

Imco/International Measurement & Control Company, Inc. and its alter egos Imco Sales Co., Imco Service Co., Imco International, Ltd., Zoe Enterprises and Dybel Enterprises, and their agents Frank Dybel, Margaret Dybel, William Dybel, Palette Dybel and Dennis Schlemmer, a Single Employer, and Frank Dybel, Margaret Dybel, William Dybel, Palette Dybel and Dennis Schlemmer, individually and Central States Joint Board, Amalgamated Clothing and Textile Workers Union. Case 13-CA-19837

August 27, 1991

SECOND SUPPLEMENTAL DECISION
AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND RAUDABAUGH

On August 31, 1990, Administrative Law Judge Claude R. Wolfe issued the attached second supplemental decision. All Respondents except Dennis Schlemmer (the Respondents) together filed exceptions with a supporting brief. Respondent Dennis Schlemmer (Respondent Schlemmer) separately filed exceptions with a supporting brief. The General Counsel filed cross-exceptions with a supporting brief and briefs in opposition to the exceptions of the Respondents and Respondent Schlemmer.

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

The Board has considered the second supplemental decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

Background

This long-running case arose in 1980, when the International Measurement and Control Company (Measurement) closed its plant temporarily, terminated several employees, and caused others to lose wages. In May 1982, the Board found that by these actions Measurement had violated Section 8(a)(1) and (3), and ordered it to pay back wages to the affected employees. 261 NLRB 1323. In March 1984, the United States Court of Appeals for the Seventh Circuit enforced the Board's Order. 732 F.2d 158. A controversy then arose over the amounts of backpay due the discriminatees. The Board resolved this matter in its Supplemental Decision and Order of December 1985,

¹ The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

setting forth the amounts owed. 277 NLRB 962. In 1986, the United States Court of Appeals for the Seventh Circuit enforced that supplemental Order in an unpublished decision. Over the course of several years beginning in 1984 and 1985, Measurement was liquidated.² Now before us are the General Counsel's allegations that the corporations and individuals named in the case caption are jointly and severally liable for the backpay award, as alter egos, as a single employer, and as individuals.

The Respondent's Exception to the Admission of
Certain Documents

The principal argument advanced by the Respondents concerns the judge's admission of and reliance on certain documentary evidence introduced by the General Counsel at the hearing. Specifically, the Respondents object to the judge's reliance on hundreds of pages of the Respondents' business records that he "conditionally" or "provisionally" admitted.

Counsel for the General Counsel introduced these documents in support of the various theories of derivative liability that she sought to prove against the named corporations and individuals. Early in the hearing, the judge asked the parties to stipulate to the authenticity of these records, and they did so. Then, at various stages of the General Counsel's case, the judge notified the parties that he was accepting the documents "conditionally," but that the Respondents later would have the opportunity to object to them on grounds of relevance.³

The Respondents claim unfair surprise and the denial of their due-process rights to confront and challenge that evidence because, they say, they could not have objected knowledgeably until they had the chance to review the documents in depth after the hearing. They further argue that the coinciding deadline for posthearing briefs by both sides made it impossible for them to foresee how the General Counsel would use the documents to argue the case, and thus prevented them from exercising their right to object to the evidence against them as irrelevant or as construed out of context.

We find these arguments to be without merit. First, the documents in question are the Respondents' own business records, including canceled checks, tax returns, and financial reports. They already have been submitted into evidence in collateral court proceedings, pursuant to a subpoena for a deposition of Respondent Frank Dybel. There can have been no surprise to their

² It is not clear from the record just when and how the liquidation was finalized. The Dybels withdrew deferred salaries from Measurement at least through 1987. William Dybel testified in 1990 that for the first time that year, no license fees were paid to the State of Illinois on Measurement's behalf.

³ It is clear from the record that by using this technique the judge was seeking to avoid a time-consuming document-by-document presentation by counsel for the General Counsel of her case.

very authors about their nature and content, nor about their relationship—if not relevance—to the claims against the Respondents. The General Counsel’s case depends on showing that the relationships between the various companies and individuals support the finding that liability attaches to those entities and persons named in the backpay specification. The documents are records of the various corporations, partnerships, and individuals. They speak for themselves.

Second, although the simultaneous due dates for posthearing briefs may prevent each party from replying to issues that the other raises at that stage of the proceeding, the Respondents were on notice of the contours of the General Counsel’s argument, and of the General Counsel’s intent to rely heavily on the documents. To begin with, the Respondents knew the nature of the General Counsel’s case from the General Counsel’s backpay specification.

In addition, counsel to the General Counsel made the following opening statement at the hearing:

I intend to prove, through the documents you see before me, which were furnished to me a year and a half ago pursuant to a District Court enforced deposition subpoena, that the entities named in the complaint are the alter egos of the original Respondent, [Measurement]. Moreover, that there have been transfers between and among the various entities names [sic], which warrant the piercing of the corporate veil.

I might say at this juncture, that my prepared case rests entirely on the information that has been obtained through the District Court ordered deposition of Mr. Frank Dybel. . . .

Some minutes later, the judge said, “if I understand what the General Counsel is saying, her reliance is going to be on the documents, which [are] going to pretty much speak for [themselves].” The Respondents’ counsel replied, “I agree.” Again, shortly after this exchange, the Respondents’ counsel acknowledged, “[i]n my view, this is a documentary case.”

Finally, the record discloses that the judge repeatedly reminded the parties of their right to object on relevance grounds; yet the Respondents did not avail themselves of this right. The Respondents did not object to the admission of the evidence during the hearing, at the hearing’s end when the judge invited any further statements, or in their posthearing brief. It strains credulity that the Respondents, aware of the General Counsel’s theory and in possession of the documents—all of which were their own business and personal records—could be “ambushed” by the General Counsel’s posthearing brief.

As the relevance of the documents was not contested, the judge’s reliance on them is wholly warranted. The testimony at the hearing and the docu-

ments together provide ample evidence of the crucial elements of the General Counsel’s case for liability against the Respondents as a single employer, as alter egos, and as individuals.

The Dybel Corporations and Partnerships as Alter Egos and as a Single Employer

After the Board’s initial order against Measurement in 1984, the Dybels began to liquidate that company. When the subsequent backpay proceeding concluded in 1986, the General Counsel commenced the present action to determine whether any of the other Dybel corporations and partnerships are liable for the backpay judgment by virtue of alter ego or single employer status with Measurement.

The judge found that both alter ego and single employer status have been established. The judge concluded that five of the Respondents,⁴ Measurement, IMCO Sales Co. (Sales), IMCO Service Co. (Service), Zoe Enterprises (Zoe), and Dybel Enterprises (Enterprises), did not have “an arms-length relationship.” Instead, “overall control of critical matters at the policy level clearly rest[ed] with family members.” He found, therefore, that the traditional single employer criteria of common ownership, common management, interrelation of operations, and common control of labor relations are all present. He further found that Sales, Service, Zoe, and Enterprises are alter egos of Measurement and of each other because, in addition to the criteria mentioned above, they had a common business purpose of producing (through subcontractors) and selling industrial controls patented by the Dybels, and their operations were integrated to achieve that end; they sold to the same class of customers, i.e., users of industrial controls; they transferred Measurement’s assets among family members; and the disposition of those assets was intended to evade Measurement’s backpay obligations.

Ample evidence supports the judge’s finding that Sales, Service, Zoe, and Enterprises are alter egos of Measurement, and each other, and as such should be liable, with Measurement, for the backpay award. See *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), *enfd.* 725 F.2d 1416 (D.C. Cir. 1984). The record shows that these five Respondent corporations and partnerships are owned principally by the Dybels and Dennis Schlemmer⁵ and reside at the same address. They share a common telephone number, reception area, and entrances to the building. They employ the same accounting firm and bank at the same institutions. Further, the record is filled with instances in

⁴The judge found, and we agree, that International is not liable as an alter ego or single employer for the backpay owed. International therefore is not affected by this decision, and is not covered by the discussion below.

⁵Dennis Schlemmer owns stock in Zoe Enterprises and IMCO Sales Corporation. His wife, Carla, owns stock in Zoe Enterprises but is not named in the backpay specification.

which the Dybels freely transferred assets among the five entities and themselves. (See below for examples relating to the individual Dybels.)

As for interrelationship of their operations, Measurement manufactured and sold the electronic equipment designed and patented by Frank and William Dybel. Sales, which was formed to sell the Dybels' products overseas, quickly took over the domestic sales operation of Measurement as the latter was undergoing liquidation in 1984. Sales also assembles and ships the products. Zoe developed the plant and owns and leases some of the manufacturing equipment. Although the Respondents describe Zoe as a real estate partnership, the record shows that no one associated with it is licensed to sell real estate. Rather it is clear that Zoe's main function has been to build and lease the plant to other Dybel corporations and partnerships. In addition, Service was formed to repair and maintain Dybel products while shielding Measurement and Sales from liability for damage incidental to the service activity, while Enterprises was formed ostensibly to handle the Dybels' investments. In short, each entity either served, in the case of Measurement, or serves, with respect to the other four, the Dybel family business of producing and selling electronic industrial controls, such as transducers and load monitoring equipment, designed by Frank and William Dybel.

Accordingly, we find in agreement with the judge that the five corporations and partnerships satisfy the criteria for alter egos: common management and ownership, common business purpose, nature of operations and supervision, common premises and equipment, and common customers. *Id.* at 1301. We further find, as did the judge, that the manner in which Measurement's assets were distributed among the other entities and the individual Dybels demonstrates intent to evade backpay obligations. See *Weinreb Management*, 292 NLRB 428 at fn. 1 (1989); and *Fugazy Continental*, *supra*.

We also find that the facts establish that the five entities in question constitute a single employer. The Respondents contest this finding on the ground that the factor of joint control over labor relations is not present among all the entities and individuals named, because not all the corporations and partnerships had or have employees. For those Respondent entities that have or have had employees, however, labor relations authority has been shared by the Dybels. Thus, as to those entities, this criterion is satisfied. Because all other pertinent single employer criteria are met with respect to the five entities, and because there is no arms-length relationship among them, the single employer finding is warranted.

Piercing the Corporate Veil to Find the Individual Dybels Liable

In addition to the alter ego and single employer findings described above, the judge also considered the issue of the Dybels' personal liability for the backpay in question. He found the Dybels to be individually liable because they diverted the assets of Measurement and related companies to themselves to evade Measurement's backpay liability. We affirm. The question turns on the degree to which the individual Dybels made personal use of the assets of their corporate entities. Applying that analysis here, the corporate veil must be pierced so that the discriminatees' recovery of backpay from the corporate respondents is not frustrated by diversions of moneys in other than proper arm's-length corporate transactions. *Riley Aeronautic Corp.*, 178 NLRB 495, 501 (1969) (corporate veil will be pierced where the employer, "siphoned off assets for the purpose of rendering insolvent and frustrating a monetary obligation such as backpay . . . or so integrated or intermingled his assets and affairs that 'no distinct corporate lines are maintained.'" (Citations omitted.)) Accord: *Air Vac Industries*, 282 NLRB 703, 711 (1987).

The record is replete with examples. Palette Dybel converted the profit from Measurement's sale of the condominium in which she made her home for use in purchasing a new personal residence. Frank Dybel received for his personal use the profit from the sale of a corporate automobile.

In another instance, the Respondents sought to answer the General Counsel's allegation that the Dybels had divided among themselves the \$40,000 Measurement received for the sale of a yacht. The four Dybels assert that entries on each of their individual tax returns for 1985 reflecting \$10,000 in income for "IMCO-SERVICES" were actually payments for services rendered to Measurement. This is implausible, because for years each Dybel had been reporting deferred salary from Measurement—totaling \$350,000 in 1985 alone. There is no explanation why \$10,000 in salary paid to each would have been recorded on their tax returns as "Other" income rather than wages or salaries, nor were these payments reflected in accounts of the Dybels' deferred compensation reported for that year.

The Respondents' Other Exceptions

The Respondents raise several other exceptions to what they say are inaccuracies in the judge's findings. Among these other exceptions is an objection to the judge's finding that Zoe leased the plant to Sales, which in turn subleased space back to Zoe. Despite the Respondents' assertion that this statement is incorrect,

the record shows that William Dybel testified explicitly to that effect.

The Respondents point out a few misstatements in the judge's decision. For example, the record does not show that Enterprises definitely subleases room in the plant from Sales, which in turn leases from Zoe. In addition, the judge incorrectly stated that Sales paid large amounts of money to Service, when the records show it to be the other way around. Even after noting and allowing for these errors in describing the myriad complex transactions among the entities and individuals involved, we find them to be immaterial. The judge's decision is well supported by the record.

Finally, we find that the judge's decision requires clarification regarding Zoe Enterprises. While we agree with the judge that Respondent Schlemmer is not personally liable for the machinations of the Dybels, Zoe, in which Schlemmer owns stock, is liable. As noted above, Zoe "leases" to the other entities the use of the building they share, several vehicles, and some equipment. Thus, the entities that lease from Zoe transfer income from their segments of the Dybel business into Zoe, which redirects the profits to the Dybels. Zoe, therefore, is inextricably bound in a web of transactions with its alter egos.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, IMCO/International Measurement & Control Company, Inc., IMCO Sales Co., IMCO Service Co., Zoe Enterprises, and Dybel Enterprises, and their officers, agents, successors, and assigns, and Frank Dybel, Margaret Dybel, William Dybel, and Palette Dybel, jointly and severally, and their agents, successors, and assigns, shall pay the backpay and interest thereon as ordered by the Board in *IMCO/International Measurement & Control Co.*, 277 NLRB 962 (1985), and enforced by the United States Court Appeals for the Seventh Circuit.

Linda McCormick, Esq., for the General Counsel.
Michael Moriano, Esq., for the Respondents.
Dennis Schlemmer, Esq., pro se.

SECOND SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This litigation is the third step in this matter. The first involved IMCO/International Measurement & Control Company, Inc. (Measurement) as the named respondent, and resulted in a decision by the Board in *IMCO/International Measurement & Control Co.*, 261 NLRB 1323 (1982), adopting Administrative Law Judge Robert T. Wallace's decision concluding that Measurement had violated Section 8(a)(1) of the Act by closing its facility on April 16, 1980, and Section 8(a)(3) and (1) by discharging Linda Schroba, Barbara Fretts, and Rita

Lannon; by laying off Arlene Dahlman; and by causing others to lose wages. Judge Wallace heard the case on February 1981, and issued his decision in August 1981.

On March 12, 1984, the United States Court of Appeals for the Seventh Circuit enforced the Board's Order in 261 NLRB 1323. Thereafter, a controversy having risen over reinstatement and the amount of backpay due the above-named employees, a backpay proceeding was conducted by Administrative Law Judge Karl H. Buschmann in January 1985, which ultimately resulted in a Supplemental Decision and Order by the Board, in *IMCO/International Measurement Co.*, 277 NLRB 962 (1985), setting forth the amounts of backpay due the discriminatees. This Supplemental Decision and Order was enforced by the United States Court of Appeals for the Seventh Circuit on December 23, 1986.

As the caption in the current proceeding indicates, the General Counsel now alleges the companies and persons named in addition to Measurement are liable for backpay due as alter egos of Measurement, as a single employer with Measurement, and as individuals. These contentions were litigated before me in Chicago, Illinois, on January 8, 9, and 10, 1990.

On the entire record,¹ and after considering the testimonial demeanor of the witnesses and the posttrial briefs, I make the following

FINDINGS AND CONCLUSIONS

I. PRELIMINARY MATTERS

Counsel for all Respondents except Schlemmer argues in his posttrial brief that the Board lacks jurisdiction because none of the Respondents, with the exception of Measurement, were named in the underlying complaint or the original backpay proceeding, and no jurisdictional allegations appear in the specification before me nor was any jurisdictional evidence adduced at the hearing. It is well settled that issues of derivative liability for backpay may be litigated in supplemental proceedings even though parties alleged in such proceedings to be alter egos, to be part of a single employer relationship, or to be liable for corporate assets distributed to them in avoidance of backpay, were not so alleged or named as parties in the underlying proceedings.² With respect to jurisdiction, suffice it to say jurisdiction has been established in the underlying case, alter egos have identical interests,³ portions of a single employer relationship also have identical interests, and corporate officials of a respondent over whom the Board has asserted jurisdiction may be held liable for backpay to the extent they have received corporate assets distributed to them in an effort to evade backpay liability,⁴ and the Board has jurisdiction in the instant proceeding.

Counsel for all Respondents but Schlemmer also contends the delay in commencing this action is contrary to the provi-

¹ There are a number of errors in the transcript, easily recognizable as such, but they have no significant effect on probative evidence. Therefore, in the absence of a motion to correct, I shall not, *sua sponte*, undertake to correct the record.

² See, e.g., *Williams Motor Transfer*, 284 NLRB 1496, 1497 (1987); *South-eastern Envelope Co.*, 246 NLRB 423 (1979); *Las Villas Produce*, 279 NLRB 883 (1986); *Commissary of Great Race Pizza Shoppes*, 277 NLRB 1175, 1176 fn. 4 (1985); *F & F Construction Co.*, 269 NLRB 287 (1984); and *Dahl Fish Co.*, 299 NLRB 413 (1990).

³ *Southeastern Envelope*, supra at 424.

⁴ *F & W Oldsmobile*, 272 NLRB 1150-1151 (1984), and cases cited therein.

sions of 29 U.S.C. § 160(a). An identical argument was rejected by the Supreme Court in *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), which therefore requires the rejection of the instant argument vis-a-vis 29 U.S.C. § 160(a).

II. THE RESPONDENTS, THEIR RELATIONSHIP EACH TO THE OTHER, AND BACKPAY LIABILITY

The original Respondent in this proceeding, IMCO/International Measurement & Control Company, Inc. was incorporated in 1969 by Frank R. Dybel, its president, and thereafter engaged in the manufacture and domestic sale of sophisticated industrial controls based on patents secured by Frank R. Dybel and his son William and licensed to Measurement. Frank R. Dybel generically describes these products as load monitoring equipment. The minutes of the meetings of shareholders in 1983, 1984, 1985, 1986, and 1987 list the shareholders as Frank and William Dybel (Frank's daughter), Palette, Dennis Schlemmer, Carla Schlemmer (Dennis' wife), Edward Antoinette, and Fred L. Phipps. Of 1193 shares outstanding in each of these years, the Dybels held 899, 442 by Frank, 425 by William, and 34 by Palette. Schlemmer held 170 and his wife held 34. The directors were the Schlemmers and three Dybels: Frank, William, and Frank's wife Margaret. The officers in each of these years were as follows

Frank R. Dybel	President
William P. Dybel	Vice President
Margaret V. Dybel	Treasurer
Palette Dybel	Secretary

The Domestic Corporation annual reports filed with the State of Illinois for the years 1984, 1985, 1986, 1987, and 1988. These documents show Frank, Margaret, and Palette Dybel as president, treasurer, and secretary, respectively, and show Frank, William, and Margaret Dybel as directors of the corporation. Dennis Schlemmer, an attorney, is shown as a director in all these annual reports except the one for 1984. His wife's name does not appear in these documents. It appears from the record before me that the Schlemmers took no active role in the management of any of the entities involved in this proceeding. Management in all the various businesses named herein was exclusively conducted by members of the Dybel family.

The four Dybels formed Dybel Enterprises (Enterprises), an Illinois general partnership, in 1974 with equal shares for the purpose of handling their personal investments. Enterprises owns equipment obtained from Measurement, as later described below, and it leases to all the companies involved, except Zoe Enterprises (Zoe).

Zoe came into being as a general partnership of the four Dybels and Dennis Schlemmer on January 1, 1977. The partnership agreement states it was formed "for the primary [but not exclusive] purpose of purchase, improvement, management and sale of real estate and the purchase, lease and sale of manufacturing machinery and office equipment." William Dybel explains that Zoe was formed to construct and to lease the building at 245 East Laraway Road, Frankfort, Illinois, where the Dybel companies have all since located. The Zoe partners guaranteed the building loan. The building was then leased to Measurement who subleased portions of it to Enterprise, IMCO Sales Co. (Sales), and IMCO Service Co. (Service). According to William Dybel, Sales now leases the building from Zoe and subleases to Enterprises, Service, Zoe,

and IMCO International, Ltd. (International). The failure of Respondent to produce signed written leases between 1980 and 1984 as General Counsel requested suggests either that Respondent does not wish to produce them or that no such written documentation exists. Nevertheless, the financial statements of Zoe show the property, buildings and equipment owned by Zoe are leased by a corporation with related ownership interests, and the total amount paid to Zoe by Sales checks⁵ signed by Margaret Dybel in 1985, the year after Measurement commenced liquidating its assets, is slightly more than 86 percent of Zoe's total rental receipts for 1985. It therefore seems reasonable to conclude William Dybel's testimony regarding the current leasing situation vis-a-vis Zoe and Sales may be correct.

IMCO Service Co. (Service) was incorporated on December 1, 1978, by William Dybel for the stated purpose to manufacture, sell, distribute, service, and install certain industrial control apparatus and other goods and wares of every kind and description. On the same day, Frank Dybel incorporated IMCO Sales Co. (Sales) for the same stated purposes. The formal descriptions of purpose aside, the real purpose for the incorporation of Service was to shift liability to independent contractors contacted by Service when repair, installation, or other service was required for unforeseen events during repair and servicing of controls sold by Measurement. Service has continued to so operate to date. The 1000 shares of Service stock are split among Frank, Margaret, and William Dybel in the amounts of 200, 400, and 400 shares, respectively. William Dybel is the corporate president. His mother Margaret is the secretary and treasurer. Frank, Margaret, and William Dybel together with Dennis Schlemmer were the corporate directors through 1984. Dennis Schlemmer was not a director thereafter. The three Dybels have continued as the directors. The affinity of Service to the other entities erected by the Dybel family is explained by the statement in Service's annual financial statements for 1982 through 1987 as follows: "The Company services and installs measuring equipment produced and sold by affiliated companies. The affiliated companies are related through shareholders having a common interest of ownership." Sales was formed for the purpose of pursuing foreign sales, a major part of the market for load monitoring equipment. It currently makes domestic sales as well and assembles industrial controls for shipping, much as Measurement did before its demise as an active organization. Of the 1000 shares of stock in Sales, 400 are held by Palette Dybel, the corporation's president, 200 by Frank Dybel, and 400 by Dennis Schlemmer. Margaret Dybel is the secretary and treasurer, and she, Frank Dybel, Schlemmer, and William Dybel were the directors through 1984. Schlemmer has not since been a director.

IMCO International, Ltd. (International) was incorporated by William Dybel on January 8, 1986. He is the sole shareholder, officer, and director. International has one employee who assembles industrial controls. This company makes specialty products such as micro processors.

Although they are held out by Respondents as separate independent businesses, most of the various enterprises involved here are in fact but parts of an intimate business relationship forged for the purpose of preserving and furthering

⁵The record is not clear these are all the payments made to Zoe by Sales in 1985.

the financial fortune and interests of the Dybel family. The bedrock on which this assemblage of corporations and partnerships is based consists of the patents of Frank and William Dybel. The value of these patents and their importance to the viability of Measurement was recognized in the Zoe partnership agreement of January 1, 1977, which provides, in addition to other capital contributions by the partners, as follows:

Frank R. Dybel and William Dybel agree that all their issued U.S. and foreign patents, and all pending U.S. and foreign applications . . . are held for the benefit of this partnership, subject to the present outstanding license to International Measurement & Control Company. It is further understood and agreed that all future inventions, patents, and patent applications of Frank R. Dybel and William Dybel relating to the general subject matter of the aforesaid patents and applications shall similarly be held for the benefit of the partnership.

Measurement was devoted to the manufacture and sale of the products patented by the Dybels. Zoe was created to furnish a facility within which to carry out the manufacture. Sales was nothing more than the foreign sales arm of Measurement, and Service was an auxiliary to Measurement constructed to avoid product liability but yet provide service of Measurement's products. Measurement, Zoe, Sales, and Service were interrelated operations, were all controlled and managed by members of the Dybel family who were the officers and owned all or most of the shares in each of these entities. Control of labor relations at each was shared by Dybel family members. Each family member had authority to write checks on each of these businesses. All of these entities were housed at the same address with the same phone number and public entrance and the same accountant. The sign in front of the building within which they were located bears the legend IMCO in large letters, with Measurement's name in smaller letters below. The sign puts the public on notice this is the business place of Measurement, and does not, as William Dybel claimed, designate two companies at that location. Another indication that here we have one integrated enterprise rather than totally separate ventures is the fact that Sales paid Service \$17,000 in 1986, \$5000 in 1987, and \$4000 in 1988, which funds were deposited in Service's payroll account. Why Sales made the payment and/or why they were placed in Service's payroll account when Service only dealt with independent contractors is not explained. A preponderance of the evidence indicates that Measurement, Zoe, Service, and Sales constituted a single integrated employer engaged in manufacturing and marketing the products of the inventiveness of Frank and William Dybel. Each needed the other to exist.

The liquidation of Measurement's assets beginning in 1984 not only did not change the relationship between Measurement, Service, Zoe, and Sales, but in fact added Enterprises to the package. This disposal of assets followed on the heels of advice by Geza Novosel, Measurement's accountant, some time in early 1984 that Measurement should terminate its manufacturing function which was operating at a loss, contract out the manufacturing of the product, and retain the domestic sales operation which appeared to be a viable option. Measurement officials followed the advice of Novosel to the

extent they ceased manufacturing and subcontracted it to others to whom they licensed their patents, but they went further and transferred Measurement's domestic sales function as well as some assembly of controls manufactured pursuant to the Dybel patents to Sales, who had already been making some domestic sales, and embarked on liquidation of all Measurement's remaining assets.

On September 19, 1985, William Dybel transferred \$116,340.27 from his personal money market account to Dybel Enterprises, which the very same day wrote a check to Measurement in the same amount in payment for Measurement's equipment. William Dybel concedes the money was given to Enterprises to enable it to make the purchase. The following day, September 20, 1985, Measurement, by Margaret Dybel, wrote checks to family members as follows: Frank Dybel—\$15,340; Margaret Dybel—\$15,340; Palette Dybel—\$18,973; and William Dybel—\$41,808. What happened here is that William Dybel's personal funds were transferred to Enterprises who then transferred them to Measurement in exchange for control of its equipment, and Measurement then returned the money to the Dybels who are in fact Dybel Enterprises. A similar circular transaction occurred when Measurement "sold" *The Palmargo*, a yacht, to Enterprises for \$40,000, and then issued checks, dated December 2, 1985, for \$10,000 to each of the Dybels. The 1985 individual income tax returns of William and Palette Dybel each show \$10,000 received from "IMCO-SERVICES" as "Other income." The joint return of Frank and Margaret Dybel for 1985 lists \$20,000 from "IMCO-SERVICES" as "Other income." There is no explanation in the record for these notations. Palette Dybel was not then and is not now an employee, officer, director, or shareholder of Service. The \$10,000 she lists could not therefore be income from salary or investment in Service. Service's financial balance sheets for 1985 and 1986 show no expenses at all for wages or salaries, and contain nothing that could be construed as a record of the \$40,000 the Dybels collectively claim on their tax returns to have received from Service in 1985, nor do the pertinent corporate tax returns and financial balance sheets of Measurement reflect any such disbursement of the sort its checks to the four show it in fact made. Absent any other reasonable explanation of these matters, I am inclined to believe it likely that, for reasons unknown to me, the Dybels elected to list the money received from Measurement on sale of *The Palmargo* as income from Service. Whatever the reason for so listing that money, the fact it happened is illustrative of the ease with which family members may, if they so desire, credit funds to or subtract funds from the various company accounts involved in this case. Measurement owned another boat named *The Palmargo*, on which there was an outstanding mortgage of \$76,379.10. This was paid by Dybel Enterprises via a promissory note signed by all four Dybels on July 1, 1985. This included an overpayment of \$1280.83 which was refunded to Measurement by General Electric Credit Corporation on or about September 20, 1985, when Measurement deposited that refund in its bank account. The boat was thereafter retained at dock for family use until it burned.

In addition to the sale of boats and various automobiles which generated proceeds for Measurement, all of which Respondents claim were paid out to the Dybels as deferred sal-

ary,⁶ there was a real property sale. Measurement owned a condominium it purchased for \$71,500. Palette Dybel lived there for years until it was sold for \$125,000 on November 2, 1984. Representations by William Dybel that this was property held for the purposes of business entertainment are not credited. This clearly was used as Palette Dybel's principal residence. Measurement cleared \$62,146.56 from the sale after paying off an existing mortgage. This was deposited in Measurement's bank account on November 5, 1984. The same day, Measurement, over the signature of Margaret Dybel, who wrote checks for all the various business entities involved in this proceeding, issued a check to Palette Dybel in the amount of \$62,146.56. Palette Dybel then used these funds to buy a new personal residence. She characterizes this money as deferred pay. The same is true of a check to Frank Dybel in the amount of \$3394.53 on October 22, 1984, by Measurement on the same day it sold an automobile for the same amount.

Conclusions

The traditional criteria for deciding a single employer issue are common ownership, common management, interrelation of operations, and common control of labor relations.⁷ All of these are present in this case with respect to Measurement, Sales, Service, Zoe, and Enterprises. Dybel family members are either sole owners or majority stockholders in these firms. Management and supervision is vested in and exercised by family members in every instance. Other persons who have a limited financial interest in some of the businesses neither possess nor exercise any management control. All of these entities together constitute one interrelated operation directed to the production, sale, and service of products based on the patents of Frank and William Dybel. Labor relations policy is not regularly set by any one member of the family, but appears to be an area in which each member of the family has authority to establish labor relations policy on an ad hoc basis as the situation requires in any constituent part of the interrelated operation. These factors and the ease with which the family, by in effect dealing with itself, transfers funds from one entity to another are sufficient to establish a single employer relationship between Measurement, Sales, Service, Zoe, and Enterprises. Theirs is not an arm's-length relationship of the type found with unintegrated companies, and overall control of critical matters at the policy level clearly rests with family members, individually and collectively. See *Emsing's*, supra; *Il Progresso Italo Americano Publishing Co.*, 299 NLRB 270 (1990). The evidence does not, however, show that IMCO International, Ltd. is part of that relationship.

The officers, shareholders, and directors of Measurement knew when it terminated its manufacturing operations effective July 1, 1984, and commenced liquidating its equipment and other assets that Measurement was liable for any amounts of backpay and interest due the employees it had

discriminated against in 1980. The Board had so found in *IMCO/International Measurement Co.*, 261 NLRB 1323 (1982), and the United States Court of Appeals for the Seventh Circuit enforced that decision on March 12, 1984, in an unpublished decision, listed at 732 F.2d 158. Notwithstanding these outstanding decisions, the liquidation of Measurement's assets proceeded with no provision for satisfaction of the Court enforced order of the Board even though Measurement's accountant Geza Novosel, who avers he was not involved in the actual liquidation of assets, credibly recalls the unfair labor practice proceedings were mentioned by Frank Dybel during Novosel's preliquidation discussions with Measurement officers and directors, and that Novosel advised that if the Board's decision became final it would have to be recognized. The obviously foreseeable consequence of the failure to sequester or otherwise preserve proceeds of the liquidation of Measurement's assets sufficient to defray the potential backpay liability clearly known to have been incurred as a result of its unfair labor practices was the distribution of those proceeds to other companies and/or individuals, such as happened here, and thus the defeat or delay of recoupment of the backpay due. Persons are held to intend the foreseeable consequences of their conduct.⁸ Accordingly, I conclude Frank Dybel and the other officers and directors involved in the distribution of the liquidation proceeds conducted that distribution in a manner designed in part to evade Measurement's backpay obligations.

The criteria applicable to an alter ego/disguised continuance issue are set forth in *Fugazy Continental Corp.*,⁹ as follows:

In determining whether [one employer] is the alter ego of [another], we must consider a number of factors, no one of which, taken alone, is the sine qua non of alter ego status. Among these, factors are: common management and ownership; common business purpose, nature of operations, and supervision; common premises and equipment; common customers, i.e., whether the employers constitute "the same business in the same market"; as well as the nature and extent of the negotiations and formalities surrounding the transaction. We must also consider 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.

Common ownership, management, supervision, premises, and equipment are all present here. The common business purpose remains the production, albeit primarily through subcontractors, and sale of industrial controls patented by the Dybels. It is an integrated operation dedicated to that business purpose for the financial betterment of the Dybel family. The product is sold by the family firms to the same class of customers, i.e., users of industrial controls. The transfer of Measurement assets to family members was accomplished in a pseudo-formalistic manner which in fact amounted to nothing more than self dealing. Add to this the inference of intent to evade backpay obligations which flows from the disposition of Measurement assets without regard to those existing obligations, and the situation before me meets all the *Fugazy*

⁶In response to a leading question posed by his counsel as follows: "Do you recall if the distributions out to your family were in payment of the money you never got that you already paid taxes on?" William Dybel answered, "Yes. They were." This quoted testimony has little probative weight because it amounts here, as in other instances, to testimony by counsel in favor of his client rather than testimony by the witness. Compare *H. C. Thomson, Inc.*, 230 NLRB 808, 809 fn. 2 (1977).

⁷ See, e.g., *Emsing's Supermarket*, 284 NLRB 302 (1987).

⁸ *Radio Officers Union v. NLRB*, 347 U.S. 17, 45 (1954).

⁹ 265 NLRB 130 (1982), enf'd. 725 F.2d 1416 (D.C. Cir. 1984).

criteria. Accordingly, I conclude and find IMCO Sales Co., IMCO Service Co., Zoe Enterprises, and Dybel Enterprises are alter egos of IMCO/International Measurement and Control Company, Inc. and each other.

Here, as in *Fullerton Transfer & Storage*, 291 NLRB 426 (1988), the Dybels have managed to divert the assets of Measurement to their own use and thus commingle their personal assets with those of Measurement. This was effected in part by (1) using their partnerships Enterprises and their personal funds to ostensibly purchase Measurement's equipment and yacht *The Palmargo*, and then redistribute these funds back to themselves; (2) selling the condominium and immediately passing the proceeds on to Palette Dybel to replace it with another residence; (3) Enterprises paying off the mortgage on another Measurement owned boat dubbed *Palmargo*, as distinguished from *The Palmargo*, and then utilizing that boat for family pleasure; and (4) immediately transferring the proceeds of the sale of a Measurement vehicle to Frank Dybel for his personal use. All of the companies discussed are part of the family enterprise in which all four members have an integral part and contribute to and benefit from it individually and collectively. The interrelated companies are owned and controlled by the family which has been the sole beneficiary of the liquidation of Measurement's assets. The diversion of those assets to family members was designed, at least in part, to evade backpay liability. For those reasons, I conclude and find that Frank, William, Margaret, and Palette Dybel are jointly and severally liable as alter egos for the backpay obligations of Measurement involved in this proceeding.

There is no evidence Dennis Schlemmer, also alleged as an alter ego, received any part of the proceeds from the Measurement liquidation, or has otherwise financially benefited therefrom or is liable for backpay except to the extent his financial interest may be affected by the liability of Zoe, in which he is a partner, his interest as a shareholder and director of Sales and as a director in Service. Dennis Schlemmer has not been shown to be an alter ego of Measurement by a preponderance of the credible evidence. Similarly, the evidence does not warrant a conclusion that International is an alter ego of Measurement.

The General Counsel alleges in the alternative that each of the Dybels and Dennis Schlemmer received fraudulent conveyances from the six named companies, and each is therefore liable for the backpay ordered in the amount of funds

so received. It is settled that corporate officers may be personally liable in a backpay proceeding to the extent corporate assets were distributed to them in an effort to avoid backpay liability. *F & W Oldsmobile, Inc.*, 272 NLRB 1150 (1984); *Las Villas Produce*, 279 NLRB 883 (1986); *G. Zaffino & Sons*, 289 NLRB 571 (1988). I have found the distribution of the proceeds from the liquidation of Measurement, without provision for meeting a known backpay obligation, was intended to avoid that obligation, but there are other considerations. Measurement's balance sheets for 1982 through 1986 reflect deferred compensation for officers in the amount of \$250,000 for 1982 and \$350,400 for 1983, a total of \$600,400, reducing to a total of \$385,156 by December 31, 1986. Novosel credibly testified the salaries of the Dybels as officers of Measurement were \$100,000 per annum each for Frank and William, and \$75,000 each for Margaret and Palette, a total of \$350,000, commencing in 1980. There is no convincing evidence to the contrary. It may well be therefore that absent the intent to avoid backpay obligation the distribution of the liquidated assets of Measurement as part payment of deferred compensation would be appropriate as Respondent claims, but the intent is present here. The matter is, however, academic inasmuch as all four Dybels are alter egos individually and collectively liable for all the backpay due with interest. An alternative finding is therefore unnecessary.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondents, IMCO/International Measurement & Control Company, Inc., IMCO Sales Co., IMCO Service Co., Zoe Enterprises, and Dybel Enterprises, and their officers, agents, successors, and assigns, and Frank Dybel, Margaret Dybel, William Dybel, and Palette Dybel, jointly and severally, and their agents, successors, and assigns, shall pay the backpay and interest thereon as ordered by the Board in *IMCO/International Measurement & Control Co.*, 277 NLRB 962 (1985), and enforced by the United States Court Appeals for the Seventh Circuit.

¹⁰If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.