective-bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

9. Respondent West End Transport, Inc. and its alter ego, Respondent M & J Supply Co., Inc. have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act by:

- a. Threatening to fire their employees if they engaged in a strike.
- b. Promising their employees a wage increase and other benefits and implementing the wage increase during the Union organizing campaign.
- c. Failing and refusing to recall striking employees after an unconditional offer to return to work had been made by them on November 17, 1987.
- d. Failing and refusing to notify and bargain in good faith with the Union concerning the decision to subcontract unit work and the effects of that decision.
- e. Subcontracting the unit work and terminating the employment of non-striking unit employees on or about December 24, 1987.
- f. Failing and refusing to notify the Union of the decision to sell the business of Respondent M & J Supply Co., Inc., and the sale of the business and failing and refusing to bargain with the Union concerning the effects of the decision to sale and subsequent sale.
- g. Failing and refusing to bargain in good faith with the Union by virtue of their overall conduct, including the withholding from the Union of notice of the subcontracting of unit work and the sale of Respondent M & J's business.

10. Respondent Building Supply Acquisition Co., Inc. t/a M & J Supply Co., Inc. is a successor with knowledge to Respondent M & J Supply Co., Inc. and has engaged in and is engaging in unfair labor practices within the meaning of Sections 8(a)(1), (3), and (5) of the Act by:

- a. Failing and refusing since April 13, 1988 to cease subcontracting unit work and reinstate unit employees to the positions they previously held which still exist.
- b. Failing and refusing to extend recognition to the Unit as the exclusive collective bargaining representative of the employees in the appropriate unit, and failing and refusing to bargain in good faith with the Union over the terms and conditions of employment of said employees.

11. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondents have violated Section 8(a)(1), (3), and (5) of the Act, I recommend that Respondents be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent M & J Supply Co., Inc. and its alter ego, West End Transport, Inc. unlawfully failed to bargain in good faith with the Union as the exclusive representative of employees in the appropriate unit, I recommend that it be ordered, upon request of the Union, to bargain in good faith over the terms and conditions of employment of the unit employees. Having further found that these Respondents unlawfully failed to reinstate striking unit employees after their November 17, 1987 unconditional offer to return to work, and thereafter unlawfully subcontracted unit work and discharged nonstriking unit employees on or about December 24, 1987, I recommend that these Respondents be ordered to make whole²² the striking unit employees from November 17, 1987, and nonstriking unit employees from December 24, 1987, until such date that Respondent West End Transport, Inc. reinstates the unit employees or to the date that this Respondent demonstrates that it has no positions available because of legitimate business reasons.²³

Having found that Respondent Building Supply Acquisition Co., Inc. has unlawfully failed to extend recognition to the Union, bargain in good faith with the Union, and reinstate the unit employees, I recommend that it be ordered to extend recognition to the Union as the exclusive representative for purposes of collective bargaining of the employees in the appropriate unit; upon request of the Union, bargain in good faith with the Union over the terms and conditions of employment of unit employees; and offer reinstatement.

²² Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The unit employees whose backpay should be computed from November 17, 1987, are: Richard Govern, Richard Santos, Malik R. Abdullah, John J. Medeiros, William G. Couitt Jr., Joseph Tabishesky, and Norman J. Carreiro.

The unit employees whose backpay should be computed from December 24, 1987, are: Kevin Peltier, Galen Bradley, Stephen Frongillo, Thomas Rosenfield, and Alfred Bucci.

Backpay should be computed utilizing the \$1.50-per-hour increase in pay that Respondents implemented after October 19, 1987, and should extend to all unit employees until April 13, 1988. Until that date, it is not clear from the record that all would have been reinstated except for Respondents' unfair labor practices. After April 13, 1987, Successor Respondent Building Supply Acquisition Co., Inc. has operated the business utilizing, under subcontract, substantially less than twelve persons to perform unit work. Because its employee complement appears based upon legitimate business needs, I do not believe that it should have to reinstate more unit employees than it actually needs nor have to pay backpay for more employees than it would have reinstated.

²³ Respondent West End Transport, Inc. did not at the time of hearing have any customers and apparently was not seeking new customers. The business it was created to serve is being operated by successor Respondent Building Supply Acquisition Co., Inc. However, based on the letters which purportedly offered reinstatement to three unit employees, this Respondent may be in a position to offer employment to certain of the unit employees at M & J Kitchen Supply Co. Inc. Unfortunately, M & J Kitchen Supply Co., Inc. is not a party to this proceeding and I do not believe it can be ordered as a result of this proceeding to enter into an agreement with Respondent West End Transport, Inc. If M & J Kitchen Supply Co., Inc. voluntarily terminates its subcontract for unit work and enters into an agreement with West End Transport, Inc. to provide employees for the positions thus created, then I recommend that the backpay liability of Respondents Robert G. Andrew, Inc. and West End Transport, Inc. end with a valid offer to reinstate unit employees to the positions created.

ment, based upon seniority, to unit employees for which it has positions available. I recommend that this Respondent be further ordered to terminate its subcontract of unit work immediately so that unit positions will become available. In the event that this Respondent, for legitimate business reasons, cannot reinstate all unit employees, those not reinstated will be maintained on a preferential hiring list, by seniority, and offered reinstatement as positions become available.

IT IS FURTHER RECOMMENDED that all Respondents be held jointly and severally liable to remedy the unfair labor practices found to have been committed with Respondent Building Supply Acquisition Co., Inc.'s joint liability, including liability for backpay, commencing as of April 13, 1988.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

ORDER

1. Respondents Robert G. Andrew, Inc., West End Transport, Inc. and its alter ego, M & J Supply Co., Inc., Providence, Rhode Island, their officers, agents, successors, and assigns, shall cease and desist from

(a) Threatening to fire their employees if they engage in a strike.

(b) Promising their employees a wage increase and other benefits and implementing the wage increase during a union organizing campaign.

(c) Failing and refusing to recall striking employees after an unconditional offer to return to work had been made by them on November 17, 1987.

(d) Failing and refusing to notify and bargain in good faith with the Union concerning the decision to subcontract unit work and the effects of that decision.

(e) Subcontracting the unit work and terminating the employment of nonstriking unit employees on or about December 24, 1987.

(f) Failing and refusing to notify the Union of the decision to sell the business of Respondent M & J Supply Co., Inc., and the sale of the business and by failing and refusing to bargain with the Union concerning the effects of the decision to sell and subsequent sale.

(g) Failing and refusing to bargain in good faith with the Union as the exclusive representative of their employees in the appropriate unit, to wit:

All full-time and regular part-time drivers, helpers, warehousemen and yardmen employed at Respondents M & J Supply Co., Inc.'s and West End Transport, Inc.'s Providence, Rhode Island facilities but excluding office clerical employees, guards and supervisors as defined in the Act.

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

2. Successor Respondent Building Supply Acquisition Co., Inc. t/a M & J Supply Co., Inc., its officers, agents, successors, and assigns, shall cease and desist from

(a) Failing and refusing since April 13, 1988, to cease subcontracting unit work and reinstate unit employees to the positions they previously held which still exist.

(b) Failing and refusing to extend recognition to the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, and failing and refusing to bargain in good faith with the Union over the terms and conditions of employment of said employees.

3. Respondents Robert G. Andrew, Inc., West End Transport, Inc. and its alter ego, M & J Supply Co., Inc., their officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all unit employees whole for any losses they may have suffered by virtue of Respondents' unlawful failure to reinstate striking unit employees after November 17, 1987, and nonstriking unit employees after December 24, 1987, in manner described in the remedy section of this decision.

(b) On request, bargain in good faith with the Union, Local 251, as the exclusive representative of all employees in the appropriate unit set out above and, if an understanding is reached, embody it in a signed agreement.

(c) Offer reinstatement to unit employees to the same or equivalent positions in the manner set forth in the remedy section of this decision.

4. Successor Respondent Building Supply Acquisition Co., Inc., t/a M & J Supply Co., Inc., its officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act.

(a) Extend recognition to the Union, Local 251, as the exclusive bargaining representative of all employees in the appropriate unit set out above, and upon request, bargain in good faith with the Union and, if an understanding is reached, embody it in a signed agreement.

(b) Terminate its subcontract for unit work and offer reinstatement to unit employees, by seniority, to the positions they previously held, or to substantially equivalent positions to the extent such positions exist.

(c) Make whole the unit employees for any losses they may have suffered by Respondent's predecessors unlawful actions and by its continuation of those unlawful actions in the manner set forth in the remedy section of this decision.

5. All of the Respondents named above shall

(a) Preserve and, on 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 the amount of backpay due under the terms of this Order.

(b) Respondents West End Transport, Inc. and Robert G. Andrew, Inc. shall mail to their former employees and Respondent Building Supply Acquisition Co., Inc. shall post at its place of business copies of the attached notice which is marked "Appendix."²⁵ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately on receipt and maintained by them for 60 consecutive days in conspicuous

²⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places including all places where notices are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.