

**Redway Carriers, Inc./Cardinal Leasing, Inc.; Ligon Transportation Company, Successor and/or Alter Ego, and Single Employer, and Quicksilver Transportation, Inc., its Successor; Litco-Wisconsin, Successor and/or Alter Ego, and Single Employer; Ligon Specialized Hauler, Inc., Successor and/or Alter Ego, and Single Employer; Smyrna Personnel Services, Inc., Successor and/or Alter Ego, and Joint Employer; and Richard Kutzler, Agent of the Employer and/or an Individual and Fraternal Association of Special Haulers**

**Laura Gail Kutzler, Agent of the Employer and/or an Individual and Marlene Graham.** Cases 30-CA-7333, 30-CA-7575-1, 30-CA-7575-2, 30-CA-7575-3, and 30-CA-7575-4

February 28, 1991

#### DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY

On July 22, 1987, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondents, Ligon Transportation Company and Ligon Specialized Hauler, Inc. filed an answering brief.<sup>1</sup>

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

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

In the absence of exceptions, we adopt pro forma the judge's findings that the Respondent, Redway Carriers, Inc. and Cardinal Leasing, Inc., a joint employer (Redway/Cardinal), violated Section 8(a)(5) and (1) by failing to bargain with the Union over how to deal with the "fold-in" of the fuel surcharge directed by the Interstate Commerce Commission (ICC), and by engaging in bad-faith bargaining by virtue of adopting "its accept-concessions-or-else negotiating stance."<sup>2</sup> However, we do not agree with his finding that the employees were on strike, with his dismissal of the complaint, or his failure to remedy the violations. The judge found that because the Respondent is defunct

<sup>1</sup> Respondents Ligon Transportation Company and Ligon Specialized Hauler, Inc. argue that the General Counsel's exceptions should be struck on the ground they do not comply with Sec. 102.46 of the Board's Rules and Regulations. Although the General Counsel's exceptions and brief do not comply with the literal requirements of Sec. 102.46, we find that the deficiencies are insufficient to justify striking them.

<sup>2</sup> None of the Respondents filed exceptions to these conclusions, including the judge's discussion of *RCA Del Caribe*, 262 NLRB 963 (1982), or to any of the judge's factual findings.

and has been without assets since mid-1983 and because the Union is also defunct, "it would be useless, even misleading, to order any affirmative remedy or even to order any entity to cease and desist from violating the Act." The judge's conclusion is contrary to Board law.

It is well settled that mere discontinuance in business does not necessarily render moot allegations of unfair labor practices against a respondent.<sup>3</sup> A Board Order is a vindication of public policy. Because such an order is binding not only on a named respondent but also on its "officers, agents, successors and assigns," it cannot be said that the cessation of a business necessarily means that there is no possibility of remedying the unfair labor practices found. Therefore, we shall issue conclusions of law, a remedy including backpay, and an order appropriate to the violations found.<sup>4</sup>

1. The collective-bargaining agreement provided that drivers be paid 27 percent of gross revenue. In the early 1970s the ICC instituted a fuel surcharge which was to be billed separately from the motor carrier's own rates. Without objection from the Union, the Respondent treated gross revenues for driver-pay purposes as excluding the fuel surcharge. In February 1982,<sup>5</sup> the ICC ordered that the amounts motor carriers had been charging their customers as a fuel surcharge be "folded-in" to the carriers' rates. As the judge found, the Respondent violated Section 8(a)(5) by continuing to deduct the fuel surcharge from gross revenue after the "fold-in," over the Union's objection and without bargaining to impasse. Thus, the drivers were paid only 23 percent of the gross amount with the amount representing the surcharge added. The General Counsel argues that the drivers are entitled to a make-whole remedy awarding them a full 27 percent of the higher gross revenue amount which includes the surcharge.

Chairman Stephens and Member Devaney agree with the General Counsel's contention.<sup>6</sup> The parties bargained for a formula, not for a fixed amount of pay. The judge's finding (which we are adopting) that the Respondent's change in the compensation formula constituted an unlawful unilateral change necessarily encompasses a finding that the change was "material,

<sup>3</sup> *East Dayton Tool & Die Co.*, 239 NLRB 141 fn. 1 (1978); *Armitage Sand & Gravel*, 203 NLRB 162, 166-167 (1973), enfd. in part 495 F.2d 759 (6th Cir. 1974), citing *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 107 (1942).

<sup>4</sup> We find it unnecessary to pass on the judge's finding that the Union is defunct. We note that it is clear that the Union was a viable labor organization at the time the unfair labor practices were committed and that our remedial Order merely requires the Respondent to bargain with the Union on request.

In her exceptions, counsel for the General Counsel has requested that in view of the Respondent's cessation of operations, we require the mailing of copies of the notice to all unit employees. We grant the General Counsel's request, and shall so order. *P. J. Hamill Transfer Co.*, 277 NLRB 462 (1985).

<sup>5</sup> All dates hereinafter are in 1982.

<sup>6</sup> As set forth in the attached dissent, Member Cracraft would find that no backpay remedy is warranted in the circumstances of this case.

substantial, and significant.”<sup>7</sup> It is self-contradictory to find that such a change has been made but that there is no basis for a remedy. Either the asserted change made no real difference, in which case it does not meet the test for an unlawful unilateral change, or it *did* make a real difference, in which case the employees are entitled to restoration of the status quo ante. Given the nature of the change at issue here, the make-whole remedy requested by the General Counsel is appropriate.

Contrary to Member Cracraft, Chairman Stephens and Member Devaney find that any increase in the compensation of the drivers resulting from folding the fuel charges back into the gross receipts would not be a windfall to the drivers but simply a result of the application of the contracted-for formula. The agreement of the employees’ bargaining representative to the application of the percentage to a smaller base at a time when there was no single figure for gross compensation does not establish that once the single rate was reinstated, gross revenues would not encompass that entire single amount.<sup>8</sup> Accordingly, Chairman Stephens and Member Devaney find not only that the Respondent’s failure to bargain about the change in the application of the contractual formula is in violation of Section 8(a)(5) and (1) of the Act, but also that the employees are entitled to backpay.

2. Chairman Stephens and Member Cracraft find that the shutdown of the terminal and the resulting lockout of the employees was lawful at all times.

At the hearing and before the judge, the General Counsel contended that the shutdown of the Respondent’s terminal and the resulting lockout of the employees on August 28 was unlawful because it was in support of the Respondent’s bad-faith bargaining position and that the employees are entitled to backpay. The judge found that the Respondent lawfully locked out its employees on August 28 because of a reasonably based fear of violence and that the lockout remained lawful thereafter.

As the judge found, the Respondent’s owner, Kutzler, mistakenly believed that his truckdrivers had called a strike, and he feared that a strike could endanger him and his family and could result in the destruction of property. During the 1980 strike the drivers had sabotaged equipment, and the damage had resulted in major expenses for equipment replacement, maintenance

expenses, lost trucktime, and security. Union officials threw rocks at trucks and threatened employees with violence.<sup>9</sup> Kutzler immediately responded to his belief that the Union had called a strike by arranging for around-the-clock guard services. One guard testified that the Kutzler family expressed concern about the truckdrivers harming them.

The parties met on August 30. The Respondent’s attorney informed the union representatives that the Respondent was taking this opportunity to demand concessions it had long believed were necessary and that the drivers had to grant them before the Company would reopen.<sup>10</sup> As noted above, we agree with the judge’s finding that the Respondent bargained in bad faith as of that date by “its accept-concessions-or-else negotiating stance.”

In agreement with the judge and their dissenting colleague, Chairman Stephens and Member Cracraft conclude that the Respondent lawfully locked out its employees on August 28 because of its objectively based fears of violence. However, contrary to Member Devaney, Chairman Stephens and Member Cracraft find that Kutzler’s unlawful bargaining position did not materially motivate his decision to continue to lock out the employees. Given Kutzler’s objectively based fears of violence, the lockout was justified.

We do not agree that *Wire Products Mfg. Corp.*, 198 NLRB 652 (1972), enf. denied in part 484 F.2d 760 (7th Cir. 1973), relied on by Member Devaney in his dissent, requires a different result. In *Wire Products*, the Board held that a lockout was unlawful where it was motivated in part “by union animus and there was the improper intent to injure the bargaining representative or to evade a bargaining duty.” Id. at 653. Given the findings made by the judge in the instant highly atypical lockout case concerning Kutzler’s state of mind (in particular Kutzler’s continuing belief that the drivers were refusing to come back except on terms different from those in effect before August 28 and were likely to react with violence to any failure to accede to their position), we do not find the requisite nexus with unlawful motivation.

The record reveals that throughout the subsequent negotiations, Kutzler continued to believe that the driv-

<sup>7</sup>See, e.g., *Weather Tec Corp.*, 238 NLRB 1535, 1536 (1978), and cases there cited.

<sup>8</sup>Had the parties agreed that the term “gross revenues” would not include the fuel costs even when those costs were included in the basic transportation rate charged the customer, then we would find not only that a backpay remedy is inappropriate but also that no violation should be found. In such case, the Respondent’s “new” percentage formula could be seen as just an awkward means of perpetuating the contract formula in the face of a different billing format, i.e., not a real change. See fn. 7, supra. But the judge has found that the Respondent made an unlawful unilateral change, and that finding has not been excepted to by the Respondent.

<sup>9</sup>See *Redway Carriers*, 274 NLRB 1359, 1412 (1985).

<sup>10</sup>The drivers refused to grant the concessions, and also stated that they would not return to work for anything less than terms equivalent to those of the expired 1979–1981 contract. (The judge did not credit testimony that the Union indicated that the drivers would be willing to return to work under the terms and conditions existing immediately prior to the August 28 lockout.) The judge found that “given the drivers’ refusal to return to work, they were on strike as of the evening of August 30.” We do not agree. Although the Union’s communications concerning the working conditions sought by the drivers were on strike, they fall short of a showing that a strike was, in fact, in progress. Certainly the Union’s refusal to grant the concessions demanded by the Respondent does not automatically translate into a strike. The record reveals that no strike vote was ever taken by the drivers, that they never notified the Respondent that they were on continued strike, and that, in fact, the Union kept insisting that the drivers were locked out, rather than on strike.

ers had struck before he secured the property. There is no indication that Kutzler did not continue to maintain full security or that he no longer had objective reasons to believe that securing the terminal was necessary to prevent violence. In the unusual circumstances of this case, we do not find that the lockout, lawful at its inception, was rendered unlawful because of Kutzler's bargaining stance. Consequently, the employees are not entitled to backpay for any part of the period that they were locked out.

3. The judge found that no entities or persons other than Redway/Cardinal were responsible for the violations found, even though he found that Litco-Wisconsin was an alter ego of Redway/Cardinal for "a limited time." In her exceptions, counsel for the General Counsel contends that, given the factual findings made by the judge, he erred in failing to conclude that Litco-Wisconsin remains liable as an alter ego and that Redway/Cardinal's owners, Richard and Gail Kutzler, are personally liable. Chairman Stephens and Member Devaney agree with the General Counsel's contentions.<sup>11</sup>

In *Advance Electric*,<sup>12</sup> the Board stated it would find alter ego status where two employers have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, as well as ownership." The Board also stated that among the other factors which must be considered is "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."<sup>13</sup> As the judge found, the Kutzlers owned two-thirds of Redway/Cardinal's stock.<sup>14</sup> Litco-Wisconsin was a sole proprietorship of Gail Kutzler which was run by Richard Kutzler.<sup>15</sup> The new operation used the same trucks, terminal, dispatchers, and clerical employees, and had the same phone number and customers as Redway/Cardinal. Redway/Cardinal was in bankruptcy, and the judge found that the Kutzlers did not advise the bankruptcy court or Redway/Cardinal's creditors, including the Union or the employees, of the new business. Kutzler testified that Litco-Wisconsin was created so that Redway/Cardinal's customers could be serviced and their business retained until the "strike" was over

and Redway/Cardinal could reopen. Based on the foregoing evidence, we find, in agreement with the judge, that Litco-Wisconsin was an alter ego of Redway/Cardinal.

Chairman Stephens and Member Devaney do not agree with the judge's finding that "it would be inappropriate and unfair to continue to require Litco-Wisconsin, after its role as a temporary replacement for R/C had ended, to fulfill any obligations that R/C might owe to its employees." Such a conclusion is contrary to Board law.

It is well settled that two nominally separate businesses may be regarded as a single enterprise if one is the alter ego or "disguised continuance" of the other.<sup>16</sup> If alter ego status is found to exist, the labor obligations of the original employer will be deemed to be shared by its alter ego, and both will be held liable, as a single employer, for any violations of the Act. To hold otherwise would allow an employer to alter its corporate form whenever it is inconvenient or unprofitable to meet its obligations under the Act. This was precisely what the Kutzlers did when they formed Litco-Wisconsin to carry on Redway/Cardinal's business.

It does not matter that the Kutzlers intended Litco-Wisconsin to be temporary, to exist only while Redway/Cardinal's employees were "on strike."<sup>17</sup> Alter ego status is to be determined based on the developments which took place at the time the alter ego was formed, not on what may have happened at a later date.<sup>18</sup> Thus, at the time Litco-Wisconsin was formed, it was obligated to recognize and bargain with the Union, and must share responsibility for Redway/Cardinal's unfair labor practices. Furthermore, as noted above, the fact that a company is defunct does not preclude the Board from issuing a remedial order against it.<sup>19</sup> Thus, given the finding that Litco-Wisconsin is the alter ego of Redway/Cardinal, Litco-Wisconsin is clearly liable for Redway/Cardinal's violations of the Act.

Concerning the personal liability of the Kutzlers, it is well settled that in certain circumstances it is appropriate to "pierce the corporate veil" and hold a corporation's officers or owners personally liable for violations of the Act. In deciding this issue, Chairman Stephens and Member Devaney are guided by the principles set forth in *Riley Aeronautics Corp.*, 178 NLRB 495 (1969). In *Riley*, the Board adopted the judge's statement of the applicable law, as follows:

<sup>11</sup> In the absence of exceptions, we find it is unnecessary to pass on the liability of any other entities or persons. In light of her view that no backpay is due the employees, Member Cracraft finds it unnecessary to pass on the issue of which persons or entities are liable for backpay.

<sup>12</sup> 268 NLRB 1001, 1002 (1984). See also *Vulcan Trailer Mfg. Co.*, 283 NLRB 480 (1987); *Continental Radiator Corp.*, 283 NLRB 234 (1987).

<sup>13</sup> 268 NLRB 1002, quoting *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984).

<sup>14</sup> The remaining one-third was owned by LeRoy Dittmer. Dittmer had no part in the day-to-day management.

<sup>15</sup> *American Pacific Concrete Pipe Co.*, 262 NLRB 1223, 1225-1226 (1962), enfd. mem. 709 F.2d 1514 (9th Cir. 1983). (Common control of operations is a factor establishing alter ego status even in the absence of common ownership.) In the absence of exceptions, we find it unnecessary to pass on the judge's finding that Richard Kutzler was an owner of Litco-Wisconsin.

<sup>16</sup> *Southport Petroleum Co.*, supra; *Knappton Maritime Corp.*, 292 NLRB 236 (1988).

<sup>17</sup> We have found that, in fact, there was no strike, but rather the employees were locked out.

<sup>18</sup> *Rogers Cleaning Contractors*, 277 NLRB 482, 488 (1985), enfd. 813 F.2d 795 (6th Cir. 1987); *Shearer Delivery Service*, 262 NLRB 622 (1982).

<sup>19</sup> *East Dayton Tool & Dye Co.*, supra.

[T]he corporate veil will be pierced whenever it is employed to perpetuate fraud, evade existing obligations, or circumvent a statute. . . . Thus in the field of labor relations, the courts and the Board have looked beyond organizational form where an individual or corporate employer was no more than an alter ego or a “disguised continuance of the old employer” . . . or was in active concert or participation in a scheme or plan of evasion . . . or siphoned off assets for the purpose of rendering insolvent and frustrating a monetary obligation such as backpay . . . . [Id. at 501.]

Applying these principles to the judge’s factual findings, we conclude that the Kutzlers are personally liable for the backpay due the employees.

As the judge found, the Kutzlers themselves perpetrated the unfair labor practices. The decision to unilaterally change the calculation of wages and the refusal to bargain in good faith were theirs personally. While seeking the protection of bankruptcy for Redway/Cardinal, and within days of the filing of the initial unfair labor practice charge against Redway/Cardinal, the Kutzlers decided to conduct their business and service their customers in the form of a disguised continuance, namely Litco-Wisconsin. By their own admission, Litco-Wisconsin was created in order for them to operate their business so as to avoid their labor problems. The Kutzlers used the assets of Redway/Cardinal to start their new business operation with Cardinal and Litco. Gail received a salary from the new operation. The judge found that the bankruptcy court was never informed of Litco-Wisconsin’s existence. There is no evidence that the bankrupt estate or any Redway-Cardinal creditors ever benefited from the operation of Litco-Wisconsin.

Such personal participation in the commission of unfair labor practices and in a scheme to avoid corporate liability for those acts by the persons who controlled the corporation warrants a finding of individual liability.<sup>20</sup> Therefore, based on their personal participation in the scheme and plan of evasion, including forming an alter ego to avoid their statutory obligation to bargain with the Union, Richard and Gail Kutzler are personally liable, jointly and severally with Redway/Cardinal and Litco-Wisconsin, for any and all backpay found to be owed to employees as a result of the unfair labor practices found here.<sup>21</sup>

<sup>20</sup> *G & M Lath & Plaster Co.*, 252 NLRB 969, 977 (1980), *enfd.* 670 F.2d 550 (5th Cir. 1982); *Carpet City Mechanical Co.*, 244 NLRB 1031, 1034 (1979).

<sup>21</sup> In finding that the Kutzlers should be held personally liable, we note that no party has excepted to the judge’s finding that Litco-Wisconsin was “nothing more than a name” that the Kutzlers labeled the series of transactions by which they continued Redway/Cardinal’s business. In any event, we agree with the judge’s characterization.

## CONCLUSIONS OF LAW

1. Redway/Cardinal and Litco-Wisconsin are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Fraternal Association of Special Haulers is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Litco-Wisconsin is, for the purposes of this proceeding, the alter ego of Respondent Redway/Cardinal.

4. It is appropriate to hold Richard Kutzler and Gail Kutzler personally liable to remedy the unfair labor practices found here.

5. All drivers, mechanics, spotters, shop helpers, and owner-operators employed by Redway/Cardinal and by its alter ego Litco-Wisconsin at or out of their Kenosha, Wisconsin and Plymouth, Indiana terminals, excluding all office clerical employees, dispatchers, managerial employees, professional 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.

6. The Union is now and has been at all times the exclusive representative of all the employees in the above-described unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. By failing and refusing to bargain with the Union regarding the “fold-in” of the fuel surcharge and by engaging in bad-faith bargaining, the Respondents have violated Section 8(a)(5) and (1) of the Act.

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

## THE REMEDY

Having found that the Respondents have violated Section 8(a)(5) and (1) of the Act, we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondents failed and refused to bargain about the “fold-in” of the fuel surcharge and its effect on the calculation of driver pay, we shall order the Respondents to bargain and to make their employees whole for any losses in wages or benefits they may have suffered, in accordance with the method described in *Ogle Protection Service*, 183 NLRB 682 (1970).

Having found that the Respondents engaged in bad-faith bargaining, we shall order the Respondents to bargain with the Union, on request, until an agreement or bona fide impasse is reached, and embody the terms of such agreement in a signed agreement.

Interest shall be paid on all sums due in the manner prescribed in *New Horizons for the Retarded*.<sup>22</sup>

#### ORDER

The National Labor Relations Board orders that the Respondents, Redway Carriers, Inc./Cardinal Leasing, Inc., Litco-Wisconsin, Richard Kutzler, and Gail Kutzler, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union regarding the “fold-in” of the fuel surcharge.

(b) Engaging in bad-faith bargaining.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.<sup>23</sup>

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

(a) On request, bargain collectively and in good faith with the Union as the exclusive bargaining representative of the employees in the unit set forth below concerning terms and conditions of employment, including the “fold-in” of the fuel surcharge and, if an understanding is reached, embody it in a signed agreement. The appropriate unit is:

All drivers, mechanics, spotters, shop helpers, and owner-operators employed by the Respondents at their Kenosha, Wisconsin and Plymouth, Indiana terminals excluding all office clerical employees, dispatchers, managerial employees, professional employees, guards and supervisors as defined in the Act.

(b) Make whole the bargaining unit employees for any losses they may have suffered as a result of the Respondents’ failure to bargain about the “fold-in” of the fuel surcharge in the manner set forth in the remedy section of the decision.

(c) 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.

(d) Mail a copy of the attached notice marked “Appendix”<sup>24</sup> to the Union and to all employees in the ap-

<sup>22</sup> 283 NLRB 1173 (1987). We leave to the compliance stage the question whether the Respondents must pay any additional sums into employee benefit funds in order to satisfy our “make-whole” remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

<sup>23</sup> Member Devaney finds, based on the violations of the Act found in this proceeding, the unlawful lockout found in his dissent, and the unfair labor practices found to have been committed by Redway/Cardinal in the prior Board proceeding cited supra, that the Respondents have demonstrated a proclivity to violate the Act and that a broad injunctive order is therefore warranted. *Hickmott Foods*, 242 NLRB 1357 (1979).

<sup>24</sup> 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.”

propriate unit at their last known address. Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondents’ authorized representative, shall be mailed immediately upon receipt by the Respondents, as directed above.

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

MEMBER CRACRAFT, dissenting in part.

I join with Chairman Stephens in finding that the bad-faith bargaining did not convert the Respondent’s lawful lockout to an unlawful one. I agree with my colleagues’ adoption of the judge’s finding that Redway/Cardinal violated Section 8(a)(5) by engaging in bad-faith bargaining and by failing to bargain about the “fold-in” of the fuel surcharge. I also agree with the reversal of the judge’s dismissal of the complaint and with the issuance of conclusions of law and order appropriate to these two violations. However, I do not agree that the employees are entitled to backpay to remedy the Respondent’s failure to bargain about the fold-in of the fuel surcharge.

Although it is true that Redway/Cardinal failed to bargain about the “fold-in” of the fuel surcharge and its effect on the calculation of driver pay, I would find that no backpay is needed to remedy this violation and would limit the remedy to an order to bargain. The collective-bargaining agreement provided the drivers be paid 27 percent of gross revenue. The Interstate Commerce Commission’s order to “fold-in” to their rates the amounts previously charged as a fuel surcharge was circumstance that neither of the parties could have foreseen. The change was in ICC regulations which changed the definition of gross revenue. When Redway/Cardinal thereafter applied the contractual percentage to gross revenues with the amount representing the fuel surcharge subtracted, the drivers lost no pay as a result of the failure to bargain. Chairman Stephens and Member Devaney state that the employees are entitled to a return to the status quo ante. However, in the circumstances of this case, my colleagues’ literal interpretation of the contract does not restore the status quo ante, but rather gives the drivers an 18-percent increase in pay. An external circumstance such as the action taken by ICC, which neither party could have reasonably anticipated during collective bargaining, should not operate to require Redway/Cardinal to grant such a windfall to the employees. In light of my view that no backpay is due the employees, I find it unnecessary to pass on my colleagues’ conclusions concerning which persons or entities are liable for backpay.

States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

MEMBER DEVANEY, dissenting in part.

In agreement with the judge and my colleagues, I believe that the Respondent lawfully locked out its employees on August 28 because of its objectively based fears of violence. However, I find that the Respondent's bad-faith bargaining commencing on August 30 converted the lockout which was lawful at its inception to an unlawful one and that the employees were not on strike as of that date.

The Respondent demanded that the Union accept concessions as nonnegotiable condition for reopening the doors and returning the drivers to work. I agree with my colleagues that the Respondent's "accept-concessions-or-else negotiating stance" constituted bad-faith bargaining. In the context of strikes, it is well established that bad-faith bargaining demands by an employer that result in prolonging a strike have the effect of converting the strike into an unfair labor practice strike. See *General Athletic Products Co.*, 227 NLRB 1565 (1977). Such a conversion is found by the Board when the employer's unfair labor practices are a factor in prolonging the strike, even though economic goals may still be present. *Superior National Bank*, 246 NLRB 721 (1979). The Board has also found that a lockout motivated in part by an improper desire to injure the bargaining representative or to evade a bargaining duty is unlawful, despite the existence of another legitimate motivation. *Wire Products Mfg. Corp.*, 198 NLRB 652 (1972), denied in part 484 F.2d 760 (7th Cir. 1973).

Accordingly, a lockout by an employer that is lawful at its inception may be converted to an unlawful lockout when it is prolonged, at least in part, in support of the employer's bad-faith bargaining position. Applying this rationale to the facts of this case, once the Respondent conditioned opening the doors on acceptance of its demand for concessions, the lockout became an extension of illegal bargaining demands. See *Vore Cinema Corp.*, 254 NLRB 1288, 1293 (1981); *Strand Theatre*, 235 NLRB 1500, 1502 (1978). Therefore, as of August 30, the Respondent violated Section 8(a)(5) and (1) by locking out its drivers.

#### APPENDIX

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

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

WE WILL NOT fail and refuse to bargain with Fraternal Association of Special Haulers regarding the "fold-in" of the fuel surcharge.

WE WILL NOT engage in bad-faith bargaining.

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, on request, bargain with Fraternal Association of Special Haulers as the exclusive bargaining representative of the employees in the unit concerning terms and conditions of employment, including the "fold-in" of the fuel surcharge and, if an agreement is reached, embody it in a signed agreement. The appropriate unit is:

All drivers, mechanics, spotters, shop helpers, and owner-operators employed by the Respondents at or out of their Kenosha, Wisconsin and Plymouth, Indiana terminals, excluding all office clerical employees, dispatchers, managerial employees, professional employees, guards and supervisors as defined in the Act.

WE WILL make whole the bargaining unit employees for any losses they may have suffered as a result of our failure to bargain about the "fold-in" of the fuel surcharge.

REDWAY CARRIERS, INC./CARDINAL  
LEASING, INC., A JOINT EMPLOYER  
AND/OR LITCO-WISCONSIN, AN ALTER  
EGO, AND/OR RICHARD KUTZLER  
AND/OR GAIL KUTZLER

*Dennis M. Selby, Esq.* and *Joyce Ann Seiser, Esq.*, for the General Counsel.

*Jack Osswald, Esq.*, of Chicago, Illinois, on behalf of Respondents Ligon Transportation Co. and Ligon Specialized Hauler, Inc.

#### DECISION

STEPHEN J. GROSS, Administrative Law Judge. Redway Carriers, Inc., was a motor carrier. It stopped operating in August 1982. At that time Redway operated out of a terminal in Kenosha, Wisconsin. Cardinal Leasing, Inc., was a lessor of tractors and van trailers, with drivers. Cardinal's ownership and management were the same as Redway's, and until October 1982 Cardinal did business only with Redway. Cardinal stopped operating in February 1983.

Richard Kutzler was part owner of Redway and Cardinal and ran both companies; he was, essentially, their only executive. (Several members of the Kutzler family were involved in the matters that led to this proceeding. But when I refer just to "Kutzler," it will always be to Richard Kutzler.)

This proceeding began on 13 September 1982, when the Fraternal Association of Special Haulers (FASH) filed an unfair labor practice charge against Redway and Cardinal (in Case 30-CA-7333). FASH amended that charge on 18 October 1982. Thereafter, on 28 January 1983, an employee of Cardinal, Marlene Graham, filed a charge against Kutzler, his wife Laura Gail Kutzler (Gail), Ligon Transportation Company<sup>1</sup> (a company with which the Kutzlers were then doing

<sup>1</sup>The complaint names as respondents two different corporations called "Ligon Transportation Company." One was incorporated in Kentucky. The

business), and a company called Kutzler Express (Case 30-CA-7575-1 through 4). A complaint first issued on 6 October 1982, and was subsequently amended at various times,<sup>2</sup> the latest amendments being made on 17 April 1985 and 30 April 1986.<sup>3</sup>

The amended complaint alleges that Redway and Cardinal violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), in various respects; that Kutzler and Gail should be held personally liable for such unfair labor practices; and that a number of companies became alter egos of, single employers with, and/or successors to Redway and Cardinal and, as such, should also be held liable for the alleged unfair labor practices of Redway and Cardinal.<sup>4</sup>

The hearing opened on 2 May 1983, adjourned for settlement purposes, resumed on 12 March 1984, again adjourned for settlement purposes and for consideration of motions to dismiss or for continuance, then resumed in earnest on 10 September 1984. I closed the hearing on 30 April 1986, after 52 days of hearing. The General Counsel and, jointly, Ligon Transportation Company and Ligon Specialized Hauler have filed briefs.

#### The Relationship Between Redway and Cardinal

The complaint alleges that Redway and Cardinal were joint employers.

Redway and Cardinal were the subjects of a previous proceeding. See *Redway Carriers*, 274 NLRB 1359 (1985). (The parties here have taken to calling that proceeding “*Redway I*,” and I will follow suit.) *Redway I* holds that Redway and Cardinal were joint employers. *Id.* at 1366. The record in this proceeding shows that the relationship between Redway and Cardinal did not change in the interval between the hearing in *Redway I* and 28 August 1982, when both Redway and Cardinal stopped operating.

As for subsequent periods: Redway never resumed operations after 28 August; both Redway and Cardinal filed petitions under Chapter 11 of the Bankruptcy Act on 17 September 1982; Cardinal (as debtor-in-possession) resumed operations (without Redway) in October 1982; and in January 1983 (while Cardinal was still operating) Redway sought liquidation under Chapter 7 of the Bankruptcy Act. (Those events will be discussed in further detail later in this decision.) Until December 1982 Kutzler proceeded on the assumption that Cardinal’s operations without Redway were temporary phenomena and that the two entities would one day resume their pre-September 1982 relationship. But given the fact that Redway’s cessation of operations turned out to be permanent, I conclude that Redway and Cardinal ceased

other was incorporated in Tennessee. Both the Kentucky and Tennessee corporations have had various names during the course of their corporate existences. See fn. 81, below.

<sup>2</sup>Like Ligon Transportation Company, Ligon Specialized Hauler has had various names. It is now known as “Ligon Nationwide, Inc.” See fn. 89.

<sup>3</sup>The 1985 amendment is in the record as G.C. Exhs. 1–8. The 1986 amendment proposes imposition of a visitatorial clause. See G.C. Exh. 161. (See, in this connection, my Orders dated 17 April 1985 and 3 July 1986.)

<sup>4</sup>The amended complaint alleges, based on Graham’s charge, that Kutzler Express was an alter ego of Redway and Cardinal. But I dismissed the allegations against that company in an Order dated 30 April 1984.

The amended complaint can be read as claiming that IU International Corporation and Nogil Management Corporation should be held derivatively liable for the unfair labor practices alleged in the complaint. I granted the motions to dismiss of IU and Nogil by Order dated 19 June 1985.

being joint employers in October 1982, when Cardinal resumed operations without Redway.

For convenience’s sake, I will use the term R/C when referring to the Redway and Cardinal when they were acting as joint employers. (And, also for convenience’s sake, I will treat the term R/C as though it referred to one entity.)

#### I. R/C’S UNILATERAL CHANGE IN THE TERMS OF ITS DRIVERS’ EMPLOYMENT IN APRIL 1982

The General Counsel claims that in April 1982 R/C violated Section 8(a)(5) and (1) by unilaterally changing the terms under which it paid its drivers. According to the General Counsel: (1) R/C had been paying its drivers 27 percent of the gross revenue of each load hauled; (2) in April 1982 R/C began paying the drivers only about 23 percent of each load hauled; and (3) R/C made the change without affording FASH—the union that represented R/C’s drivers—an opportunity to bargain.

This part of this decision considers that claim.

*Redway I*: FASH began representing R/C’S drivers (and certain of its other employees) early in 1976. Then, in January 1980, in an election conducted by the Board, a majority of R/C’s bargaining unit employees voted for representation by the Teamsters. But FASH claimed that the election had been tainted by unfair labor practices that R/C had committed prior to the election. And in May 1981 Administrative Law Judge Marvin Roth issued a decision in which, among other things, he: (1) found that R/C and FASH had entered into a collective-bargaining contract for the period September 1979 through August 1981; and (2) recommended that the January 1980 election be set aside and a new election ordered. R/C appealed. R/C contended that the 1980 election was valid—so that the Teamsters, not FASH, represented R/C’s employees. R/C further contended that R/C had never agreed to FASH’s proposals for a 1979–1981 contract.

The Board issued its opinion in *Redway I* in March 1985. The Board upheld Judge Roth in most respects, including his finding that R/C and FASH had entered into a 1979–1981 contract and his recommendation that an election be held to determine which, if any, union should represent R/C’s employees. (Because both Redway and Cardinal had ceased to exist by the time the Board issued its opinion, the election that *Redway I* ordered was never held.)

Other facets of Judge Roth’s and the Board’s actions will be considered below.

*The Terms of the Collective-Bargaining Contract Between R/C and FASH; the ICC’s Imposition of a “Fuel Surcharge”*: R/C’s first contract with FASH, for the period 1976–1978, provided that starting in 1978 the drivers’ wages were to be 27 percent “of the gross revenue paid to the company for the transportation of a load.”<sup>5</sup>

The effect of that kind of wage provision was that whenever Redway increased the rates it charged shippers because of, say, increases in its costs, driver wages per load increased proportionately. But starting in June 1979 (which as during the interval between the end of the 1976 R/C-FASH collec-

<sup>5</sup>General Counsel’s Exhibit 25 at 8 (hereafter GCX). The 27-percent provision applied only to R/C’s over-the-road drivers, not to its “spotters.” Moreover, the provision did not apply to owner-operators who operated under lease to R/C. But most of R/C’s drivers were covered by the 27-percent provision. In this part of this decision, I use the term “driver” as referring only to over-the-road drivers who were subject to the provision.

tive-bargaining contract and the start of the 1979 contract), the drivers' wages no longer reflected increases in the amounts shippers paid to Redway where those increases were the result of R/C's higher fuel prices.

That change stemmed from a series of orders of the Interstate Commerce Commission. What happened was this. Throughout the United States, generally many owner-operators operate under lease to motor carriers. Those leases often provide that owner-operators are to receive as their compensation a percentage of the motor carrier's revenues, but that the owner-operators are responsible for paying for the fuel for their vehicles. During the 1970's owner-operators became financially hard-pressed by a combination of leases of that nature, skyrocketing fuel prices, and various ICC actions holding down motor carrier rates. In response to the owner-operators' vociferous complaints, the ICC instituted a "fuel surcharge." The ICC's fuel surcharge orders had two effects of interest here. First, each motor carrier began billing its customers for two separate amounts—one that represented the motor carrier's own rates and charges, and another that was the fuel surcharge. Second, motor carriers were required to pass the amounts they received by way of the fuel surcharge on to "the person actually responsible for the payment of fuel charges." See 44 Fed.Reg. 40467 (10 July 1979).

R/C paid its drivers 27 percent of "gross revenues" (as stated above). And R/C, without objection from FASH, treated gross revenues—for driver pay purposes—as excluding the fuel surcharge.

As noted above, in September 1979 R/C and FASH entered into another collective-bargaining contract, this one for a 2-year period ending in August 1981. The pertinent driver wage provisions of the 1979 contract were identical to those in the 1976 contract. Thus drivers were to receive 27 percent of "gross revenues." But in keeping with R/C's earlier practice, the amounts that R/C paid its drivers during the course of the contract did not reflect the fuel surcharge.

The 1979 collective-bargaining contract was the last to which R/C was ever a party. But even after the termination of the contract (in August 1981) R/C continued to pay its drivers 27 percent of the gross revenues of the loads they hauled—with gross revenues treated as not including the fuel surcharge.

*The Elimination of the Fuel Surcharge; R/C's Response:* In February 1982 the ICC ordered an end to the fuel surcharge, effective 13 April 1982.<sup>6</sup> The amounts that motor carriers had been charging their customers as a fuel surcharge had to be "folded in" to the carriers' rates. But the ICC continued its protection of lessors who were responsible for paying their own fuel costs. The ICC did that by requiring motor carriers to pay the folded-in amounts to such lessors.

In 1982 the fuel surcharge amounted to about 18 percent of the total amount that Redway's customers paid Redway for freight haulage. Thus if "gross revenues," as used in the R/C-FASH agreement, were deemed to include the fold-in, and if Redway had continued to pay its drivers 27 percent of gross revenues, R/C's drivers would have received an 18-percent pay increase beginning on 13 April.

R/C did not respond to the ICC's action in that manner. Instead R/C paid its drivers the same dollar amounts the drivers had been earning. R/C did that by applying 27 percent to a figure equal to the amounts R/C charged shippers minus the fold-in. The upshot was that drivers received about 23 percent of the enlarged gross revenues assuming that "gross revenues" within the meaning of the R/C-FASH contract included the fold-in.

That is the action that the General Counsel claims that R/C should have bargained about.

*Did R/C Bargain with FASH—the Facts; Kutzler's Discussions with FASH's Steward:* As noted earlier, Kutzler was R/C's only executive officer. Kutzler at no time even considered paying R/C's drivers 27 percent of gross revenues as increased by the fold-in. Rather, Kutzler simply presumed that R/C would continue to pay the drivers the same dollar amounts they had been receiving. Kutzler's only concern was how to change the weekly "settlement sheets" that R/C gave its drivers so that the settlement sheets reflected that course of action and also reflected the fold-in that the ICC had ordered. (Settlement sheets were the forms that R/C gave each of its drivers that explained how the Company arrived at the dollar amount of the driver's paycheck. Among the entries on the settlement sheets that R/C had traditionally used was one that referred to "company gross revenue" and another called "drivers pay . . . gross." As indicated earlier, the "company gross revenue" entry did not include the fuel surcharge. Prior to the fold-in, the drivers' gross pay entry on the R/C settlement sheets was 27 percent of the company gross revenue entry.)

William Burton was FASH's head steward at R/C. On several occasions, sometime in February or March 1982, Kutzler spoke to Burton about the ICC's fold-in order and R/C's settlement sheets. (The fold-in order was a topic of intense discussion among the nation's over-the-road drivers. Thus Kutzler's reference to it was not news to Burton.) Kutzler proposed that R/C handle the fold-in by either: (1) simply using 23 percent, instead of 27 percent, when computing the figure to insert on the "drivers pay . . . gross" line; or (2) changing the settlement sheet form by adding entries necessary to deduct the fold-in from "company gross revenue." In the latter case, gross drivers' pay would be computed as 27 percent of company gross revenue after the deduction. (The reason for the 23-percent figure: 23 percent of gross revenues including the fold-in approximated 27 percent of gross revenues less the fold-in.)<sup>7</sup>

*The Drivers' Meeting and its Aftermath:* Burton told Kutzler that he (Burton) wanted to discuss the matter with FASH's officials. Burton did, and then in late March or early April Burton called a meeting of R/C's drivers for the purpose of considering how the drivers wanted R/C to handle the fold-in. Paul Dietsch, who was one of FASH's principal spokesmen, attended the meeting.

In Judge Roth's decision in *Redway I*, Judge Roth had recommended that R/C be ordered to "maintain and give effect to its contract with FASH" until the conclusion of the election he had ordered among R/C's bargaining unit employees. (Judge Roth issued his decision on 6 May 1981, when the contract still had about 4 months to run.) Burton and Dietsch

<sup>6</sup>See 46 Fed.Reg. 50075 (1981); id at 54745 (1981); 47 Fed.Reg. 4689-4690 (1982). These documents are in the record as GCX 153.

<sup>7</sup>Assume a freight rate of \$100 and a surcharge (i.e., fold-in) of \$18; 27 percent times \$100 equals \$27; and 23 percent times \$118 equals \$27.14.

assumed that that language spelled out R/C's obligation to its employees. As it turned out they were incorrect: The Board (in 1985) modified Judge Roth's Order in that respect, ruling that R/C had to comply with the contract's terms only until contract's termination date, 31 August 1981.

Burton and Dietsch also assumed that the contract's reference to 27 percent of gross revenues meant 27 percent of gross revenues including the fold-in.

The upshot of Burton's and Dietsch's assumptions was that they (incorrectly) did not think that there was any issue to bargain about. As far as they were concerned, R/C had no choice but to pay its drivers 27 percent of gross revenues, including the fold-in. They said as much at the meeting to the drivers, and the drivers agreed that FASH should demand that R/C pay the drivers 27 percent of gross revenues as increased by the fold-in.<sup>8</sup>

No FASH official communicated directly with any R/C representative about these matters until months after the events we are here considering. But sometime before the effective date of the ICC's fold-in order (April 13), Burton did report the results of the drivers' meeting to Kutzler. The problem is that it is unclear exactly what words Burton used in making that report.

It is clear that Burton thought that he communicated to Kutzler that "the men rejected his [Kutzler's] proposal."<sup>9</sup> But it is also clear that Kutzler did not hear Burton's report that way. Rather, Kutzler thought that Burton's report was a statement about which of Kutzler's two settlement sheet proposals the drivers favored. Kutzler thought that Burton told him that the drivers wanted R/C to use the settlement sheet version in which R/C backed the fold-in amounts out of gross revenues and then paid the drivers 27 percent of the reduced amounts. Given the testimony of Burton and Kutzler, given my evaluation of their credibility, and given what I understand to be the personalities of the two and the Burton-Kutzler relationship, I think that when Burton told Kutzler about the drivers' vote, he probably limited his message to something like "the men want 27 percent of gross revenues." In view of Kutzler's state of mind, Kutzler would had to have heard that as an expression by Burton of which settlement sheet form the drivers wanted.

Kutzler assented to what he thought Burton was saying. Thus all R/C settlement sheets for pay periods subsequent to 13 April did compute the drivers' pay at 27 percent of an amount equal to gross revenues less the fold-in.

*Did R/C Violate the Act—Did R/C Change the Terms Under Which it Employed its Over-the-Road Drivers:* If the record were clear that the term "gross revenues," within the meaning of the R/C-FASH 1979–1981 contract, did not include the fold-in, then, of course, it would also be clear that R/C's actions in April 1982 did not change the terms of the drivers' employment. The record, however, provides no such clarity. Rather, it suggests that when R/C and FASH entered into their 1979–1981 contract, neither of them contemplated how R/C should treat, for pay purposes, a fold-in of the kind the ICC ultimately ordered. (The ICC's orders did not use

the term "gross revenues." But the ICC's comments about its orders did assume that the fold-in would be deemed part of gross revenues for some purposes.<sup>10</sup> It does not seem to me, however, that such comments can be treated as a definitive interpretation of the R/C-FASH contract.)

Given that R/C and FASH had not foreseen the circumstances of the fold-in when they entered into their contract, I think that R/C's action did amount to a change in conditions of employment. In fact the settlement sheets themselves represent a change in the way R/C computed driver pay.<sup>11</sup> Indeed, given the ICC's action, and given the fact that there is no indication that either R/C or FASH had anticipated it, any response by R/C arguably would have been a change in terms of employment—whether the company paid 27 percent of the resulting higher freight rates (causing a massive pay raise), or (as it did) retained the same dollar pay levels (resulting in the drivers getting something less than 27 percent of the freight rates that R/C charged its customers) or took some other intermediate action.

*Did R/C Bargain:* As noted earlier, no collective-bargaining contract was in force between R/C and FASH in April 1982. But ordinarily an employer whose employees are represented by a union may not change its terms of employment without bargaining with the union, even in the absence of a contract. *NLRB v. Katz*, 369 U.S. 736 (1962).

If *Katz* applied to R/C's circumstances in April 1982 then, in my view, R/C violated the Act. Burton did, after all, tell Kutzler that the drivers wanted 27 percent of gross revenues. As for Kutzler's failure to understand Burton's message, without question Burton could have been more specific. But Kutzler was required by the Act (assuming *Katz*' applicability) to respond thoughtfully to the Union's communications. See *Interstate Food Processing Corp.*, 283 NLRB 303 (1987). And Burton said enough so that had Kutzler given some thought to the matter, he would have realized that Burton was not merely naming which version of the settlement sheet the drivers preferred.

To summarize, Kutzler notified Burton (and, through Burton, FASH) that R/C planned a change in the drivers' terms of employment. FASH, through Burton, rejected the planned change by means of language that Kutzler should have heard as a rejection. At that point, if R/C had any duty at all to bargain with FASH, the Act precluded R/C from altering its terms of employment without reaching either agreement with FASH or impasse. Because R/C made the change without any further bargaining, R/C violated the Act—assuming the existence of a duty to bargain.

*Was R/C Required to Bargain About the Change:* Given Judge Roth's, and the Board's action in ordering an election among R/C's employees, R/C was in the midst of a question concerning representation (QCR) at all relevant times. Had R/C's actions regarding the fuel surcharge and driver pay occurred a few months later, the existence of the QCR would have made no difference in R/C's bargaining obligations: since 16 July 1982 it has been clear that employers are required to bargain with incumbent unions even if QCR's exist. *RCA Del Caribe, Inc.*, 262 NLRB 963, 965 (1982); see also *Dresser Industries*, 264 NLRB 1088 (1982).

<sup>8</sup>Dietsch testified that he remembered no such meeting. He further testified that "when we come to Bill Burton we have found him to be totally unable to recall anything day to day . . . he has got a very poor recollection, and would never rely on [Burton's] statements whatsoever about having a meeting or anything." Tr. 7829. I nonetheless credit Burton's account.

<sup>9</sup>Tr. 1500.

<sup>10</sup>See 46 Fed.Reg. at 50072, 54746.

<sup>11</sup>Compare GCX 2 with GCX 3.

But prior to July 1982, things were not that simple. *Shea Chemical Corp.*, 121 NLRB 1027 (1958); see also *Telautograph Corp.*, 199 NLRB 892 (1972).<sup>12</sup> In *Shea Chemical* the employer had entered into a collective-bargaining agreement with the incumbent union in the face of a rival union's petition. The Board held that the employer thereby violated Section 8(a)(2):

We now hold that upon presentation of a rival or conflicting claim which raises a real question concerning representation, an employer may not go so far as to bargain collectively with the incumbent (or any other) union unless and until the question concerning representation has been settled by the Board.<sup>13</sup>

Then, in two subsequent cases, the Board, relying on *Shea* and *Telautograph*, held that during a QCR an employer could unilaterally change the terms of its employment. *Ellex Transportation*, 217 NLRB 750 (1975), and *Vernon Mfg. Co.*, 214 NLRB 285 (1975), reaffirmed 219 NLRB 622, 623 (1975). Those cases have never been explicitly overruled (in respect to employer action prior to *RCA Del Caribe*). In other words, two cases arguably still extant in April 1982 stood for the proposition that since R/C was involved in a QCR, R/C was entitled to make unilateral changes in driver pay.

The problem with *Ellex* and *Vernon* is that, although they had not been explicitly overruled, several cases subsequent to them (but still prior to April 1982) held that even where a QCR existed, an employer did have to bargain with the incumbent union about any changes in terms of employment the employer wanted to make. According to those cases, the prohibitions of *Shea* and *Telautograph* were limited to bargaining about or entering into a new collective-bargaining contract during the pendency of a QCR. *Baugham Co.*, 248 NLRB 1346 (1980); *Coca Cola Bottling Co. of Memphis*, 232 NLRB 794, 818 (1977). As *Baugham* puts it (at 1347 fn. 6):

*Telautograph* . . . absolves an employer from bargaining for a new contract while a [decertification] petition is pending, but the Board clearly did not intend to hold in that case that an employer would be permitted to take advantage of

<sup>12</sup> The General Counsel argues that R/C's actions in April 1982 should be deemed subject to *RCA Del Caribe* even though *RCA* was decided 3 months after those actions; even though *RCA* abruptly changed the law; and even though it is clear that *RCA's* companion case, *Dresser Industries*, applied prospectively only. The General Counsel cites *Richmond Waterfront Terminals*, 265 NLRB 1214 (1982), in support of that position. In that case the employer entered into a contract with an incumbent union even though a rival union had filed an election petition and even though *RCA Del Caribe* had not yet been decided. Then, a few days prior to the election (and still prior to *RCA*), the employer rescinded the contract. The issue was whether a second election should be ordered. The Board, deciding the case after *RCA* had issued, did order a second election. In so doing, the Board ruled that: (1) the employer's act of contracting with the incumbent union did not violate Section 8(a)(2); and (2) it was the employer's rescission of the contract that required a second election. But the Board did not state that its ruling was predicated on its view that *RCA* should generally be retroactively applied. Because of that, and because the facts in *Richmond* are so unique, my conclusion is that the Board did not intend that *Richmond's* retroactive application of *RCA* should be deemed applicable to proceedings such as the one at hand.

<sup>13</sup> 121 NLRB at 1029

such a period for the purpose of instituting unilateral changes.<sup>14</sup>

What all this adds up to is that the question of whether R/C had any obligation to bargain with FASH is a close one. Given the fact that *Ellex* and *Vernon* have never been explicitly overruled in respect to pre-*RCA* matters, the law governing R/C's actions is ambiguous. See *Houston Coca-Cola Bottling Co.*, 265 NLRB 766 fn. 2 (1982). Moreover we are here dealing with an extinct area of the law (bargaining obligations during QCR's prior to *RCA*). This may well be the last case ever to consider QCR bargaining obligations arising from events occurring prior to the issuance of *RCA Del Caribe*. Thus a finding in favor of R/C on this issue is unlikely to send the law off in some inappropriate direction.

But *Baugham* and *Memphis Coca Cola* were decided subsequent to *Ellex* and *Vernon*. And the interpretation of *Shea* and *Telautograph* they espouse seems more in keeping with the purposes of the Act than does *Ellex's* and *Vernon's* approach.

My conclusion, therefore, is that R/C violated Section 8(a)(5) of the Act when it failed to bargain with FASH about how R/C should have taken account of the fold-in when it computed the drivers' pay.

*FASH's Two Rules*: At all material times FASH (that is, the Fraternal Association of *Special Haulers*) had an affiliate, the Fraternal Association of *Steel Haulers* (the *Steel Haulers*), that represented owner-operators who operated as independent contractors. FASH and the *Steel Haulers* had the same officers. Judge Roth accordingly referred to FASH as "part of what might be described as a double-breasted union."<sup>15</sup>

The owner-operators whom the *Steel Haulers* represented typically operated under leases with motor carriers that provided that the owner-operators had to pay for their own fuel. The *Steel Haulers* accordingly had been in the forefront of those urging the ICC to adopt the fuel surcharge. The *Steel Haulers* never changed that position. Thus the *Steel Haulers* urged the ICC to retain the fuel surcharge in the proceeding that led to the fold-in and further argued that if a fold-in were to be ordered, the folded-in part of the carriers' revenues should be treated specially.<sup>16</sup>

Kutzler was infuriated by what he saw as FASH's inconsistent positions. And the Ligon respondents argue that FASH's ties to nonemployee owner-operators preclude it from being deemed a "labor organization" for purposes of the Act. But *Redway I* holds that FASH is a labor organization, and the record contains no evidence showing that FASH's circumstances relevant to its labor organization status had changed by April 1982. Thus, although Kutzler's reaction to FASH's two roles is understandable, it does not appear to me that FASH's "double-breasted" nature affected R/C's obligation to bargain with FASH.

## II. DID R/C'S CESSATION OF OPERATIONS ON 28 AUGUST 1982 VIOLATE THE ACT

R/C stopped operating on 28 August 1982. The General Counsel claims that R/C locked out its employees and that

<sup>14</sup> *Baugham* and *Telautograph* concerned decertification petitions, while the cause of the QCR here was a petition filed by a rival union. But *Telautograph* itself equates the two types of situations in respect to issues such as the one at hand. See 199 NLRB at 892.

<sup>15</sup> 274 NLRB at 1375.

<sup>16</sup> See sec. I, above.

R/C did so because of its employees' concerted protected activities and in order to discourage its employees from engaging in such activities. The Respondents argue that R/C closed because of a strike, not a lockout. This part of the decision will consider those contentions.

*The Situation at R/C in August 1982, as Viewed by FASH's Officials:* FASH's two business agents were George Sullivan and Paul Dietsch. Beginning in about May 1982 they began to hear rumblings of irritation from some of R/C's drivers about R/C's response to the fold-in.

Sullivan and Dietsch were certain that R/C's drivers were entitled to 27 percent of gross revenues as enlarged by the fold-in. But rather than to try to discuss the matter with R/C, they decided to call for a strike. Their reasoning: First, they felt that mere talk would not produce the pay increase the drivers wanted. Second, FASH had been losing support at R/C, and Sullivan and Dietsch thought that a strike might promote some enthusiasm for FASH among the drivers. Third, Sullivan and Dietsch thought that R/C had the kind of business that made it vulnerable to a strike. And fourth, they believed that R/C was highly profitable. As it turned out, they were correct about R/C's vulnerability to a shut-down. But they were incorrect about R/C's profitability. R/C had been suffering substantial losses, had been unable to pay its bills as they came due, and had a negative net worth. (R/C's financial situation during the summer of 1982 will be discussed in further detail in part III, below.)

*The 14 August FASH Meeting:* FASH held a meeting of R/C drivers on 14 August. The first order of business was to show the drivers that they "were not getting [their] full percentage," that they "were not getting their share."<sup>17</sup> That was accomplished, successfully. Dietsch then proceeded to make the point that, as one of the drivers related it, the drivers "should go on strike against the Company because that was the only way that we would get our fair share."<sup>18</sup>

The drivers at the meeting backed Dietsch on the need for a strike. But no more than about half of R/C's drivers were at the meeting. As Dietsch remembered it, in fact, attendance was much sparser than that. In any case, Dietsch felt that "there weren't enough drivers there to do much about it politically."<sup>19</sup> Dietsch therefore proposed, and the drivers agreed, that "they would have another union meeting and at that time we would call for a strike vote."<sup>20</sup>

*Kutzler's Response to the 14 August Meeting:* Kutzler had close ties to a number of R/C's drivers—generally the most senior of the drivers, and some of them routinely advised Kutzler of what transpired at union meetings. Thus, soon after FASH's 14 August meeting, Kutzler learned that FASH planned to call for a strike.

As *Redway I* and the record here make clear, any talk of a strike against R/C precipitated a sense of outrage on Kutzler's part. Kutzler considered any employee who was willing to engage in a strike against R/C to be disloyal and underhanded. Moreover Kutzler considered August 1982 to be a particularly unfair time for the employees to strike since Kutzler had reason to think that R/C's revenues were about to increase dramatically if, but only if, no snags developed.

But anger was not Kutzler's only reaction to the news of an upcoming strike vote. His other reaction, and, I think, the stronger one, was of anguish and fear. R/C's survival was at stake. In view of R/C's losses, the company simply did not have the financial resources necessary to sustain a strike. Moreover Kutzler believed that a strike could endanger him and his family and, in addition, result in the destruction of R/C property. Kutzler knew that FASH had a reputation for violence. More importantly, he had personally experienced a FASH strike. FASH had called a strike against R/C in 1980, and the strike was a destructive one even though virtually all of R/C's drivers stayed on the job. A number of the drivers sabotaged R/C equipment, causing major expenses in terms of equipment replacement costs, maintenance expenses, lost trucktime, and security costs. Moreover FASH's officials personally sought to coerce R/C and its employees. George Sullivan and FASH's president, Bill Hill, threw rocks at R/C's trucks and threatened R/C employees with violence.<sup>21</sup> And Paul Dietsch got into a fistfight with an R/C driver when Dietsch tried to keep the driver from making a delivery.

Because Kutzler assumed that R/C was about to be revisited by FASH-instigated violence, one of his first responses to the news that FASH was going to call a strike was to speak to the head of a guard service—one made up of off-duty police officers. Kutzler told the guard service that he expected a strike, that it might be violent, and that, if the employees did go out on strike, R/C would need round-the-clock guard service. (A guard, describing Dick and Gail Kutzler's attitude, referred to them as "extremely paranoid. They were worried about the truckdrivers harming them.")<sup>22</sup>

On 20 August FASH issued a notice that called for a meeting of R/C employees at 10 a.m. on Saturday, 28 August. When Kutzler learned of the notice he became still more convinced that R/C was about to face a strike.<sup>23</sup> Kutzler accordingly told a carpenter to be prepared to board up the windows of R/C's terminal on 28 August. And he decided to meet with R/C's stewards.

*The Meeting on 27 August:* Kutzler met with R/C's two stewards, William Burton and Merle Reams, on 27 August. R/C's labor counsel, James Honzik, and R/C's accountants, John and Cathleen Lloyd, participated in the meeting.

Kutzler had met with R/C's drivers a month earlier, on 24 July. He had spoken then about R/C's troubled financial circumstances. But, clearly, the message had not been a convincing one. Kutzler tried again at the 27 August meeting. The meeting covered two topics. The first was the state of R/C's finances. The second topic was cost-cutting measures that R/C would be adopting.

Kutzler, Honzik, and R/C's accountants reported on R/C's financial picture. They said that R/C "was on the very verge of turning itself around" but that the company was having cashflow problems, that R/C could not afford increased costs, and that R/C "was not strong enough to survive . . . any

<sup>21</sup> See 274 NLRB at 1406.

<sup>22</sup> Tr. 9381.

<sup>23</sup> During the week following FASH's notice one of Kutzler's sons, Frank, opined that Kutzler "was going to close the place down." (Another son, Scott, disagreed.) I attach no significance to Frank's comment. Frank's personality and capabilities were such that: (1) Kutzler would not have confided in Frank; and (2) Frank would not have understood the circumstances any better than any outsider.

<sup>17</sup> Avery, Tr. 8021.

<sup>18</sup> Id.

<sup>19</sup> Tr. 7675.

<sup>20</sup> Avery, Tr. 8022.

kind of labor action.”<sup>24</sup> The accountants sought to bolster R/C’s case by showing R/C’s financial statements to Burton and Reams.

As it turns out, there was no way that anyone connected with R/C’s management could have convinced the stewards that R/C was having financial difficulties. Burton, in particular, was certain that R/C was highly profitable. As for the picture portrayed by the financial statements, the stewards did not understand the documents. (As Burton put it, “these figures they showed us didn’t mean anything to us, because we weren’t bookkeepers.”)<sup>25</sup> In addition the stewards did not consider it to be their job to try to understand the documents, and, as indicated above, they probably would not have believed that the documents accurately portrayed R/C’s circumstances even had they read and understood them.

Burton did ask for a copy of the financial statements. But the financials portrayed such a devastatingly bad financial picture that any company would have been hesitant about having copies of such documents in the hands of persons with hostile interests. And Kutzler is secretive and suspicious by nature anyway. R/C accordingly refused to give a copy of the statements to the stewards.

As for the cost-cutting actions, Kutzler told the stewards that R/C would soon require its drivers to use self-service pumps when they fueled company trucks (which would have been a change from the then-current situation).<sup>26</sup>

Kutzler knew that the drivers did not want to use self-service pumps. So however reasonable that proposal might have been in other circumstances, it is astounding that he chose 27 August—the day before a strike vote—to announce the change. I accordingly have considered the possibility that Kutzler might not have been interested in heading off a strike, after all. (The General Counsel raises a similar point, claiming that R/C’s presentation of its financial data at the 27 August meeting was deliberately unbelievable.) Having considered that possibility, however, I remain convinced that Kutzler was horrified by the thought of a strike and urgently wanted to keep R/C operating.

At no time during the meeting did anyone say anything about a strike. But as the meeting closed, Honzik (R/C’s labor counsel) asked the stewards to “talk to the men”—that is, the drivers—and “explain to them what [the accountants] had shown” the stewards.<sup>27</sup>

*FASH’s Meeting on 28 August:* The meeting began about 10 a.m., as scheduled. Burton spoke first, reporting on the meeting the day before with Kutzler, Honzik, and the accountants. Burton voiced disbelief about R/C’s claims of poverty.

Dietsch followed, saying that R/C could and should pay the drivers 27 percent of gross revenues (including the fold-in). Dietsch went on to argue that R/C was not making the pension payments that the 1979 contract provided for, and that the drivers were entitled to vacation pay (as also pro-

vided by the 1979 contract but not being paid by R/C). Burton and Reams supported Dietsch.

Dietsch and Sullivan then urged the drivers to go out on strike forthwith, on the ground that that would give FASH the best bargaining leverage. Several drivers, in response, proposed that the employees go out on strike only if R/C refused to negotiate with FASH. It turned out that those proposals expressed the consensus of the meeting. Thus the resolution that the drivers ultimately adopted was something to the effect that FASH was authorized to call a strike but should exercise that authority only if R/C’s management refused to negotiate with FASH.<sup>28</sup>

*FASH’s Communications with R/C:* The next step, after the vote, was for FASH to advise R/C of the drivers’ demand. Dietsch took that on himself, doing it via a telephone in the lobby of the hotel where the meeting had just been held.

Years before, both Kutzler and his wife, Gail, had told Dietsch that he was not to contact them directly, that he should instead route all communications through Honzik.<sup>29</sup> (I will hereafter sometimes refer to Kutzler and Gail, collectively, as “the Kutzlers.”) Kutzler claimed that the reason for that policy was that Dietsch and Sullivan could not be trusted. And although Kutzler’s viewpoint about Dietsch’s and Sullivan’s trustworthiness may have had something to do with it, the more likely explanation is that Kutzler was unable to say anything to Dietsch without their getting into “screaming matches.”<sup>30</sup> That would be disagreeable and counterproductive under any circumstances. It became a matter of greater importance beginning early in 1982, when Kutzler had a heart attack. From that point on, Kutzler himself and, even more strongly, Gail, were desperately worried that direct communication between Kutzler and Dietsch would, literally, kill Kutzler.

Dietsch, however, hated dealing with Honzik. (The record here shows that to be the case, as does the Board’s findings in *Redway I*.)<sup>31</sup> And the Kutzlers never told Dietsch about their medical concerns. Dietsch accordingly made no effort to reach Honzik. Dietsch instead telephoned R/C’s office in an attempt to talk to Kutzler.

Dietsch called R/C’s office about noon. Neither of the Kutzlers were there; they had gone home for lunch. Dietsch spoke to Jon Woodman, one of R/C’s clerical personnel, telling Woodman that the drivers had just taken a strike vote, but that “it’s not a strike, it’s just a vote, and I need to talk to Dick.”<sup>32</sup>

Woodman immediately called the Kutzlers’ home, reaching Gail. Woodman told Gail that Dietsch had called. Woodman then said something on the order of “Dietsch said the drivers are going on strike and you [the Kutzlers] have to call Dietsch immediately if you want to stop it.”<sup>33</sup>

<sup>28</sup> Some of the drivers’ proposals provided for specified periods for negotiation, such as that afternoon, or that week. It could be that the drivers voted without anyone ever making clear exactly which proposal was being voted on. But the greatest likelihood is that the proposal that was the subject of the vote did not limit the period for negotiations.

<sup>29</sup> E.g., Dietsch: “Dick Kutzler told me, and she [Gail] told me that . . . they would not talk to me under any circumstances. I had to talk to Honzik.” Tr. 7847.

<sup>30</sup> Kutzler, Tr. 9554.

<sup>31</sup> 274 NLRB at 1406.

<sup>32</sup> See Webster, Tr. 401.

<sup>33</sup> See Kutzler, Tr. 9554.

<sup>24</sup> C. Lloyd, Tr. 7270–7271

<sup>25</sup> Tr. 6526.

<sup>26</sup> Kutzler also referred to a new system by which R/C would pay service stations for fuel. The system, which would have affected drivers only slightly, was a function of R/C’s poor credit worthiness, on the one hand, and on the other, R/C’s lack of cash.

<sup>27</sup> Burton, Tr. 6526. On 27 August Kutzler sent a letter to R/C’s employees that reiterated the position the Company took in the meeting that day. See Exh. 3 presented, jointly, by Ligon Transportation Company and Ligon Specialized Hauler. (I will hereafter refer to such exhibits as “LX”.)

Gail, after describing the conversation to Kutzler, called Honzik's office but was told that Honzik would not be available until that evening. At that point Kutzler wanted to call Dietsch, but Gail convinced him that she should make the call instead. She did so. Dietsch asked to speak to Kutzler. Gail responded that she did not know where Kutzler was (which, of course, was not the case) and that Honzik would not be available until later that day. Dietsch, who thought that he was getting a runaround and who personally favored an immediate walkout by the drivers, replied curtly, saying something to the effect that "the drivers have authorized a strike," and that he had to talk to Kutzler. The conversation ended there.

The moment was emotionally charged. Gail had never had much to do with R/C's labor relations. And Gail knew that Kutzler expected a strike.<sup>34</sup> She thus was not in a frame of mind to make careful distinctions between strikes and strike authorizations. As a result Gail turned to Kutzler and said words to the effect of "Dietsch says they're on strike."

The foregoing description of the telephone conversations represents an amalgam of the testimony of a number of witnesses, testimony that conflicts in a number of particulars. I thus would not be surprised if the actual conversations were not precisely as described above. In fact, given the varying testimony about those conversations, it would be remarkable if the above description was entirely accurate. But the evidence is overwhelming that the Kutzlers came away from the conversations convinced that FASH had just called a strike.<sup>35</sup>

When Woodman telephoned the Kutzlers to tell them of Dietsch's call, he had indicated that there was a possibility of stopping the strike. Moreover R/C's employees had in the past taken action similar to their vote on 28 August: Almost exactly 3 years earlier the employees had voted to authorize a strike if R/C "failed or refused to negotiate."<sup>36</sup> Finally, in the past when FASH had called a strike, it had done so only after giving several days' notice. (In fact, the 1979 contract provided for such notice.) Given these factors and the importance of the matter to R/C, one might expect that Kutzler would have pursued the matter further, checking to find out exactly what Dietsch had in mind.

Kutzler did not. Kutzler had been sure that the drivers were going to vote to strike R/C. And Gail's words confirmed that expectation. Kutzler consequently did not even consider the possibility that the employees had not called a strike. Instead he moved to protect R/C from the violence he thought would flow from what he thought was a strike. Kutzler did that by telling the carpenter to board up the windows of the terminal building and by telling the guard service to patrol the property and to exclude all employees from the property.

All of this occurred on a Saturday which, for most employees, was not a working day. For various reasons, how-

ever, some of the employees who had participated in the meeting went to the terminal later in the day. What they found was boarded-up windows and a uniformed guard who would not let them on the property. (Those few employees who were on the property when the guard arrived were ordered to leave.) R/C's bargaining unit employees promptly (and understandably) concluded that R/C had locked them out and that the company had opted to refuse to negotiate with the employees' bargaining representatives.

*Had R/C Done Anything Unlawful at this Juncture:* The question I address here is whether R/C had violated Section 8(a)(1), (3), or (5) of the Act as of the afternoon of 28 August 1982.

Certainly Kutzler's decision to shut R/C down was coercive. The employees concertedly demanded that R/C negotiate with their union (action protected by the Act) and coupled that demand with a strike authorization, not a strike (also action protected by the Act). R/C's response was to stop operations and to deny the employees access to company property. The "inhibiting effect" of that response on the employees' "willingness to engage in Section 7 activities" is obvious.<sup>37</sup>

Moreover, but for Kutzler's union animus and his unwillingness to view strikes as anything but an underhanded effort to destroy his company, the shutdown might never occurred. As discussed earlier, on 28 August Kutzler's primary concern was about potential violence. But had Kutzler been less antagonistic toward FASH and employee strikes, he might have retained sufficient clarity of thought to determine exactly what position FASH had adopted before he shut R/C's doors.

Finally, it was Gail Kutzler who erred most egregiously, ignoring the distinction between "strike authorization" and "strike." And although Gail was inexperienced in such matters, she was an owner and officer of R/C.

Those circumstances point to R/C having violated Section 8(a)(1) of the Act, and Section 8(a)(3), notwithstanding the fact that both of the Kutzlers honestly thought that FASH had called a strike, and notwithstanding the fact that the Kutzlers were not motivated by any desire to punish employees for concerted protected activity or to discourage union activity. See *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

But two factors point in the other direction: FASH's history of violence, and the fact that the Kutzlers had made it clear that Dietsch was to deal with Honzik, not the Kutzlers.

As for FASH's violence, FASH cannot escape responsibility for the effects on Kutzler's state of mind of FASH's violence during the 1980 strike at R/C. Chickens do come home to roost. The probabilities are that Kutzler would not have panicked into shutting down R/C had the 1980 strike been free of violence.

As for Dietsch's decision to communicate with the Kutzlers rather than with Honzik, the shutdown was the product of misunderstood communications that, in turn, were the result of factors ranging from Gail's inexperience in labor matters to the weakened condition of Kutzler's heart. Those factors would not have obtained had Dietsch called Honzik who, Dietsch knew, was R/C's representative for purposes of receiving communications from FASH. I accordingly have no

<sup>34</sup> "People hear," the truism goes, "what they expect to hear." Tr. 9435.

<sup>35</sup> For example, the record includes the testimony of many of the persons who worked in the terminal with the Kutzlers during the period in question. (Such persons include R/C's clerical employees and employees of the Lloyd accounting firm.) Without exception all such witnesses firmly believed that the shutdown was caused by a FASH strike. Such beliefs could not have developed unless the Kutzlers honestly thought that FASH called a strike on 28 August or unless the Kutzlers carefully plotted to lie repeatedly to such persons. And given the personalities of Kutzler and Gail, that latter alternative is not a real possibility.

<sup>36</sup> 274 NLRB at 1380.

<sup>37</sup> The quotes are from *Carlson Roofing Co.*, 245 NLRB 13, 16 (1979), modified on other grounds 627 F.2d 77 (7th Cir. 1980).

basis for assuming that Honzik would have failed to understand Dietsch's message, and I therefore have no basis for assuming that R/C would have shut down had Dietsch dealt with Honzik. And Dietsch's insistence on speaking with the Kutzlers instead of Honzik is particularly egregious given Judge Roth's specific criticism about Dietsch's unwillingness to deal with Honzik.

Because of these considerations my conclusion is that: (1) R/C's act of shutting down on 28 August did not violate Section 8(a)(1) or (3), and (2) R/C's failure to notify FASH that it was shutting down did not violate Section 8(a)(5).<sup>38</sup>

### III. THE POSTSHUTDOWN MEETINGS BETWEEN R/C AND FASH

Representatives of R/C and FASH met intermittently between 30 August and 17 November 1982. This part of the decision discusses what happened at those meetings, the motivation behind R/C's negotiating position, and whether R/C violated Section 8(a)(1), (3), or (5) during the course of those meetings.

*The Situation in and near the Terminal:* On Sunday morning (29 August) 30 or 40 drivers gathered near R/C's terminal area—specifically, across the street from the southwest corner of the terminal property. At that location the drivers were within easy sight of persons in the terminal building and, concomitantly, could see all traffic entering and leaving the terminal area. But the drivers were not directly in front of the terminal itself.

The drivers did not hinder anyone in any way from entering or leaving the terminal. And none of the drivers displayed any picket signs. (One dissident driver set up a sign directly in front of the terminal. But the message on the sign attacked FASH, not R/C.)<sup>39</sup> That set of circumstances continued day and night for several weeks. The only change during that time was in the number of drivers present at the corner. Throughout the period only a few drivers were present at night. And as the days progressed the number of drivers congregating near the terminal during the day decreased as well.

As for the situation in the terminal building and on its grounds, security guards excluded bargaining unit employees from the terminal area during the entire period under consideration here. But that did not mean that the terminal building was empty. The Kutzlers and R/C's entire office staff showed up at the R/C offices virtually every day during the period even though, much of the time, there was no work to be done and even though no one got paid.

*The R/C-FASH Meeting During the Afternoon of 30 August:* At about 10 a.m. on Monday, 30 August, a security guard walked across the street to where the drivers had stationed themselves and told Burton (the steward) that Kutzler wanted to meet with the drivers that afternoon.

<sup>38</sup> Under Wisconsin law, employees are not eligible for unemployment compensation if they lose their jobs as a result of a "labor dispute." R/C's bargaining unit employees assisted by FASH, successfully applied for unemployment compensation, claiming that they did not lose their jobs as a result of either a lockout or a strike. I have not taken the employees' unemployment compensation claims into account in arriving at the factual and legal conclusions set out above even though those claims do conflict to at least some degree with the position of FASH and the General Counsel in this proceeding.

<sup>39</sup> One of FASH's business agents, Sullivan, testified that the drivers did picket in support of FASH. But that testimony appears to represent faulty memory, not the facts as they occurred.

The meeting started about 1 p.m. in the terminal. Kutzler and Honzik represented R/C. They did not get to meet with the entire bargaining unit. Rather, Dietsch, Sullivan, Burton, and one or two other drivers represented R/C's bargaining unit employees.

Kutzler started the discussion by asking why FASH called a strike when the drivers knew that R/C had such bad financial problems. An argument ensued, with FASH asserting that R/C locked out the drivers and Kutzler reiterating that the drivers were on strike. No one used the occasion, however, to try to determine what was in fact the case.

At that point Honzik took over as spokesman for R/C. For the rest of the meeting Kutzler rarely said anything. Dietsch did most of the talking for FASH. Honzik began by talking about R/C's financial condition. Honzik said that that condition was terrible, that R/C had suffered huge losses and, moreover, that if by 10 p.m. that night R/C was not able to tell its two major shippers that it was about to resume operations, R/C might lose massive amounts of business and thus be unable ever to reopen its doors. Honzik went on to say that until recently R/C had not been permitted to negotiate new terms with FASH. But, said Honzik, a recent change in Board law coupled with the "life or death" circumstances facing R/C meant that R/C now could propose those new terms. (Honzik's view that R/C had been prohibited from negotiating new terms with FASH presumably stemmed from *Shea Chemical* and its progeny (see part I, above) coupled, perhaps, with the provision in Judge Roth's recommended Order that R/C maintain in force the terms of the 1979-1981 collective-bargaining contract. The recent change in Board law must have been a reference to *RCA Del Caribe*, which the Board had issued on 16 July.) Honzik then said something like "we are taking this opportunity to demand concessions we felt were necessary for some time"<sup>40</sup> and that the drivers had to grant to R/C if R/C were to be able to resume operating.

Dietsch thought that Honzik's claims of R/C poverty were "no more than a ploy," and said so.<sup>41</sup> Honzik, however, reiterated that the company was failing. He then said that "in order for the company to turn around rather than go out of business [it] now needed these concessions."<sup>42</sup> The concessions he then demanded were the following:

- (1) A reduction in the percentage of gross revenues that drivers would receive (from 27 percent of gross revenues—excluding the fold-in—to 23 percent of gross revenues—excluding the fold-in). This, of course, was in the face of the drivers' belief that they should be getting a substantially greater percentage of revenues.
- (2) Reductions in the pay that drivers got for multi-stop loads and for shipments that had to be loaded or unloaded by hand.
- (3) Decreased health insurance payments by R/C.
- (4) A variety of other changes that would be unfavorable to most of the drivers, including changes in the dispatch system; affirmation by FASH that the drivers were not entitled to pension payments or vacation pay; and a no-strike agreement by FASH.

<sup>40</sup> Tr. 6281.

<sup>41</sup> Tr. 7766.

<sup>42</sup> Tr. 6176.

The FASH representatives dismissed Honzik's proposals out of hand, saying that it was "ridiculous" for R/C to even consider asking for such concessions.<sup>43</sup> Instead, R/C had to live up to the terms of the 1979–1981 contract, including paying 27 percent of gross revenues including the fold-in, vacation pay, pension payments, payment by R/C of dues owed to FASH, and so on. (Dietsch was well aware that the 1979 contract had expired by its own terms; but he was also well aware that Judge Roth had ordered R/C to abide by the terms of the contract pending an election.) Dietsch went on to say that if R/C would "take the contract that we have [i.e., the 1979–1981 contract] and accept that," then FASH would be willing to go over the contract "item by item and . . . discuss the renegotiation of some of these issues that you don't feel that you can live with."<sup>44</sup> But, Dietsch emphasized, the starting point had to be R/C's agreement that the contract governed.<sup>45</sup>

Honzik rejected the applicability of the contract and said that R/C would not agree to any of the terms Dietsch spoke of.

As the meeting concluded, Honzik asked the FASH representatives to allow the drivers to decide whether they wanted to accept R/C's proposed set of concessions. Dietsch and Sullivan agreed to do so and said that they would arrange for a drivers' meeting that evening.

*The Evening Meeting on 30 August:* As Dietsch and Sullivan had promised, the drivers met that evening. The drivers not only rejected the R/C's package, but also they decided that they would not return to work for anything less than the terms of the 1979–1981 contract (which included, as the drivers saw it, driver pay based on 27 percent of gross revenues including the fold-in). I earlier concluded that the drivers did not go out on strike on 28 August. But, clearly, given the drivers' refusal to return to work, they were on strike as of the evening of 30 August. The strike lasted for as long as Redway and Cardinal continued to exist.

Dietsch and Sullivan promptly advised Kutzler and Honzik of the drivers' decision. Honzik asked if he could speak to the drivers. Dietsch said no.

*The Meeting of 1 September:* At R/C's request, representatives of FASH met with Honzik and the Kutzlers at 4 p.m. on 1 September.

Honzik and Kutzler began the meeting by urging FASH to accept R/C's 30 August proposal. But Dietsch again rejected the proposal, and again said that the drivers would not return to work until R/C agreed to live up to the terms of the 1979 contract. Dietsch, moreover, insisted that R/C pay backpay to the drivers, withheld dues to FASH, COLA increases to R/C's mechanics, and spotting fees.<sup>46</sup>

Honzik responded by saying that R/C's proposal of 30 August was R/C's "final" proposal, that the drivers had to accept the proposal for R/C to be able to operate, and that there was no reason to meet again unless and until FASH was willing to accept that proposal. Honzik went on to say

that even if FASH did subsequently agree to R/C's proposal of 30 August, R/C might not be able to reopen—that reopening would depend on whether any of R/C's customers would then be willing to resume shipping via R/C. Meanwhile, said Honzik, R/C would be "exploring other avenues to solve [its] financial problems without remaining in the trucking business."<sup>47</sup>

Sullivan's response was to draft a paper for Kutzler's signature acknowledging that R/C was going out of business. That led Honzik and Kutzler to retreat from Honzik's earlier statements. R/C was not going out of business, they said. Rather, when R/C resumed operations it might be a lot smaller.

During the course of the meeting Dietsch and Sullivan asked to see R/C's books. A meeting was set up for 3 September in response to that request.

*The Meeting on 3 September:* Once again the meeting was held in R/C's office. The usual representatives of FASH, the drivers, and R/C were there, with the addition of Cathleen Lloyd, an accountant who had been reviewing R/C's books.

Kutzler and Honzik treated the meeting as one in which Lloyd would explain R/C's financial status to the FASH and driver representatives. Lloyd did that, reading from a sheet of figures. What Lloyd's report added up to, essentially, was a claim that, in Sullivan's words, "the company was broke."<sup>48</sup> Kutzler then added that R/C was going to have to end some truck leases, which would reduce R/C's size by as much as 50 percent, "unless there was an immediate settlement of the strike" because "it would take some time for him to get the business back."<sup>49</sup>

Dietsch and Sullivan responded that they did not believe anything that Lloyd had said about R/C's finances and that they wanted to review R/C's books of accounts themselves. Kutzler and Honzik rejected that request, suggesting that Dietsch and Sullivan content themselves with a look at the paper from which Lloyd had been reading. Lloyd said that she would be willing to have R/C's books reviewed by any accounting firm that FASH named. Neither Dietsch nor Sullivan considered either of those alternatives to be satisfactory, and the meeting ended.

*R/C's Mailing to Employees on 3 September:* On 3 September Kutzler sent a three-page letter to R/C's bargaining unit employees and, as an attachment, R/C's proposal of 30 August. Kutzler intended the letter to be an accurate summary of the bargaining between FASH and R/C during the period 27 August to 3 September and a plea for the drivers to return to work at the terms proposed by R/C on 30 August. Among other things the letter referred to R/C's debts and losses, to the "precarious financial position of the Company," to the low wages paid by R/C's "cut rate competitors," to a plan by Kutzler to explore "other avenues to solve [R/C's] financial problems without remaining in the trucking business," and to the claim that "Redway/Cardinal may never recover even if there is an immediate settlement and the Company receives all of the concessions it needs."<sup>50</sup>

<sup>43</sup> Tr. 7549.

<sup>44</sup> Tr. 7634.

<sup>45</sup> Burton testified that Dietsch told Honzik and Kutzler that the drivers would be willing to work at their present terms—that is, the terms in force on and before 28 August—while FASH and R/C tried to work out some compromise terms. But that testimony conflicts with considerable other evidence, and I do not credit it.

<sup>46</sup> R/C's spotting fees are discussed at 274 NLRB 1375, 1389–1392.

<sup>47</sup> See LX 4.

<sup>48</sup> Tr. 7551.

<sup>49</sup> Honzik, Tr. 6181.

<sup>50</sup> One difference between the attachment and the 30 August proposals was that the attachment referred to driver pay of 19 percent of gross revenues "including the fuel surcharge fold-in" while the 30 August proposals referred to 23 percent of gross revenues excluding the fold-in. The two formulations,

*The Meeting on 10 September:* On 10 September Kutzler called a meeting for the purpose of reading a statement to the FASH representatives. According to the statement: (1) R/C had lost most, perhaps all, of its business with its major customers; (2) R/C was “relinquishing the 31 tractors we have now on lease”; (3) those tractors and most of R/C’s trailers “will be . . . taken over by an Illinois truck line”; (4) R/C’s terminal was “available for lease to anyone interested”; (5) while R/C still retained 30 of its trailers and the 18 tractors that it owned, “if the strike continues” Kutzler would consider leasing out that equipment as well; and (6) even if the strike were promptly settled, the reduced level of business available to R/C might mean that the company could employ only few drivers.<sup>51</sup>

The statement was a peculiar one in that: (1) R/C never did “relinquish” its trucks to any Illinois truckline; and (2) at that point R/C had not disposed of any of its assets to anyone.

The reference to an Illinois truckline does, however, point to a company called Redway Contract Carrier Corporation (hereafter sometimes referred to as RCCC), the only Illinois truckline to which the record refers. Paul Maton, who was R/C’s, and Kutzler’s, longtime lawyer and confidant, had filed RCCC’s incorporation papers and applied for ICC authority for RCCC in early 1982, a period in which R/C’s fortunes looked bleak. According to the ICC filing, RCCC was located in northern Illinois and planned to serve Ocean Spray (which was R/C’s main customer). Maton met with the Kutzlers a few days after the shutdown on 28 August.

Kutzler claimed that he had “no ownership or responsibility for” the unnamed Illinois company to which R/C had purportedly provided its trucks.<sup>52</sup> But if Kutzler’s reference was to RCCC, as I think it was, the evidence suggests that his claim was at best a half-truth. Similarly, Maton testified that the Kutzlers had no interest in RCCC and that RCCC had “no connection” with Redway. But as I listened to Maton’s testimony, it seemed to me that it amounted to a careful dance designed to avoid both the whole truth and outright falsehood.

RCCC was never more than a paper corporation (even though its ICC application claimed that it operated 20 tractors and 50 trailers). The State of Illinois dissolved RCCC in 1983 because it failed to pay its franchise tax.

*Robert Kutzler’s “Go-Between” Efforts:* Kutzler’s brother, Robert, drove his own truck for R/C and was a member of the bargaining unit. He became dissatisfied with the course of the negotiations between R/C and FASH, and proposed to Kutzler that he (Robert) talk to the drivers about returning to work under the terms that had been in force on 28 August. Kutzler agreed, saying only that R/C could not afford to pay more than the drivers had been receiving. But according to Robert’s credible testimony, when he did propose to the drivers that they return to work on those terms, the drivers flatly refused.

The record provides no information about the dates of Robert’s go-between efforts.

*Events Subsequent to September 10—R/C Seeks Bankruptcy Protection:* Both Cardinal and Redway filed Chapter

11 petitions on 17 September 1982. Those petitions were the product of Kutzler’s discussions with lawyers and accountants that probably began about 12 September, perhaps a week or so earlier. The General Counsel claims that R/C’s Chapter 11 filings were merely an antiemployee and antiunion tactic. My conclusion is that that contention is wrong and that R/C filed its petitions for entirely bona fide purposes. (R/C’s Chapter 11 petitions are further discussed in part IV, below.)

*The 23 September Meeting Between R/C and FASH:* On 23 September representatives of R/C and FASH held the last meeting they were to hold in R/C’s terminal and the last they were to hold for 3 weeks. The meeting was no more productive than any of the previous sessions. Neither R/C nor FASH made any new proposals. FASH, moreover, insisted that before the drivers would return to work, R/C would have to pay all backpay claims, notwithstanding the barriers to such payments presented by R/C’s Chapter 11 status.

*Cairns’ Letter of 24 September:* The following day, Donald Cairns (an associate of Honzik’s and Honzik’s replacement as R/C’s labor counsel) wrote to FASH stating his understanding of FASH’s position (as FASH had propounded it at the meeting on 23 September); stating that as he understood FASH’s representatives, the Union was unwilling to shift its position and that the Union saw no purpose in scheduling further negotiating sessions; and stating that R/C was “not prepared to make any changes to its last offer at this time.” FASH did not reply to Cairns’ letter.

*Cardinal Resumes Operations in Conjunction with other Companies:* In early October 1982 Cardinal leased many of its tractors and trailers to a Tennessee corporation named Ligon Transportation Company. Thereafter Cardinal (but not Redway) resumed operations out of the Kenosha terminal in conjunction with Ligon Transportation Company and two other companies, Smyrna Personnel Services (SPS) and Litco-Wisconsin. SPS hired the drivers for the trucks. Some of the striking R/C drivers unconditionally offered to return to work, and SPS hired a few, but only a few, of those R/C drivers. (All of that is the subject of part IV of this decision.)

*Kutzler’s Last Meetings with FASH:* Officials of Region 30 tried twice to bring R/C and FASH together for further negotiations. A brief, nonsubstantive meeting was held in the Region’s Offices on 14 October 1982. Then, on 17 November (again in the Region’s Offices), representatives of R/C and FASH did discuss what it would take to get R/C back into operation. R/C, on its part, claimed that its financial circumstances had so worsened that it needed concessions from the drivers that were much greater even than those it had previously demanded. FASH, in response, said that the drivers would not return to work until R/C paid everything due them under the terms of the 1979–1981 contract. Neither side was willing to ease its stand, and the meeting ended.<sup>53</sup>

R/C and FASH never met again.

however, come close to resulting in the same pay levels. The letter and attachments are included in the record as LX 4 and LX 4(a).

<sup>51</sup> The text of Kutzler’s statement is in the record as LX 11.

<sup>52</sup> LX-11.

<sup>53</sup> The General Counsel does not claim that any post-September events constitute a refusal to bargain on the part of R/C or the Kutzlers. As for the October and November meetings, the General Counsel argues that the parties’ intent in attending them was to attempt to settle this proceeding and that I accordingly should not have received evidence concerning those meetings (see Fed.R.Evid. 408). Although the issue is a close one, I think the record tends to show that R/C and FASH treated the meetings as continuations of their August-September meetings rather than as an effort to compromise the claims in this proceeding of FASH and/or the General Counsel.

*R/C's Motivation for its Negotiating Tactics:* The most difficult factual issue in this case is why R/C took the stance that it did in its negotiations with FASH from 30 August onward. Try as I might, I have been unable to figure out why R/C proceeded as it did.

*The General Counsel's Theories:* The General Counsel poses alternative possibilities for why R/C took the negotiating stance that it did.

One is that the Kutzler wanted to "cause a capitulation and require [FASH] to execute a contract that no self-respecting union would execute."<sup>54</sup> The other is that Kutzler knew from the start that FASH would reject R/C's offers. In fact, that was the plan. Kutzler claims the General Counsel had no interest in having R/C resume its operations. Rather, Kutzler's plan was to transfer R/C's business to another business entity, perhaps temporarily, perhaps permanently. In the case of a temporary shutdown, Kutzler's point was to punish the drivers for their efforts to gain better pay and fringe benefits, to discourage any future efforts of that type, and to neutralize FASH. If Kutzler intended a permanent shutdown, his aim was to set up an alter ego in order to end having to deal with R/C's drivers and with FASH. And that, in turn, was again a function of the drivers' concerted protected activities.

The most obvious evidentiary support for the General Counsel's contentions is the manner in which R/C "bargained." R/C's demands for concessions, presented as ultimatums, virtually precluded any possibility of agreement with FASH. (Alternatively, had FASH nonetheless agreed to R/C's demands, it is clear that FASH would thereby have lost all of its support among the drivers.) In addition, R/C based its demands for concessions on claims of poverty, but then denied FASH direct access to R/C's financial records. Finally, after 17 November R/C never again sought to meet with FASH.

Nonetheless, I am not convinced that the General Counsel's assertions paint an accurate picture.

To begin with, R/C was debt-ridden, was behind in its payments to creditors, and lacked any cash at all. R/C accordingly was in no position to attempt to "cause a capitulation" of anybody.

Second, if, as the General Counsel contends, R/C's negotiating posture was a function of Kutzler's plan to transfer R/C's business to another entity, one would expect Kutzler to have entered into some arrangements in that respect on or before 30 August, when R/C first made its demands for concessions from FASH. (If Kutzler's intention was to transfer R/C's business, it would have been extraordinarily foolhardy for Kutzler to have taken action that threatened R/C's existence without having made such arrangements.) But the record fails to show that Kutzler had made any such arrangements on or prior to that date, or even within a few weeks thereafter. (The closest the record comes in that respect is in its limited references to Redway Contract Carrier Corporation. Matters pertaining to that company will be discussed below.)

Third, R/C's financial position was such that it grew weaker (and less valuable) each day it failed to operate. Thus Kutzler had nothing to gain, and much to lose, by keeping

R/C shut down until he effectuated a transfer of R/C's business.

Fourth, R/C was far and away the most significant feature of Kutzler's life, and Gail's. Kutzler formed Redway in 1970. It was an outgrowth of Kutzler Cartage Company, which had been begun by Kutzler's father and for which Kutzler began working while he was still a teenager. The Kutzlers had for years spent long hours at the terminal, labored for R/C's success and growth, anguished over its difficulties, and mortgaged their home to provide funds for the company. On top of all that, R/C provided the livelihood for seven other members of the Kutzler family. The result of this state of affairs was that both Kutzler and Gail considered their well being and their family's, on the one hand, and R/C's, on the other, to be utterly intermingled. I have trouble, therefore, picturing Kutzler deliberately endangering R/C's continued existence by causing the prolonging of a strike that R/C simply could not afford.

Fifth, neither the record in this proceeding nor in *Redway I* shows Kutzler to be so venomous toward FASH and R/C's drivers that, in order to punish them, he would undertake to put R/C at risk and, accordingly, his well being and that of his family as well.

Sixth, although R/C's unwillingness to give FASH direct access to its books was provocative, for the reasons previously discussed (in part II), that unwillingness says nothing about Kutzler's interest in keeping R/C alive. And R/C did offer to open its books to any accounting firm that FASH named.

Seventh, Kutzler authorized his brother, Robert, to suggest to FASH that the drivers return to work at their existing pay scales. And last, the General Counsel's arguments do not take into account: the fact that the drivers were on strike (the General Counsel claims, erroneously, that they were not on strike); that FASH (and the drivers) refused to consider returning to work unless R/C paid the drivers 18 percent more than they had been receiving plus additional fringe benefits (the General Counsel argues, again erroneously, that FASH was willing to have the drivers return to work under the terms and conditions existing on 28 August); and that Kutzler's view that R/C could not afford to pay the drivers anything like what FASH was demanding was not unreasonable given (a) R/C's financial condition, and (b) the fact that R/C already was paying its drivers more than its competitors.<sup>55</sup>

*Kutzler's Claim that R/C's Demand for Concessions was a Bargaining Tactic:* Kutzler was asked, only once, to explain "how it could be that . . . this stoppage . . . was the basis for the company asking the employees for concessions, with the optimism you had about the company?" (The question was posed by the attorney for the Ligon Respondents. Neither the Kutzlers nor R/C was represented by an attorney.) Kutzler's response was a hodgepodge of two different thoughts. The first was that R/C was paying its drivers more than R/C's competitors were paying theirs. The second was

<sup>55</sup>The General Counsel argues that R/C's failure to replace the strikers with new employees is additional evidence of Kutzler's decision to terminate R/C. But the record shows that Kutzler felt that any such attempt would produce violence on FASH's part, violence that not only would be a problem in its own right, but would result in expenses that R/C was in no position to handle. That is true even though, anomalously, Kutzler was willing to run Cardinal trucks with new employees as part of an arrangement with Ligon Transportation Company (see part IV, below).

<sup>54</sup>Tr. 6388-6389.

that R/C did not really expect concessions from FASH. Rather, R/C's demand for concessions was nothing more than a bargaining tactic. In Kutzler's words:

If we had . . . said "we will put you back to work for exactly what you were getting yesterday," they [the drivers] would have asked for more. . . . I mean [in] negotiation you never put on the table what you are willing to settle for.<sup>56</sup>

Turning to Kutzler's claim about negotiating tactics, it is true that at no time did FASH evince any willingness to consider the possibility that R/C could not afford to pay increased wages and fringe benefits. FASH's position was that R/C had to honor the terms of the 1979-1981 contract (with, perhaps, minor modification) and had to treat the fold-in as part of "gross revenues" for driver pay computation purposes.

But it is difficult to credit Kutzler's explanation that R/C's proposal was merely a tactic designed to encourage FASH to make more realistic responses. To begin with, R/C made its proposal before FASH's representatives made theirs. Second, right from the start (on 30 August) Honzik, as R/C's spokesman, went out of his way to present R/C's proposal as an ultimatum, not as a place from which to start bargaining. And R/C continued to present its proposals as ultimatums in every subsequent meeting. Kutzler knew that the drivers believed that they were entitled to a pay increase. In fact he thought that they went out on strike on 28 August to gain such an increase. Yet R/C responded by demanding cuts in pay and tougher working conditions, on a take-it-or-leave-it basis.

*Did Kutzler Think that R/C Needed the Concessions it Demanded:* It could be that, as Honzik kept telling FASH, R/C needed major concessions from the drivers to survive or, at least, that Kutzler and Honzik honestly believed that to be the case.

As just noted, Kutzler said that a reason for R/C's negotiating approach was that R/C's wages and benefits were higher than its competitors. And, in fact, R/C's driver wages and fringe benefits were more costly than those paid by R/C's competitors. (There is virtually no dispute about that. Dietsch's testimony indicates that he considered R/C's drivers to be unusually well paid. And R/C's drivers found that when they searched for new jobs, none was as attractive as their positions at R/C had been.)

But the question is why R/C chose to demand concessions at a moment that seems extraordinarily inopportune—when, Kutzler thought, R/C's drivers had gone out on strike in the belief that they were entitled to a wage increase. No one claims, after all, that R/C's disadvantage in labor costs had just occurred. Thus R/C's high labor costs would explain R/C's sudden demand for concessions only if Kutzler thought that those wage costs were about to cause R/C's collapse.

It is true that R/C was in serious financial trouble. R/C was deeply in debt. Some of R/C's vendors had cut off credit. Others had instituted lawsuits over unpaid bills. R/C owed the Internal Revenue Service over \$200,000 in unpaid payroll taxes. The State had levied a large assessment against R/C's terminal which R/C was unable to pay. R/C had no cash at

all; in fact its checking accounts were overdrawn. And although R/C's cashflow had turned positive by August (its cashflow had been negative for much of 1982), R/C's operations remained unprofitable. In that regard, although R/C's biggest customers had promised increases in business starting in September, increased volume is not a panacea for a trucking company if the company is losing money on every shipment it carries.

But shortly before the shutdown Kutzler had told R/C's accountants that good times were just ahead. As one of those accountants, Cathleen Lloyd, testified, the Kutzlers "were very positive about their company and its ability to survive and repay its debts . . . prior to the work stoppage everything was very positive."<sup>57</sup> According to Kutzler's own testimony, moreover: (1) he did not believe that R/C really did owe any substantial amounts to the IRS; (2) as of August 1982 some of R/C's expenses were about to decline—R/C was just about to make its final payments on some equipment it had acquired through lease-purchase agreements; and (3) the increased business that R/C's customers had promised would have had a markedly beneficial impact on the Company. And nowhere in his testimony did Kutzler claim that in order for R/C to have operated successfully R/C actually needed the concessions that Honzik kept demanding in the negotiating sessions with FASH.

*Honzik's Concern About the Restrictions Imposed by Shea Chemical and the Recommended Order in Redway I:* As discussed earlier, *RCA Del Caribe* issued on 16 July 1982—only 6 weeks before the 28 August shutdown; and the recommended Order in *Redway I* required R/C to maintain the terms of its 1979-1981 contract with FASH, *pendente lite*. Both Kutzler's and Honzik's testimony can be read as indicating that until Honzik received, read, and digested the Board's decision in *RCA Del Caribe*, he thought that *Shea Chemical*, as well as Judge Roth's Order, precluded R/C from bargaining with FASH about reducing driver pay rates and fringe benefits. And Honzik's testimony can also be read as indicating that Honzik concluded that the drivers' strike (or what Honzik believed to be a strike) nullified FASH's right to rely on the provision of the recommended Order that required R/C to adhere to the terms of the 1979-1981 contract, but only for the duration of the strike. If Honzik did come to that conclusion about the impact of the strike on Judge Roth's Order, he may well have told Kutzler that the strike gave R/C its one chance, for the foreseeable future, to bring the drivers' pay and fringe benefits into line with those of R/C's competitors.

That would explain why: (1) R/C responded so anomalously to the strike even if Kutzler believed that, for the moment, at least, R/C could survive without imposing pay reductions; and (2) R/C had not previously sought any of the concessions it demanded on 30 August and thereafter.

But that theory is based entirely on testimonial hints by Honzik. He never specifically testified that that was the basis for R/C's bargaining position. In addition, there remains the question of why Kutzler would take a track so likely to fail and thereby cause R/C's collapse.

*The Possibility of a Planned Transfer of R/C's Business to Redway Contract Carrier Corporation:* It is possible that

<sup>56</sup>Tr. 9706.

<sup>57</sup>Tr. 7297-7298.

R/C's bargaining position stemmed from an abortive plan on Kutzler's part to transfer R/C's business to RCCC.

As discussed above as of the summer of 1982 R/C's debt had reached catastrophic levels. Moreover R/C was faced with a work force whose wages were out of line with those of R/C's competitors and which was represented by a union that showed no inclination to face up to what Kutzler considered obvious economic realities. Finally, Honzik may have advised the Kutzlers that the situation at hand was R/C's only chance for the foreseeable future to reduce its wages and fringe benefits (as just discussed).

On the other side of the equation, Kutzler believed that R/C's two largest customers, Ocean Spray and American Motors, were about to greatly increase their trucking needs. But those customers were, ultimately, the Kutzlers, in that R/C's business with Ocean Spray and American Motors stemmed from the Kutzlers' relationships with officials of Ocean Spray and American Motors. Thus Kutzler had good reason to expect that those companies would be willing to use whatever motor carrier that he and/or Gail recommended. (Later events were to prove that to be the case; see part IV, below.)

That could mean that by 30 August Kutzler had concluded that R/C would be worth trying to save if, but only if, R/C's payroll costs and inefficiencies stemming from certain work rules could be reduced. If R/C could not obtain those changes, the more effective, albeit risky, course of action would be to let R/C go under and to use RCCC to profit from the Kutzlers' relationships with the Ocean Spray and American Motors traffic departments. (That might be the explanation for Maton's visit to R/C on or about 30 August.) Under this hypothesis, Kutzler meant it when he claimed that R/C would not resume operations unless FASH accepted R/C's demand for concessions.

Assuming the accuracy of that hypothesis, some unexpected event put an end to Kutzler's hopes for RCCC. (Some testimony suggests that RCCC ran into jurisdictional problems between Teamsters locals. Other testimony indicates that RCCC's problem was a lack of funding.) By the time the RCCC arrangement fell through—presumably a few days after Kutzler's 10 September statement to FASH—R/C was too far gone to save.

That scenario would explain Kutzler's reference to "an Illinois trucking company" (in Kutzler's 10 September statement), and would explain why Maton so obviously withheld information when questioned about RCCC.

The problem with all this is that it fails to fully recognize the attachment that the Kutzlers felt to R/C, and it relies on inferences based on inferences. In that latter regard, the theory hinges almost entirely on one reference by Kutzler to an Illinois trucking company (and, obviously, there are thousands of Illinois trucking companies) and on speculation that the failure of Kutzler and Maton to be forthright about RCCC related in some way to a connection between RCCC and R/C's negotiating stance on and after 30 August.

*Did Kutzler's Negotiating Stance with FASH Violate Section 8(a)(3) or (5) of the Act:* As I view the record, I have no basis for making any finding about why R/C negotiated the way it did. All the evidence that might explain why R/C adopted its accept-concessions-or-else negotiating stance is contradicted by other, equally persuasive, evidence or, in the case of the RCCC hypothesis, is too speculative to rely on.

Accordingly, although I certainly cannot conclude that R/C's motives for its negotiating stance were necessarily lawful, I also cannot conclude that that stance was based on motives that violated Section 8(a)(3).

The 8(a)(5) issue is another matter. The question there is whether R/C bargained in good faith.

I think that R/C did not. The Act does not require that R/C agree to compromise. Moreover, R/C was entitled to adopt what sounded like an unbending position if in fact it was no more than a bargaining tactic (as Kutzler claimed). But everything about R/C's stance showed that its representatives (Honzik and Kutzler) had made up their minds in advance, that they were not "accessible to persuasion." And that spells out a violation of Section 8(a)(5).<sup>58</sup>

I have considered the fact that Honzik and Kutzler were facing FASH representatives who also had made up their minds in advance. (Kutzler, it may be recalled, claimed that R/C would have proposed a compromise position as soon as FASH had shown itself willing to do likewise.) But apart from Kutzler's testimony, the record gives no hint that Honzik and Kutzler would have given an inch even had FASH indicated that it was willing to compromise.

#### IV. REDWAY, CARDINAL, LITCO-WISCONSIN, AND THE KUTZLERS: SEPTEMBER 1982 THROUGH THE SPRING OF 1983

This part of the decision considers the activities of Redway, Cardinal, and the Kutzlers from late September 1982 until May 1983. It also focuses on a company the Kutzlers operated during part of that period: Litco-Wisconsin.

This part discusses, in addition, the activities of a number of other companies that the General Counsel alleges to be alter egos or successors of R/C. Those companies: Ligon Transportation Company, Ligon Specialized Hauler, and Smyrna Personnel Services. Part V of this decision will discuss why I have concluded that none of those companies was an alter ego of or successor to R/C.

*The Creation of Litco-Wisconsin; Cardinal Resumes Operations:* As of mid-September 1982 R/C was in serious trouble. Talks with FASH had stalled (as discussed in part III), debts were mounting, no cash was coming in, R/C's creditors were becoming impatient, and much of R/C's equipment was in danger of being repossessed by lessors.

Kutzler's initial response to these circumstances was to file petitions under Chapter 11 of the Bankruptcy Act on 17 September, on behalf of both Redway and Cardinal.

Redway had few if any assets, other than receivables. But Cardinal had its trucks and trailers (albeit generally as a lessee rather than owner). Kutzler concluded that the only way he could keep R/C viable pending resolution of its problems with FASH was to lease out Cardinal's equipment to third parties.<sup>59</sup> In late September, therefore, Kutzler began talking

<sup>58</sup>See *Food & Commercial Workers Local 1439 (Food City)*, 262 NLRB 309, 312 (1982); *General Electric Corp.*, 150 NLRB 192, 268 (1964), enf. 418 F.2d 736 (2d Cir. 1969).

<sup>59</sup>Because Cardinal's equipment was all leased to Redway, on 24 September Kutzler applied to the bankruptcy court for permission for Cardinal to rescind those its leases. (As a technical matter, Kutzler's request was presented as an application by Redway to reject its executory leases with Cardinal. But R/C specifically advised the bankruptcy court that the purpose of the request was to permit Cardinal to lease the equipment to third parties.) The General

to one Arnold Ligon about leasing some of Cardinal's trucks to a motor carrier that Ligon headed. (As this decision will later discuss, this proceeding involves several different persons and companies named "Ligon." I will accordingly sometimes refer to Arnold Ligon as "Arnold.")

Arnold Ligon had numerous interests. He was chief executive of a motor carrier called Ligon Transportation Company. (I will sometimes refer to Ligon Transportation Company as Litco, a name which that company used as a service mark.) He owned and ran a number of "Safeway" companies, all related in one fashion or another to the motor carrier business. And he was in the business of leasing trucks to motor carriers. Kutzler had first met Arnold when Arnold was acting in his role as a lessor of trucks. As of September, R/C had been leasing about 20 trucks from Arnold for about 9 months, and another dozen 30 or so for a somewhat shorter period. (That batch of a dozen trucks was nominally leased to Kutzler's son, Frank. But Frank had leased the trucks from Arnold only because R/C had then needed them.)<sup>60</sup>

Kutzler's interest in Arnold Ligon and Litco was natural. First, Kutzler knew that Litco had nationwide ICC authority, routinely obtained its trucks by leasing them, and routinely compensated persons able to find customers for Litco for such revenue generation. And second, Kutzler knew that R/C's failure to make its truck lease payments to Arnold, combined with Arnold's inability to repossess the trucks (due to the protection accorded by R/C's Chapter 11 petitions), was causing financial problems for Arnold. Kutzler knew, therefore, that Arnold would be eager to enter into an arrangement that might permit Kutzler to resume the truck payments.

The upshot of Kutzler's discussions with Arnold as a set of agreements that were decided on by 1 October and completely in place by mid-October. Under the agreements:

1. Cardinal would lease some of its trucks to Litco on a monthly basis. (The trucks were the ones that Cardinal was leasing from Arnold.) Cardinal would receive 78 percent of the line-haul revenues that shippers paid to Litco for service via those trucks. Cardinal would provide drivers for the trucks, pay for fuel, and handle all maintenance.

2. A company purportedly owned by Gail Kutzler, called Litco-Wisconsin, would receive 7 percent of the revenues on freight it booked for Litco.

Counsel appeared before the bankruptcy court and opposed the application. The court granted the request on 7 October.

The General Counsel points out Cardinal had obtained much of the equipment it wanted to lease out via leases in which Redway was joint lessee. But that consideration seems more appropriate for consideration by the bankruptcy court than by the Board. (R/C did bring the matter to the court's attention. See LX 41 at p. 12.)

<sup>60</sup>Actually, R/C and Frank did not lease the trucks directly from Arnold. Rather, they leased the trucks from two companies—Power Leasing Division and Howell Leasing which, in turn, leased the trucks from other companies. Arnold owned Power Leasing Division. He had no ownership interest in Howell. But for reasons the record does not fully explain, Arnold had a vital stake in the Howell leases as well as the Power Leasing leases in that he had signed documents entitling the truck owners to turn to him if either Power Leasing or Howell failed to make the required lease payments on the trucks. Because Kutzler's dealings were with Arnold, I will treat the matter as though the trucks were Arnold's. (The foregoing still does not do justice to the complexities of the situation. For example: (1) some of the trucks I include in the group leased to Frank were in fact leased to a company called FSK Leasing. The principals of FSK were, originally, Frank and his brother, Scott. But Scott later pulled out; (2) Litco was also a guarantor, along with Arnold, for the lease payments on some of the trucks.)

3. Frank Kutzler leased his dozen trucks to Litco.

4. Smyrna Personnel Services (SPS) was a company in the business of providing truckdrivers and payroll services for persons operating fleets of trucks. SPS was closely tied to Litco and Arnold. The Kutzlers and SPS agreed that Litco-Wisconsin would use SPS to obtain the drivers for the trucks belonging to Cardinal and to Frank Kutzler that had just been leased to Litco. They also agreed that Cardinal, Litco-Wisconsin, and Frank would use SPS' payroll services.

5. The Kutzlers agreed to pay one of Arnold's "Safeway" companies, Safeway Transportation Company, 1 percent of gross revenues for "consultant" services. Litco-Wisconsin also agreed to pay 2 percent of gross revenues to Litco for insurance. (Thus although Litco-Wisconsin nominally was entitled to 7 percent of revenues, it kept only 4 percent.)<sup>61</sup>

From Kutzler's point of view the above set of agreements had a number of advantages.

One is that it permitted Kutzler to "maintain control" (as he put it) over the shippers that had used R/C.<sup>62</sup> Kutzler wanted to be able to resume R/C's operations if R/C's labor difficulties could be handled (and if, at the time, R/C had the financial wherewithal to do so). But to have any chance of success, the Kutzlers had to continue to provide trucking services to such shippers.

Another advantage is that it did not lock Kutzler or Cardinal into a long-term commitment. Because the Kutzlers' goal was to "resurrect" R/C, they considered the arrangement with Arnold Ligon and Litco to be a temporary one—"a stop-gap," as Gail put it.<sup>63</sup> And under the arrangement, the Kutzlers and Cardinal could have pulled out on short notice.

The third advantage was the fact that the operations would produce revenue for Litco-Wisconsin, which is to say the Kutzlers, directly, rather than just for Cardinal. And because Litco-Wisconsin was paid out of a Litco account rather than through Cardinal, and because Litco-Wisconsin had not subjected itself to the bankruptcy court's jurisdiction, not all the revenues generated by Cardinal's equipment would be subject to disclosure to creditors. (The court, in fact, was never informed of Litco-Wisconsin's existence.)

In the last respect, however, it is only fair to note that: (1) there is no evidence directly proving that Kutzler gave any consideration to the fact that Litco-Wisconsin was not subject to supervision by the bankruptcy court; (2) there is nothing in the record showing that Litco-Wisconsin's connection to the court-approved Cardinal-Litco arrangement was out of the ordinary; and (3) Cardinal's accountants were fully informed of Litco-Wisconsin's role.<sup>64</sup>

<sup>61</sup>The Kutzlers, Cardinal, Litco, and Arnold Ligon entered into a number of different agreements, some superseding others. (The General Counsel ascribes nefarious motives to such goings on—wrongly, I think.) None of the various sets of agreements were wholly internally consistent, moreover, or fully reflected the actual conduct of the parties once operations began. The above description of the arrangements among Litco-Wisconsin, Cardinal, Litco, SPS, and Safeway accordingly represents a combination of several of the various sets of agreements and the behavior of the parties during the course of operations.

<sup>62</sup>Tr. 1149.

<sup>63</sup>Tr. 1149–1150, 2613.

<sup>64</sup>As touched on earlier, about a half-year prior to its bankruptcy filings, R/C retained the accounting firm of John Lloyd & Co. to review R/C's financial records and to propose changes in its operations. During the existence of Redway and Cardinal as debtors in possession, Redway and Cardinal contin-

On 11 October trucks started operating out of the Kenosha terminal pursuant to the Litco-Wisconsin/Cardinal/Litco/SPS arrangement. (No one ever bothered to remove the large "Redway" that had long ago been painted on the front outside wall of terminal. But about the time that the Litco-Wisconsin/Cardinal operation got underway, someone encribed "Litco" or "Ligon Transportation Company" on the terminal's front door.)

The trucking activity attracted a number of R/C drivers (and perhaps others, as well) to the Kenosha terminal as applicants for truckdriving jobs. "They came in peace," they said, and wanted only a job.<sup>65</sup> Kutzler told SPS' owner not to hire employees of R/C.<sup>66</sup> But SPS' owner ignored Kutzler, invited R/C drivers to apply for positions with SPS, and ultimately did hire a few R/C employees as drivers for Cardinal's trucks. (The paucity of job offers to R/C drivers stemmed from the fact that SPS gave priority in job offers to persons whom SPS had previously recruited for other truckdriving jobs and who had since been laid off.)<sup>67</sup>

According to the General Counsel, the most obvious way for R/C to have remained viable during a strike would have been for R/C to have hired replacements for its drivers. Kutzler's willingness to resume operations out of the Kenosha terminal in conjunction with Litco and SPS, argues the General Counsel, shows that R/C's failure to try to operate with replacement employees was not a function of any fear of violence and that, accordingly, Kutzler's arrangements with Litco and SPS must have been the product of discriminatory motivation. But there is ample evidence showing that Kutzler felt any attempt by R/C to use replacement drivers would produce only devastating attacks on R/C's personnel and property. And I have no basis for concluding that Kutzler did not honestly believe that R/C's striking employees would be less aggravated by the operation of trucks marked "Litco" than by the operation of the same trucks still displaying "Redway."<sup>68</sup>

*Operations out of the Kenosha Terminal—11 October Through 31 December 1982:* As the agreements outlined above suggest, and as detailed below, starting in October, Litco-Wisconsin and Cardinal combined to operate a trucking service that was in many respects identical to the service that had been provided by the Redway/Cardinal combination prior to 28 August. The new operation was run by Kutzler; used only trucks that R/C had used; operated out of the terminal that R/C had used; serviced only companies that had been customers of R/C; charged the same rates that R/C had charged based on a tariff that was a deliberate copy of R/C's; used the same telephone numbers that R/C had used; and had its clerical work, most of its dispatching, and some of its

maintenance work done by the same persons who had done that work for R/C. The major differences were: the drivers used by the new operation were hired and paid by SPS rather than by Cardinal; the drivers were paid on a different basis (by the mile rather than as a percentage of revenues); the new operation was smaller than R/C's had been; Litco personnel at Litco's headquarters in Tennessee did some dispatching of Cardinal's trucks (for backhaul movements returning to the Kenosha area); and the ICC authority supporting the operation was Litco's rather than Redway's.

*How the Litco-Wisconsin/Cardinal/Litco Operation Worked:* The new operation used the trucks that R/C had leased from Arnold Ligon. But now the placards on their doors said "Litco" or "Ligon Transportation" rather than "Redway." Clerical personnel in the Kenosha terminal billed shippers, who sent their payments back to the terminal. The checks, however, were made out to Litco, not to Redway. Those checks were deposited in a Litco account in a local Wisconsin bank. Litco-Wisconsin drew on that account (pursuant to agreement with Litco) in order to pay the amounts that Cardinal was entitled to under Cardinal's agreement with Litco, Gail's salary (about \$200 per week), Safeway's 1 percent (notwithstanding the fact that Safeway never provided any "consultant" services to Litco-Wisconsin), and the amounts owing to Litco. Cardinal was responsible for paying for most of the operational costs, including the amounts owing to SPS, dispatching costs, utilities, most of the clerical help, the mechanics, fuel, lease payments on the trucks, Kutzler's salary, and the like. As it turned out, the operation did not generate sufficient cash for Cardinal to be able to pay all its bills.

*The Relationship Between Litco-Wisconsin, Cardinal, and SPS:* Arnold Ligon proposed that Cardinal obtain its drivers via SPS. Kutzler heard the proposal as a demand. (It thus remains unclear how Cardinal would have obtained drivers had Kutzler been left to his own devices.) SPS recruited drivers for Cardinal's trucks, selected from among those applying, qualified the drivers (pursuant to U.S. Department of Transportation standards), set the drivers' rates of pay and fringe benefits, paid the drivers, handled such matters as health insurance coverage for the drivers, and paid the various employment taxes (unemployment compensation, FICA, etc.). Cardinal (either directly or through Litco-Wisconsin) reimbursed SPS for all such expenses and paid a fee to SPS for its services. SPS' duties were specified in a contract between SPS and Litco-Wisconsin. That contract provided that "the drivers shall at all times be and remain employees only of SPS."<sup>69</sup>

The drivers were dispatched, however, by Cardinal (or, occasionally, by Litco). And the dispatchers' selections of which runs a driver was to handle affected the driver's pay because the driver was paid by the mile. In addition, Cardinal itself advanced cash to the drivers for fuel expenses and the like. The record does not indicate whether Cardinal or Litco-Wisconsin had any other authority, direct or indirect, over the drivers. For example the record does not tell us whether Cardinal ever disciplined a driver, or asked SPS to discipline a driver, or what the agreement was between

ued to use the firm, and personnel from the firm prepared the reports that Cardinal and Redway submitted to the court.

<sup>65</sup> GCX 67, p. 10

<sup>66</sup> Kutzler denied telling SPS not to hire any R/C drivers. I do not credit that denial. Kutzler's reason for not wanting SPS to hire R/C drivers is unclear. It could have been a product of animus, of course. But, equally likely, it could have been because of Kutzler's fear of sabotage.

<sup>67</sup> The record provides only sparse evidence about the job applications of exstrikers. For instance, the record does not specify how many of R/C's drivers applied for work with the new operation (although it is clear that only a small percentage of R/C's drivers did so), nor does it tell us the names of any of the applicants. The lack of detail is due at least in part to the death of SPS' owner before he had a chance to testify.

<sup>68</sup> There were one or two instances of violence aimed at the resumed operations.

<sup>69</sup> A copy of Litco-Wisconsin's contract with SPS is appended to GCX 67. SPS had comparable agreements with Frank Kutzler and FSK Leasing.

Litco-Wisconsin/Cardinal and SPS regarding drivers who were not performing adequately.

*Who Owned Litco-Wisconsin:* The Kutzlers claimed that Gail owned Litco-Wisconsin, and the complaint makes the same allegation. In fact Litco-Wisconsin was nothing more than a name that the Kutzlers used in connection with the Cardinal/Litco arrangement. Litco-Wisconsin was not incorporated or otherwise registered as an entity, and it had virtually no assets. As far as the record in this proceeding shows, therefore, if it makes any sense to speak of the "ownership" of Litco-Wisconsin at all, then both of the Kutzlers owned Litco-Wisconsin.

*The Kutzlers' Role in the Litco-Wisconsin/Cardinal Operation:* Gail was paid by Litco-Wisconsin; Kutzler was paid by Cardinal. Gail worked for the new operation in much the same way as she had at R/C. She did some clerical work, and from time to time she met with customers.

Of greater importance is Kutzler's role. As stated earlier, Kutzler had been R/C's sole executive. He had handled R/C's financing, relations with customers and creditors, equipment acquisition, and labor relations—which included frequent conversations with the stewards and many of the other drivers.

Kutzler's role in the Litco-Wisconsin/Cardinal operation was different, for two reasons. First, there was less for him to do. SPS handled labor relations matters, and the new operation was relatively small. And second, Kutzler seems to have been unable to recover from the events of that past August and September. He appears to have lost the vitality and drive that may have been R/C's most important assets. Kutzler could have, but did not, resist Arnold Ligon's proposal that SPS handle all matters relating to driver employment; he could have, but did not, look for ways to expand the new operation; and although he continued to deal with customers, his dealings were almost entirely defensive—soothing complaints and seeking to retain some of the business that R/C had enjoyed. All the people working in the Kenosha terminal were affected by what amounted to a sense of defeat on Kutzler's part.

*Size:* The Litco-Wisconsin/Cardinal operation was roughly half the size of R/C. R/C operated about 70 or 80 trucks compared to the new operation's 30 or so. R/C's revenues averaged about \$400,000 per month in 1981–1982; the new operation averaged about \$200,000 per month.

*The New Operation's Customers:* Ocean Spray had been central to R/C's viability, accounting for about 55 percent of R/C's gross revenues. Ocean Spray was even more important to the Litco-Wisconsin/Cardinal operations, accounting for 65 percent of gross revenues. American Motors was R/C's and Litco-Wisconsin/Cardinal's second largest customer, providing about 20 percent of R/C's revenues and about 10 percent of the revenues of the new operation.

The new operation was by no means able to retain the business of all of the shippers served by R/C. Most importantly, S. C. Johnson, which had been R/C's fourth largest customer, refused to deal with Litco-Wisconsin/Cardinal (because of its unhappiness with R/C's treatment of it in the days immediately following the 28 August shutdown). On the other hand, all the shippers served by the new operation had been customers of R/C.

*The New Operation's Dispatchers and Clerical Help:* Not all the persons who had done the dispatching and clerical

work for R/C worked for the new operation. (As discussed earlier, the new operation was smaller than R/C had been. Moreover, Litco and SPS picked up some of the functions for the new operation that had been handled by R/C, such as some paperwork stemming from regulatory requirements and payroll matters.) But all the persons who did the dispatching and clerical work out of the Kenosha terminal for the new operation had worked for R/C. (As touched on above, when Cardinal's trucks carried loads from Kenosha into areas frequently served by Litco, Litco's dispatchers found loads for those trucks that would send them back to the Kenosha area.)

There was one notable difference. All the persons who had handled R/C's clerical and dispatching work had been employees of R/C. None of such persons were employees of the new operation. At least none were treated as employees for pay purposes. For example, prior to 28 August Cardinal had employed Larry Summers as one of its dispatchers. Sometime before the Litco-Wisconsin/Cardinal operation got underway, Summers formed a one-person company called "Dispatch Services." Summers, as Dispatch Services, handled the new operation's dispatching out of the Kenosha terminal. Dispatch Services paid for the space it used in the terminal and paid for the telephone service it used. Cardinal's payments to Dispatch Services, in turn, resulted in Dispatch Services netting about the same as Summers had previously earned as a Cardinal employee.<sup>70</sup>

Name	Manner Employed by R/C Pre-28 August	Manner Employed by the New Operation
Kristine Buhnerkemper	Clerical employee	Formed "K. B. Clerical Services," which operated under contract to the new operation.
Vickie Kutzler	Clerical employee	Worked in the terminal as an employee of K. B. Clerical Services.
Norbert Pfeiffer	Part-time payroll/bookkeeping employee	Formed "Pfeiffer Accounting Service"; worked in the terminal one morning per week.
Jon Woodman	Handled rate and tariff work, etc.	Formed "Jon T. Woodman Associates," and, as such, did much the same work as he had pre-August (taking into account the fact that the new operation had fewer regulatory responsibilities since it did not hold any ICC authority).

*The New Operation's Mechanics:* The situation in the shop facilities of the terminal was comparable to that in its office. James Kutzler (Kutzler's brother) had been R/C's shop foreman and, similarly, ran the shop for the new operation. And Ernest W. Gilmore, whom Cardinal had employed as one of its mechanics prior to August 28, formed "EWG Truck Re-

<sup>70</sup> Persons present in the Kenosha terminal's office during the new operation's existence included the following (in addition to Summers):

pair," hired some mechanics as employees of EWG, and—as EWG—repaired and maintained the trucks run by the new operation (again, in the Kenosha terminal's shop facilities).

*Litco-Wisconsin Comes to an end in January 1983; the Collapse of the Kutzlers' Hopes to Revive Redway:* For reasons that are not entirely clear, the Litco-Wisconsin/Cardinal operation was never a financial success. The problem was not lack of business. As the operation's dispatcher put it, "there was more freight out there than we knew what to do with."<sup>71</sup>

One problem was that the operation's trucks kept breaking down, perhaps because of a lack of funds with which to maintain them properly, perhaps because the trucks were nearing the end of their useful lives, and/or perhaps because of inattention on Kutzler's part. Another was that the operations' drivers did not know how to handle the kinds of freight the operation generated, resulting in a surfeit of customer claims and complaints. A third was a management issue: Gail testified that due to the nature of the Litco-Wisconsin/Cardinal/Litco/SPS operation, Kutzler was unable to control it as tightly as he had R/C's. Finally, as discussed above, a sense of defeat pervaded the terminal.

By late December (about 2-1/2 months after Litco-Wisconsin/Cardinal's first truck runs), the Kutzlers reached two depressing conclusions. The first was that the Litco-Wisconsin/Cardinal operation could not generate sufficient profits to support them. The second was that Redway's existing debts, coupled with the considerable outlays it would take to put Redway back into operation, meant that there was no possibility of resuming business with Redway. Life to the Kutzlers looked bleak indeed. They contemplated suicide.

The Kutzlers' conclusion that Redway could not be salvaged led Kutzler to petition the bankruptcy court to liquidate Redway (under Chapter 7 of the Bankruptcy Act). The petition was filed on 17 January 1983. The fact that Litco-Wisconsin/Cardinal did not generate sufficient funds to support the Kutzlers led them to discuss their situation with Arnold Ligon. He offered them jobs with his Safeway organization in Madisonville, Kentucky (which was Arnold's home and place of business). Kutzler, said Arnold, could advise Arnold about matters pertaining to Arnold's fleet of trucks. Gail could do sales work.

The Kutzlers accepted Arnold's offer and moved to Madisonville in January, still hoping that before long they could return to Kenosha to resume some form of trucking business. (Arnold offered jobs to the Kutzlers more out of sympathy for their plight than because he needed their services. Once in Kentucky the Kutzlers discovered that there was little work for them to do there.)

By and large the Kenosha operation continued as before through much of January (notwithstanding the absence of the Kutzlers). But January was to be Litco-Wisconsin's last month. In mid-January Litco's owner agreed to sell most of Litco's assets to a company called Quicksilver Transportation, Inc. The sale was to be consummated on 31 January. Quicksilver promptly advised Litco that Quicksilver did not want to associate itself with the Kenosha operation and that Litco should end its relationship with the Kutzlers. Litco complied and, effective on 31 January or 1 February, Litco severed its connection with Litco-Wisconsin, with Cardinal,

and with Frank Kutzler. Cardinal and Frank Kutzler were able to find a new home for their trucks (as will be discussed below). But Litco's action permanently snuffed Litco-Wisconsin out of existence.

*Cardinal's Association with Ligon Specialized Hauler:* A company called Ligon Specialized Hauler (LSH) operated out of Arnold Ligon's home town of Madisonville. At one time LSH had been affiliated with Litco, but starting in September 1982 it was not. (That will be discussed in more detail in part V.) LSH saw Litco's severing of ties with Cardinal as an opportunity for it to gain additional business in the Kenosha area. On 1 February, LSH accordingly entered into a set of agreements involving Cardinal, Frank Kutzler, and Safeway Transportation (the Arnold Ligon company to which Litco-Wisconsin had been paying 1 percent of the revenues generated by the Litco-Wisconsin/Cardinal operation.)

Under one such agreement, LSH leased from Cardinal the trucks that Cardinal was leasing from Arnold Ligon. It was a routine type of LSH lease, providing, among other things, that Cardinal would provide the drivers for the trucks. (Cardinal continued to use SPS' services in this regard.) Unlike Litco's arrangement with Litco-Wisconsin and Cardinal, the compensation that LSH agreed to pay Cardinal did not reflect the fact that the Kutzlers had important contacts with shippers in the Kenosha area. LSH also entered into a comparable lease agreement with Frank Kutzler. Third, LSH entered into an agency agreement with Safeway Transportation under which Safeway would be compensated for sales in the Kenosha area (in somewhat the same way that Litco-Wisconsin had been compensated by Litco).

As a result of that arrangement Cardinal trucks continued to operate out of the Kenosha terminal, serving—in the main—Ocean Spray and American Motors. But in almost all respects the Kutzlers lost control of the operation. For example, shippers now sent their payments to LSH in Madisonville, not to Kenosha.

The LSH-Cardinal arrangement was short-lived. Soon after it was set in motion, LSH learned that its connection with Cardinal might lead to alter ego allegations against it (as indeed it did). Probably because of a concern about that, on 15 February LSH terminated its agreement with Cardinal.

Redway was gone. Litco-Wisconsin was gone. Now Cardinal's operations came to a final end too. The day after LSH ended its agreement with Cardinal, Arnold Ligon repossessed the trucks he had been leasing to Cardinal. (LSH continued to operate out of the Kenosha terminal, using the same trucks—which now were back in Arnold Ligon's possession, and serving the same customers. But in late March LSH ended all operations out of the Kenosha terminal.)

On 24 February Cardinal petitioned the bankruptcy court to convert from Chapter 11 to Chapter 7 (liquidation).

The Kutzlers kept drawing paychecks from Safeway until some time in April. But from mid-February on they did not have anything to do with the Kenosha operation. In May they moved to California for a life unconnected with the trucking business. The First Wisconsin Bank of Racine had, as security for R/C's debts to the bank, a "blanket lien" (in the words of R/C's trustee in bankruptcy) on all R/C's assets and held a mortgage on the Kutzlers' home in Kenosha as well. By the time of the hearing in this proceeding the bank

<sup>71</sup> Tr. 2543.

had taken possession of, and then disposed of, all such property.<sup>72</sup>

*Conclusion—Litco-Wisconsin as an Alter Ego of or Single Employer with R/C:* The issue of whether Litco-Wisconsin was an alter ego of R/C or a single employer with R/C is a peculiar one in that half of the joint employer Redway/Cardinal continued in business (Cardinal), although the other half (Redway) did not.<sup>73</sup>

Turning first to Litco-Wisconsin's single-employer relationship, Litco-Wisconsin and Cardinal formed a single-integrated business. They had common management, a common business purpose, and they shared common premises and facilities. Their clerical and bookkeeping work was handled by the same people. That adds up to Litco-Wisconsin and Cardinal being a single employer. E.g., *Airport Bus Service*, 273 NLRB 561 (1984); *Mashkin Freight Lines*, 272 NLRB 427 (1984). Although the ownership of the two companies was not identical, in that LeRoy Dittmer owned one-third of R/C, given all the other indicia of single-employer status that difference is not a critical one.

As for the alter ego status of the single employer Litco-Wisconsin/Cardinal, in a few particulars Litco-Wisconsin/Cardinal did differ from R/C. Most of those differences are insignificant. They include the fact that the new operation's trucks were sometimes dispatched by Litco and that Litco-Wisconsin/Cardinal depended on Litco's certificate authority. One such difference, however, is noteworthy. That is, during the entire period in which Litco-Wisconsin existed, it was SPS, not Litco-Wisconsin or Cardinal, that determined who should be hired to drive Cardinal's trucks, handled all the details of the hiring process, set the drivers' rates of pay, determined their fringe benefits, and paid them.

But in most respects, Litco-Wisconsin/Cardinal was remarkably similar to the earlier Redway/Cardinal combination. All the new operation's customers had been customers of R/C. The new operation's clerical work was done by the same persons who had done that work for R/C.<sup>74</sup> Litco-Wisconsin/Cardinal used the same terminal that R/C had. The new operation's principal mechanic had been employed as a mechanic by R/C. All the trucks had been used by R/C. The way that Litco-Wisconsin/Cardinal operated was in many ways identical to the way R/C had. As for ownership, Cardinal's remained unchanged, and the Kutzlers, who held majority interest in R/C, wholly owned Litco-Wisconsin.

An additional circumstance that I think deserves some weight in determining whether the new operation should be deemed R/C's alter ego is the fact that the Kutzlers made Litco-Wisconsin part of the arrangement with Litco without

advising R/C's creditors or the bankruptcy court of Litco-Wisconsin's existence. Kutzler sought the protection of Chapter 11 for Redway and Cardinal, as he had the right to do. But given Cardinal's status as debtor-in-possession, Cardinal's creditors—including its bargaining unit employees and FASH—had the right to expect that Kutzler would seek to shape the Cardinal-Litco lease agreement in a way that maximized Cardinal's profits and, thereby, the likelihood that Cardinal could pay off its debts. Kutzler, however, did not do that. Instead he opted for an agreement that funneled moneys to Litco-Wisconsin (and away from the bankruptcy court jurisdiction) that could otherwise have gone directly to Cardinal. No witness claimed that the Kutzlers are the kind of people who would try to make off with money that they did not earn. In fact the evidence on point was to the contrary. Moreover there is no indication that, as things turned out, Cardinal would have been better off had Kutzler worked out a deal with Litco that did not include Litco-Wisconsin. Nonetheless, as of the time that Litco-Wisconsin was created, it stood to profit at the expense of persons who had become creditors of Cardinal when Cardinal was part of the joint Redway/Cardinal operation.

For all of that, Litco-Wisconsin, whether considered alone or together with Cardinal, was a beast fundamentally different from anything the Board has ever held to be an alter ego (even if one puts aside the changed relationship with the drivers).

That difference has to do with why, and for what period, Kutzler created Litco-Wisconsin. The Litco-Wisconsin/Cardinal operation was intended to be temporary, to exist only while R/C's employees were on strike. Kutzler shaped Litco-Wisconsin/Cardinal's business arrangements, in fact, with a view to enabling R/C to resume operations promptly after the strike and to regain as many of its customers as possible. These objectives, in turn, are the very reverse of the usual purposes for which an alter ego is created.

What that points to, I think, is that Litco-Wisconsin should be considered to have been the alter ego of R/C for only limited purposes—or rather, for only a limited time. The Litco-Wisconsin/Cardinal operation was so similar to R/C that during the period in which Litco-Wisconsin/Cardinal replaced R/C, Litco-Wisconsin should be held to have had the same obligations to R/C's employees that R/C had. But given Kutzler's objective in establishing the Litco-Wisconsin/Cardinal operation, it would be inappropriate and unfair to continue to require Litco-Wisconsin, after its role as a temporary replacement for R/C had ended, to fulfill any obligations that R/C might owe to its employees.

I recognize that, in the present context, it seems academic to discuss imposing a temporal limitation on Litco-Wisconsin's alter ego status. Litco-Wisconsin ceased to exist, after all, even before Cardinal came to an end. But Litco-Wisconsin was not incorporated. As a result, a holding that Litco-Wisconsin picked up all the usual responsibilities of an alter ego might mean that the Kutzlers would thereby become personally liable for backpay obligations of R/C stretching back to the 1970's. (For additional discussion regarding the Kutzlers' personal liability for unfair labor practices committed by R/C, see part VI, below.)

*Did R/C's Transfer of Services to the Cardinal/Litco-Wisconsin/Litco/SPS Combination Violate Section 8(a)(5):* R/C did advise FASH, several times, that R/C planned to

<sup>72</sup> As noted earlier, LeRoy Dittmer held a one-third interest in R/C. Dittmer too had given the bank a lien on some assets to secure a loan to R/C. The bank liquidated Dittmer's assets along with R/C's and the Kutzlers'.

<sup>73</sup> Once upon a time Cardinal Leasing, Inc., debtor-in-possession, as it existed after 17 September 1982, would have been deemed to be an entity different from the Cardinal Leasing, Inc., that existed prior to the 17 September bankruptcy filing. From that viewpoint, of course, Litco-Wisconsin's relationship was with an alter ego of Cardinal, not with Cardinal itself. But *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527–528 (1984), put an end to such talk. See *Ohio Container Service*, 277 NLRB 305 (1985).

<sup>74</sup> As discussed earlier, the new operation's clerical work and most of its dispatching work was done by persons purporting to be contractors (or employees of contractors) rather than, as at R/C, employees of R/C. It would serve no purpose, however, to attempt to determine whether the purported contractors were in fact such or, instead, actually were employees of the new operation.

lease out much of its equipment. R/C never did, however, notify FASH that Cardinal was going to resume operations under the Cardinal/Litco-Wisconsin/Litco/SPS form of organization.<sup>75</sup> But because Kutzler intended that form of organization to be temporary, for the duration of the strike, it appears that Cardinal was entitled to obtain drivers for its trucks through a contractor, and to do so without bargaining with FASH. See *American Cyanamid Co.*, 235 NLRB 1316, 1323 (1978), enfd. 592 F.2d 356 (7th Cir. 1979); *Empire Terminal Warehouse Co.*, 151 NLRB 1359, 1363-1366 (1965), enfd. 355 F.2d 842 (D.C. Cir. 1966); cf. *Harter Equipment*, 280 NLRB 597 (1986).<sup>76</sup>

*Was Litco-Wisconsin a Successor to R/C:* The complaint alleges that Litco-Wisconsin was a successor to R/C and is thereby responsible for remedying R/C's unfair labor practices.

Where a new employer acquires substantial assets of a predecessor, doing so with knowledge of the predecessor's unremedied unfair labor practices, the new employer is liable for remedying the predecessor's unfair labor practices. *Pepsi-Cola Bottling Co. of Sacramento v. NLRB*, 414 U.S. 168 (1973). But Litco-Wisconsin purchased none of R/C's assets. It did not even lease them. Rather, Litco-Wisconsin was merely the name under which two owners and officers of R/C participated, briefly, in a business venture with Cardinal which was, in turn, previously part of the joint employer Redway/Cardinal. Under those circumstances it is fair to ask whether Litco-Wisconsin was an alter ego of R/C (as discussed above). But it would be stretching the concept of successor beyond recognizable proportions to consider Litco-Wisconsin a successor to R/C, particularly because Kutzler planned to do business via Litco-Wisconsin only for the duration of FASH's strike.

In any event, it appears that for Litco-Wisconsin to be considered a successor to R/C, the majority of its employees (in this case, the majority of the employees of Litco-Wisconsin/Cardinal) must have previously been employees of R/C, or the record must show that the reason that that was not the case was discrimination violative of the Act on the part of Litco-Wisconsin/Cardinal. *Airport Bus Service*, 273 NLRB 561, 562-563 (1984).<sup>77</sup> (I am assuming, for present purposes, that Litco-Wisconsin/Cardinal was a joint employer with SPS. If Litco-Wisconsin/Cardinal was not a joint em-

ployer, Litco-Wisconsin for that reason alone could not be a successor. *Container Transit*, 281 NLRB 1039 fn. 4 (1986.)) Plainly the work force used by Litco-Wisconsin/Cardinal was almost completely different from R/C's. Because that difference was not a product of discrimination, I conclude that, for that reason too, Litco-Wisconsin was not a successor to R/C.

V. WERE LIGON TRANSPORTATION COMPANY, SMYRNA PERSONNEL SERVICES, OR LIGON SPECIALIZED HAULER ALTER EGOS OF OR SUCCESSORS TO R/C

The preceding pages focused on R/C and the Kutzlers. This part of the decision considers whether SPS, Litco, or LSH should be deemed alter egos of or successors to R/C.<sup>78</sup>

*The Bankruptcy Court's Order Settling all Claims Against SPS, Litco, and LSH:* During the early stages of this litigation, SPS, Litco, LSH, and several other companies offered to pay a total of \$12,500 to the trustee in bankruptcy of the Redway and Cardinal estates to settle all claims "that the Trustee or either of the estates in Bankruptcy . . . may have . . . against" any of such "settlers." The General Counsel urged the bankruptcy court to accept that offer. The bankruptcy court did so in an order dated 17 November 1983. The settlers subsequently did pay the \$12,500 to the trustee.

Litco and LSH argue that that order of the bankruptcy court "renders moot these proceedings against [Litco] and LSH (and SPS)."<sup>79</sup>

The overlap in the authority of, on the one hand, the Board, and, on the other, the bankruptcy courts, can present knotty questions about who is responsible for what. But here the bankruptcy court order at issue stemmed from an agreement that the parties in the bankruptcy case entered into for settlement purposes. The court's order was not the product of litigation over the issue of the liability of Litco, LSH, or SPS. Had the parties to this (Board) proceeding intended the \$12,500 payment in the bankruptcy proceeding to settle this proceeding as well, they readily could have so agreed. But they did not. And because the bankruptcy court's order was the product of a settlement agreement, it is not entitled to any weight here. See *U.S. v. International Building Co.*, 345 U.S. 502 (1953), rehearing denied 345 U.S. 978 (1953); Re-statement, 2d, *Judgments*, § 27.<sup>80</sup>

*Litco:* Litco—that is, Ligon Transportation Company—was at all relevant times owned by Herbert Arnold Ligon, Jr. (He is Arnold's son. I will hereafter refer to Ligon, Jr. as "Herbert").<sup>81</sup>

<sup>78</sup>The complaint alleges that Litco and LSH were single employers with R/C as well as successors to and alter egos of R/C. But the evidence falls far short of showing any single-employer relationships between those companies and R/C, as the General Counsel recognizes on brief.

<sup>79</sup>Br. at 15.

<sup>80</sup>This issue arose earlier in this proceeding, when the General Counsel sought to exclude from the record the above-discussed order of the bankruptcy court. See my Order dated 23 May 1986.

<sup>81</sup>The company I call "Litco" was named "Cherokee Hauling & Rigging, Inc." until 1980, when its name was changed to "Ligon Transportation Company." It subsequently changed its name to "Litco Transportation Company," but switched back (to Ligon Transportation Company) on 1 July 1982, retaining, however, the service mark "LITCO" until 15 February 1983. (On that date Herbert transferred the right to use the mark "LITCO" to a subsidiary of IU International Corporation. That will be touched on again in connection with the discussion of Ligon Specialized Hauler, below.) Subsequently the

*Continued*

<sup>75</sup>The Chapter 11 petitions of Redway and Cardinal did not affect R/C's duty to notify FASH of these new arrangements. See *Bildisco*, above, 465 U.S. at 534.

<sup>76</sup>I have considered whether Cardinal's failure to reinstate exstrikers to existing vacancies on their unconditional offers to return to work (see the text at fns. 65-67, above) constituted a violation of the Act. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). But it would appear that Cardinal had no reinstatement obligation at the time the R/C drivers sought reinstatement given the fact that Cardinal had temporarily contracted out the driver hiring process. Cf. *American Cyanamid*, above; *Harter Equipment*, above.

<sup>77</sup>A finding of successorship by the Board can yield two different results. One is that the successor must bargain with the union that represented the employees of the predecessor. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). The other relates to the responsibility of the successor to remedy the unfair labor practices of the predecessor, as discussed above. The Board has always required the General Counsel to show that a majority of the employees of an alleged *Burns*-type successor had been employed by the predecessor (or that the successor's hiring policies were marred by discrimination). See *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987); *Love's Barbeque Restaurant No. 62*, 245 NLRB 78 (1979). Then, in *Airport Bus*, the Board adopted the same criterion for successorships in which the issue is whether the alleged successor should be liable for the predecessor's unfair labor practices.

Herbert participated directly in the management of Litco until the summer of 1982. At that point he decided to tie his fortunes to a company that competed with Litco, IU International Corporation. (IU International is a large, publicly held company that owns a number of motor carriers. Herbert's opportunity to associate himself with IU occurred as a result of IU's interest in another company that Herbert owned, Ligon Specialized Hauler. The IU-LSH connection will be discussed below.) Herbert accordingly opted to end all of his managerial connections to Litco. Complicating matters was that at about the time that Herbert sought to limit his ties to Litco, a number of Litco's executives quit, including Litco's chief operating officer.

Herbert's response was to begin looking for a way to dispose of Litco and, in the meantime, to appoint his father, Arnold, as "caretaker" president of Litco.<sup>82</sup> Thus Arnold had just become chief executive of Litco when Kutzler made his overtures to Litco in September 1982.

As discussed in part IV, Litco did business with Litco-Wisconsin and Cardinal during the period October 1982 through January 1983. The three companies were connected during the period in ways that went way beyond Litco's lease of Cardinal's trucks. To begin with, Litco allowed, or perhaps required, the Kutzlers to use the service mark "Litco" as part of the name of their sales agency (Litco-Wisconsin). Second, the Litco-Wisconsin/Cardinal operation depended on Litco's ICC authority and utilized Litco's tariffs which, in turn, were copies of R/C's (in respect to Kenosha operations). Third, Litco gave Litco-Wisconsin personnel, including Gail Kutzler, direct access to a Litco bank account in Wisconsin. Fourth, the trucks that Cardinal leased to Litco were the ones that Cardinal had leased from Arnold Ligon. Fifth, the Litco-Wisconsin/Cardinal/Litco deal included payments by Litco-Wisconsin to a company personally owned by Arnold—Safeway Transportation Company. Sixth, the deal included driver recruiting and payroll services by SPS, and SPS, as previously noted and as will be discussed below, was closely connected to Arnold and to Litco. And last, the deal enabled Litco to gain access to an area of the country and to customers to which Litco otherwise would have had no practicable access.

Notwithstanding all those connections, it does not seem to me that Litco can be deemed an alter ego of R/C.

First, the negotiations that led to the Cardinal/Litco-Wisconsin/Litco/SPS arrangement did not get underway until sometime after R/C filed its Chapter 11 petitions (in mid-September). That means that Litco played no role in R/C's

company once again changed its name, this time returning to the original, "Cherokee Hauling & Rigging, Inc."

Herbert did not directly own this variously named company. Rather, Litco was a second-tier subsidiary in a chain of companies all wholly owned directly or indirectly by Herbert.

To complicate things still further, during the period relevant to this proceeding Herbert owned three different coexisting companies that were named "Ligon Transportation Company." One was incorporated in Georgia, one in Kentucky, and one in Tennessee. (The Kentucky company owned the Tennessee company which, in turn, owned the Georgia Company.) The Tennessee company had the broadest ICC authority, and it was the Tennessee company that entered into the agreements with Cardinal and Litco-Wisconsin. Thus when this decision refers to "Litco," the reference is to the company that was incorporated in Tennessee.

As a final matter, the Georgia and Kentucky companies went through name changes analogous to those of the Tennessee company. See, e.g., LX 56.

<sup>82</sup> Tr. 7416.

cessation of operations or in the postshutdown bargaining between Kutzler and FASH. And that, in turn, means that Litco could not have participated with Kutzler in any plot to cause the 28 August shutdown or to stonewall FASH during the R/C-FASH talks (even assuming that Kutzler's actions in that connection were deliberately antiunion). Compare *Circle T Corp.*, 238 NLRB 245 (1978). It is true that Arnold Ligon had contractual relationships with R/C and with Kutzler's son, Frank, that predated R/C's shutdown. But those relationships amounted to nothing more than a routine set of truck leases. The existence of those truck leases, in fact, meant that Arnold had every incentive to encourage R/C to keep operating.

Second, there has been no showing that Litco's relationship with Litco-Wisconsin and Cardinal was in any way predicated on an antiunion bias on Litco's part.

Third, there were no ownership links between R/C and Litco.

Fourth, the connection between R/C and the Kutzlers, on the one hand, and Litco, on the other, only lasted 3-1/2 months, at which time Litco ended it.

Finally, the connection between Cardinal/Litco-Wisconsin and Safeway Transportation Company says little about any alter ego relationship on the part of Litco, even though Safeway was owned by Litco's chief executive, Arnold Ligon. Based on the evidence before me, the "consultant" contract between Safeway and Litco-Wisconsin contract represented self-dealing on Arnold's part, contravening Arnold's fiduciary obligations to Litco. (The existence of the contract between Safeway and Litco-Wisconsin suggests that, but for the contract, Litco might have been able to negotiate an agreement with Litco-Wisconsin or Cardinal that would have been more lucrative for Litco.) Safeway's contract with Litco-Wisconsin thus might be evidence of an alter ego relationship between Arnold Ligon and/or Safeway, on the one hand, and, on the other, Litco-Wisconsin/Cardinal (had one been alleged); it is not evidence of an alter ego relationship on Litco's part.<sup>83</sup>

*Smyrna Personnel Services*: Litco neither owned any trucks nor employed any drivers. Rather, Litco leased all the trucks it used, and required the lessors to provide drivers for the trucks (as we have seen in the case of its arrangements with Cardinal and Frank Kutzler). Litco leased most of its trucks from Arnold Ligon and one or two other Litco insiders. Arnold and those other insiders created SPS as the entity that would find drivers for the fleets of trucks that Litco leased from them, and that would administer the fleets' payrolls. As SPS' owner and chief executive, Melvin Potter, put it, the "corporate purpose" of SPS was to "select, hire, ori-

<sup>83</sup> Arnold Ligon did not have an opportunity to testify in this proceeding. He died just as the hearing got underway. Safeway employed the Kutzlers, starting in January 1983. But the evidence shows that Safeway's employment of the Kutzlers was not part of any scheme on Litco's part (or Arnold's) to gain ownership of, or to control, Cardinal. It was, as claimed by an associate of Arnold's, and as touched on in part IV, a gesture by Arnold of friendship and sympathy for the Kutzlers who were, by then, in serious trouble—both financial and emotional.

After Litco ended its relationship with Cardinal and Litco-Wisconsin (on 31 January 1983), Arnold began to supervise the persons who had handled the Litco-Wisconsin/Cardinal clerical and dispatching work in the Kenosha terminal. But that supervision related to Safeway, to Arnold's truck leasing company (Power Leasing Division), and to LSH, not to Litco.

ent and qualify drivers for fleets under contract with” Litco.<sup>84</sup>

When Kutzler proposed the Litco-Wisconsin/Cardinal arrangement to Arnold Ligon, Arnold suggested that Cardinal use SPS’ services. (The Kutzlers claimed that Arnold required Cardinal to use SPS, but, as discussed earlier, I do not credit that testimony.) Kutzler agreed, and SPS—without significant input from the Kutzlers—recruited applicants for Cardinal’s truckdriving positions, checked the applicants’ qualifications, selected from among the applicants, hired them, set their terms of employment, paid them, and handled their fringe benefits. Litco-Wisconsin or Cardinal reimbursed SPS for such services.

SPS considered itself to be the drivers’ employer. But Cardinal directed the drivers’ day-to-day work. Cardinal (via “Dispatch Services”) handled most of the dispatching of the drivers, and that dispatching not only affected where they drove, at what hours they drove, and with what kinds of loads they drove, but it also directly affected their pay. (The drivers were paid on a per-mile basis, and they were paid more per loaded mile than per unloaded mile.)

SPS may accordingly have been a joint employer with Cardinal (and with Litco-Wisconsin) during the period of Cardinal’s trucking operations as debtor-in-possession. But the complaint does not allege that either Cardinal or Litco or Litco-Wisconsin (or SPS) violated the Act during that period; thus a finding that SPS was a joint employer with Cardinal and/or Litco-Wisconsin would be beside the point.<sup>85</sup>

As for whether SPS was an alter ego of R/C, the answer is clear. It was not.

To begin with, neither SPS nor the owner of SPS ever had any ownership interest in Redway or Cardinal or Litco-Wisconsin. And none of those companies nor any owner of any of those companies had any ownership interest in SPS.

Second, SPS was created for reasons that had nothing to do with R/C—and vice versa. SPS’ business with Litco-Wisconsin and Cardinal represented only a small part of SPS’ overall business. No member of SPS’ management nor any SPS supervisor held any position with R/C and vice versa.

Third, SPS did not participate in any scheme by which R/C and/or the Kutzlers sought to circumvent the requirements of the Act. In that regard I will assume that if the Kutzlers had created the Litco-Wisconsin/Cardinal arrangement in order to avoid dealing with FASH, and if SPS had knowingly participated in that scheme, SPS could be considered an alter ego of R/C. But the Kutzlers did not enter into the Litco arrangement in order to avoid their obligations to FASH or to R/C’s employees. Moreover: (1) SPS was not privy to the Kutzlers’ motives for entering into the arrangement; (2) SPS entered into its relationship with Cardinal for ordinary commercial reasons; (3) SPS made no attempt to hide its activity from R/C’s employees or from the Board;<sup>86</sup>

<sup>84</sup> GCX 67, p. 2.

<sup>85</sup> The complaint alleges that SPS was a joint employer with Litco and LSH, as well as with R/C and Litco-Wisconsin. But the record does not provide sufficient evidence about the four-way relationship between SPS, Litco, the persons from whom Litco leased its trucks, and the drivers of the trucks that Litco used, or the comparable relationship involving LSH, to permit me to make findings in those respects.

<sup>86</sup> SPS’ owner telephoned the Board’s Regional Office for Region 30, advising Regional personnel of SPS’ role, before SPS began its work for Litco-Wisconsin/Cardinal.

and (4) SPS in many respects acted entirely independently of the Kutzlers.

*Ligon Specialized Hauler, Inc.:* This, I’m afraid, may seem complicated. The problem is that there were two motor carriers named “Ligon Specialized Hauler,” and both were connected in one way or another to the events at issue here. One company named Ligon Specialized Hauler was a Kentucky company owned by Herbert Ligon. The other was a Delaware company owned by IU International. (I will refer to the two companies as LSH-Kentucky and LSH-Delaware. I am using the past tense because, as will be discussed below: (1) both companies have been renamed; and (2) the company that was LSH-Kentucky is no longer in the trucking business.)

LSH-Kentucky was headquartered in Madisonville, Kentucky, but operated throughout the United States. Until the summer of 1982, Herbert managed LSH-Kentucky as well as owned it.<sup>87</sup> Like Litco, LSH-Kentucky did not own any trucks or employ any drivers. Rather, it provided service via owner-operators with whom it had lease arrangements.

In August 1982 Herbert agreed to sell the assets of LSH-Kentucky, including its operating rights, to LSH-Delaware (the subsidiary of IU International). Because interstate operating rights were involved, the agreement could not be consummated without approval by the ICC. The agreement accordingly provided that LSH-Delaware would take over the operation of the assets of LSH-Kentucky on a temporary basis as soon as the ICC granted temporary authority to LSH-Delaware, pending final ICC approval of the acquisition. (The parties to the agreement knew that the ICC generally took months to consider asset acquisitions, but that the ICC could be expected to promptly approve a request by LSH-Delaware for temporary authority to operate LSH-Kentucky’s assets.)

In late September 1982 the ICC did grant LSH-Delaware the temporary authority to operate the assets of LSH-Kentucky. And from that point on LSH became an IU operation. That is, while the assets still nominally belonged to LSH-Kentucky, in fact they were treated as though they were part of LSH-Delaware. (The assets were formally transferred to LSH-Delaware on 15 February 1983.)<sup>88</sup>

In sum, LSH-Kentucky ceased operating as a motor carrier in September 1982.<sup>89</sup>

Prior to the summer of 1982, Herbert Ligon had run LSH-Kentucky and Litco as though they were divisions of one company. A shipper that called Litco for service might end up with its shipment on a truck leased by LSH-Kentucky (or vice versa). Because of that, and because both Litco and LSH-Kentucky had the word “Ligon” in their names, shippers and, sometimes, truckdrivers, did not readily distinguish

<sup>87</sup> As with Litco, Herbert’s ownership was not direct. Rather, LSH-Kentucky was a wholly owned subsidiary of a corporation that Herbert wholly owned.

<sup>88</sup> Included in the 15 February transfer was Litco’s conveyance to LSH-Delaware of the right to use the names “Ligon Transportation” and “Litco.” See fn. 81, above, and GCX 122.

<sup>89</sup> In the interest of readability the foregoing discussion did not cover all the name changes involving the companies I have referred to as LSH-Delaware and LSH-Kentucky. To begin with, LSH-Delaware began life on 12 August 1982 with the name “LSH Carriers, Inc.” That was changed to “Ligon Specialized Hauler, Inc.” on 5 October 1982. Finally, in September 1983 Ligon Specialized Hauler, Inc. (the Delaware corporation) changed its name to “Ligon Nationwide, Inc.” In January 1983, meanwhile, LSH-Kentucky—that is, the Kentucky corporation named “Ligon Specialized Hauler, Inc.”—changed its name to “Cherokee Leasing, Inc.”

between the two carriers. The relevance of that here is that when the Litco-Wisconsin/Cardinal operation began doing business under contract with Litco, shippers and drivers sometimes treated Litco-Wisconsin/Cardinal as though its connection was with Ligon Specialized Hauler rather than with Ligon Transportation Company.

But that was solely a matter of confusion on the part of the shippers and/or drivers that was generated by the then extinct ties between Litco and LSH-Kentucky. For at the time such events occurred: (1) Cardinal and Litco-Wisconsin had contracted with Litco, not with LSH-Kentucky or with LSH-Delaware; (2) LSH-Kentucky was no longer in the trucking business—or rather, it had no part in the management of any trucking business; (3) LSH-Delaware was owned by IU, which had no ownership interest in Litco; (4) Litco had not entered into any sort of arrangement with LSH-Delaware regarding Cardinal and/or Litco-Wisconsin; and (5) although there were some connections between Litco and LSH-Delaware (both used the same computer facilities, for instance) the two companies were distinct, separate operations.<sup>90</sup>

On 1 February LSH-Delaware entered into a set of transactions that involved leasing trucks (with drivers) from Cardinal and from Frank Kutzler and agreeing to pay an agency fee to Safeway Transportation. The trucks operated out of the Kenosha terminal serving, in the main, Ocean Spray and American Motors. The connection between LSH-Delaware and the Kutzlers ended after 2 weeks. (All that has been discussed in part IV.)

LSH-Delaware entered into those arrangements with Cardinal, Frank Kutzler, and Safeway for usual commercial reasons. The number of trucks involved in those arrangements amounted to only a tiny fraction of LSH's total fleet. There is no evidence at all that LSH-Delaware leased trucks from Cardinal as part of any plot with Kutzler to do harm to FASH or to the rights of R/C's employees, or that LSH-Delaware would have had any reason to suspect that Cardinal was behaving discriminatorily toward R/C's employees (even if Cardinal had been doing so). And because the ownership of LSH-Delaware was (and is) entirely different from R/C's, there is no basis to deem LSH-Delaware to be an alter ego of R/C—even if the ties between LSH-Delaware and Cardinal had lasted more than 2 weeks.<sup>91</sup>

Cardinal's switch to LSH-Delaware from Litco again resulted in some confusion among shippers using Cardinal's services. Thus at least one such shipper erroneously sent payments to Litco for services via Cardinal after 1 February instead of to LSH-Delaware. But the happening of mistakes of that nature says nothing about either Litco's relationship to LSH-Delaware or about any alter ego relationship between R/C and either Litco or LSH-Delaware.

<sup>90</sup> Herbert Ligon became a member of LSH-Delaware's management on 15 February 1983. Arnold Ligon had been on the payroll of LSH-Kentucky, and he went onto the payroll of LSH-Delaware when the latter company took over. But he played no management or supervisory role at either LSH-Kentucky or LSH-Delaware. LSH-Delaware ended its connection with Arnold in the summer of 1983, over Arnold's protests.

<sup>91</sup> LSH-Delaware ended its ties to the Kutzlers on 15 February 1983. It formally completed its acquisition of the assets of LSH-Kentucky on the same day, 15 February. Because of that chronological relationship, Kutzler assumed that there was a cause-and-effect connection between the two events. There was not. LSH-Delaware continued to operate some trucks out of the Kenosha terminal for about a month after LSH had ended its ties to Cardinal, in conjunction with Safeway Transportation Company and Arnold's Power Leasing Division. But that says nothing about LSH's status as an alter ego of R/C.

As for LSH-Kentucky, for all intents and purposes it had ceased its trucking business before Cardinal entered into any relationship with Litco, much less with LSH-Delaware. Thus there is no basis at all to hold LSH-Kentucky derivatively liable for R/C's unfair labor practices.

*Successorships:* I do not understand how Litco could be deemed a successor to R/C since Cardinal, during the entire time it dealt with Litco, maintained the same kind of ownership of its equipment and facilities that it had when it operated with Redway. Successorship, after all, implies some change in ownership.

Turning to LSH-Delaware, it is true that: (1) starting in the middle of February Cardinal's interest in the trucks it had been leasing and, apparently, the Kenosha terminal, did change drastically; and (2) LSH-Delaware utilized those trucks and terminal until sometime in March. But LSH-Delaware used such assets via contract with two companies owned by Arnold Ligon, Safeway Transportation, and Power Leasing Division.<sup>92</sup> Thus if any entity were to be held a successor based on the mid-February shift in the ownership interests in the trucks and terminal, it would be one or both of those two Arnold Ligon companies, not LSH-Delaware.

Finally, both Litco and LSH operated exclusively via leased trucks driven by persons who were employees of the lessors (or, in Litco's case, of SPS). Because the record fails to show that either Litco or LSH was a joint employer of those drivers, for that reason too neither Litco nor LSH may be deemed a successor to R/C. See *Container Transit*, 281 NLRB 1039 at fn. 4 (1986).

As for SPS, I will assume, for present purposes, that a labor broker like SPS could in some circumstances be deemed a successor to a motor carrier. Turning specifically to SPS and the facts at hand, SPS did employ truckdrivers, including some who had worked for R/C. But SPS acquired none of R/C's equipment or facilities. Its offices, moreover, were always in Tennessee, while R/C's were in Wisconsin. Finally: (1) only a small percentage of SPS' drivers had been employed by R/C; and (2) the fact that less than a majority of the drivers SPS employed had previously been with R/C was not a function of discrimination on SPS' part. On several counts, therefore, SPS was not a successor to R/C.

#### VI. THE KUTZLERS' PERSONAL LIABILITY

The complaint alleges that the Kutzlers were "principal shareholder[s] in and responsible for the daily operations of Redway/Cardinal," that they "employed the operations" of Redway/Cardinal, Litco-Wisconsin, Litco, LSH and/or SPS to insulate themselves "from effective liability under the Act for unfair labor practices," and that Kutzler and Gail should therefore be jointly and severally liable for the unfair labor practices considered in this proceeding.<sup>93</sup>

The Board does not hold corporate shareholders or officers personally liable for unfair labor practices unless such individuals perpetrate a fraud, disregard the corporate form by intermingling personal and corporate assets, or dissolve the employing corporation in favor of a disguised continuance. See *Martin Arsham Sewing Co.*, 275 NLRB 633 (1985); *Workroom for Designers*, 274 NLRB 840 at 840-841 (1985).

<sup>92</sup> Power Leasing Division was the company from which R/C had leased trucks. See fns. 60 and 83, above. By February 1983, Power Leasing Division had changed its name to "Leasing Division, Inc."

<sup>93</sup> Pars. 11 and 12 of the amended complaint.

The record fails to disclose any such behavior on the Kutzlers' part. They neither dissolved R/C in favor of a disguised continuance nor intermingled personal and corporate assets. As for the perpetration of a fraud, there is the matter of the Kutzlers' failure to notify the bankruptcy court and/or Cardinal's creditors that the Kutzlers had formed Litco-Wisconsin (as discussed in part IV). But the record proves no *mens rea* on the Kutzlers' part (as also discussed in part IV) and as things turned out the formation of Litco-Wisconsin caused no harm.

I accordingly will recommend dismissal of the allegations against Richard and Gail Kutzler.

#### THE REMEDY

I have found (in part I) that in the spring of 1982 R/C violated Section 8(a)(5) of the Act by failing to bargain with FASH about how the pay of R/C's over-the-road drivers should be affected by the fold-in that the Interstate Commerce Commission had ordered. And, in part III, I concluded that R/C violated Section 8(a)(5) in the period following the shutdown on 28 August 1982.

The question is what remedy, if any, to order.

Redway and Cardinal are defunct. That, alone, would not stand in the way of an order requiring the remedying of the unfair labor practices committed by those companies. E.g., *Construction Erectors*, 265 NLRB 786 fn. 6 (1982). Here, however, not only are Redway and Cardinal defunct, they

have been without assets since mid-1983. Moreover FASH too is defunct. Finally, as this decision has discussed at some length, no other entity is liable for any of R/C's unfair labor practices.

Under these circumstances it would be useless, even misleading, to order any affirmative remedy or even to order any entity to cease and desist from violating the Act. Redway and Cardinal are not in any position to bargain with FASH. In any case, there is no FASH. There is no place to post a notice. And there is no money available with which to pay any backpay (even assuming that an Order requiring R/C to pay backpay would otherwise be apposite).<sup>94</sup> All that also means, or course, that a "visitorial" provision<sup>95</sup> would be singularly inappropriate.

The accompanying recommended Order accordingly dismisses the complaint.<sup>96</sup>

[Recommended Order for dismissal omitted from publication.]

<sup>94</sup>R/C's failure to bargain in the postshutdown period generated no backpay. As for R/C's failure to bargain about fold-in matters, my conclusion (as stated in part I) is that R/C violated the Act by failing to bargain with FASH over whether "gross revenues," within the meaning of the drivers' terms of employment, included the fold-in. It is not clear that a violation of the Act of that nature gives rise to backpay obligations.

<sup>95</sup>See fn. 3, above.

<sup>96</sup>See *Electrical Workers IBEW Local 3 (Telecom Plus)*, 280 NLRB 265 (1986).