

**Girardi Distributors, Inc., Quabbin Labor Pool, Inc., Erin Distributors, Inc., Suburban Contract Carriers, Inc., Commonwealth Labor Pool, Inc., and Metrowest Warehousemen, Inc. and Truck Drivers & Helpers, Local 170, a/w International Brotherhood of Teamsters, AFL-CIO.**<sup>1</sup> Cases 1-CA-26394, 1-CA-26561, 1-CA-26660, and 1-CA-27243

July 24, 1992

### DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On August 19, 1991, Administrative Law Judge Wallace H. Nations issued the attached decision. Counsel for the General Counsel filed exceptions and a supporting brief,<sup>2</sup> the Respondent filed an answering brief, and the General Counsel filed a brief in response.

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,<sup>3</sup> and to adopt the recommended Order.

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Girardi Distributors, Inc., Suburban Contract Carriers, Inc., Commonwealth Labor Pool, Inc., Metrowest Warehousemen, Inc., Quabbin Labor Pool, Inc., and Erin Distributors, Inc., Leominster, Massachusetts, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The name of the Charging Party has been changed to reflect the new official name of the International Union.

<sup>2</sup> Counsel for the General Counsel's motion to correct inadvertent errors in her briefs is granted.

<sup>3</sup> In adopting the judge's recommendation that the informal settlement agreement in Case 1-CA-26660 should be reinstated, we note that the General Counsel has not specifically excepted thereto otherwise asserted that the settlement agreement should be set aside.

In relation to the judge's 10(b) discussion, Chairman Stephens agrees that the instant case is distinguishable from *Kanakis Co.*, 293 NLRB 435 (1989); and *Redd-I, Inc.*, 290 NLRB 1115 (1988). The Chairman further observes that the result here is consistent with the analysis set forth in his dissents in those two decisions.

Member Raudabaugh also agrees that *Kanakis* is distinguishable from the instant case and he expresses no opinion as to whether he agrees with *Kanakis*.

*William F. Grant* and *Gene Switzer, Esqs.*, for the General Counsel.

*Henry F. Telfeian, Esq.*, of San Francisco, California, and *Fred R. Long, Esq.*, of Los Gatos, California, for the Respondent.

*Donald S. MacCalmon, Esq.*, of Boston, Massachusetts, for the Charging Party.

### DECISION

#### STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Truck Drivers and Helpers, Local 170, a/w International Brotherhood of Teamsters, AFL-CIO (the Union) represents certain employees of Girardi Distributors, Inc. (Respondent or Girardi), for purposes of collective bargaining. At all times relevant to this case until April 16, 1990, Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit employees, such recognition being embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms for the period May 19, 1986, to May 19, 1989 (the 1986-1989 agreement).

The Union and the Respondent commenced negotiations for a successor agreement to the 1986-1989 agreement on or about April 18, 1989. Respondent engaged the services of West Coast Industrial Relations Association (West Coast) to represent it in negotiating.<sup>1</sup> Negotiations continued through September 4, 1989, when Respondent, on that date, implemented its final offer.

The Union filed the charges in Cases 1-CA-26394 and 1-CA-26561 prior to Respondent's implementation of its final offer.<sup>2</sup> Those charges alleged, inter alia, that the Respondent had engaged in bad-faith bargaining in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The charges also contained 8(a)(3) allegations relating to the Respondent's conduct during the bargaining process. After investigation, those charges were dismissed by the Regional Director.<sup>3</sup>

On September 8, 1989, the Union filed the charge in Case 1-CA-26660. That charge alleged, inter alia, that Respondent violated Section 8(a)(5) when it implemented its final offer as well as Section 8(a)(1) by certain statements attributed to Kenneth White, Respondent's operations manager. After investigation, the Regional Director dismissed that portion of the charge alleging that Respondent had unlawfully implemented its final offer, while the alleged 8(a)(1) statements became the subject of a unilateral, informal settlement agreement approved by the Regional Director on February 22, 1990.<sup>4</sup>

On December 1, 1989, Respondent, without explanation, notified the Union of its withdrawal of its final offer. Respondent subsequently contacted the Union to inform it that it was considering utilizing a subcontractor to perform the work that was being performed by the unit employees. On

<sup>1</sup> The parties have stipulated that West Coast is an agent of the Respondent.

<sup>2</sup> The charge in Case 1-CA-26394 was filed on May 19, 1989, while the charge in Case 1-CA-26561 was filed on August 4, 1989.

<sup>3</sup> The decision to dismiss the charge in Case 1-CA-26561 was subsequently upheld on appeal. No appeal was filed in Case 1-CA-26394.

<sup>4</sup> The Regional Director's partial dismissal of the charge was upheld on appeal.

or about April 2, and again on April 4, 1990, the Union requested the Respondent to provide it with the name of the subcontractor the Respondent was thinking of using to perform the unit work. Respondent refused to provide that information. On or about April 13, 1990, Respondent began to use a subcontractor to perform the unit work which resulted in the discharge of all unit employees.

On April 16, 1990, the Union filed the charge in Case 1-CA-27243, alleging, inter alia, that Respondent's refusal to provide it with the name of the subcontractor violated Section 8(a)(1) and (5) of the Act. After an investigation, a complaint was issued on June 28, 1990, alleging that Respondent's refusal to provide the Union with the name of the subcontractor violated Section 8(a)(1) and (5) of the Act. The complaint further alleged that the Respondent had subcontracted the unit work without providing the Union an opportunity to negotiate and bargain over the matter and had withdrawn recognition of the Union in violation of Section 8(a)(1) and (5) of the Act. A hearing on the complaint was scheduled for November 19, 1990.

On the morning of November 19, 1990, prior to the opening of the hearing in Case 1-CA-27243, David Murphy and Peter DeVito, the principals of the subcontractor that Respondent was using to perform the unit work, presented themselves at the Regional Office. Murphy and DeVito provided certain information to counsel for the General Counsel regarding their relationship with Respondent which caused counsel for the General Counsel, with the assent of Respondent, to request an adjournment of the proceeding. Further investigation was performed, resulting in the receipt of certain information from now former Operating Manager Kenneth White. Based on the information provided by messengers Murphy, DeVito, and White, the Regional Director decided to reinstate the earlier dismissed charges on the theory of fraudulent concealment. That information also caused the General Counsel to move to amend the complaint in Case 1-CA-27243.<sup>5</sup> With respect to the issues of fraudulent concealment, the General Counsel contends that the information provided by messengers Murphy, DeVito, and White revealed that Respondent had engaged in an elaborate scheme with West Coast to rid itself of the Union, using the collective-bargaining process to conceal that fact from both the Union and the General Counsel.

A consolidated complaint and notice of hearing issued on March 15, 1991, in Cases 1-CA-26394, 1-CA-26561, and 1-CA-26660 (the consolidated complaint) alleging that the Respondent had engaged in bad-faith bargaining during the months of April through September 1989 and that it had unlawfully implemented its final offer on September 4, 1989, in violation of Section 8(a)(1), (3), and (5) of the Act.<sup>6</sup>

<sup>5</sup> Amended charges were filed in Case 1-CA-27243 on November 27 and March 13, 1991. Those amended charges were never made a part of the record herein. On brief, General Counsel moved that the record in this matter be reopened for the limited purpose of accepting into evidence those amended charges. Counsel for the Charging Party and the Respondent were apprised of this motion and do not oppose it. The motion is granted.

<sup>6</sup> The consolidated complaint also set aside the informal settlement agreement in Case 1-CA-26660, and, as such, the consolidated complaint contains an 8(a)(1) allegation relating to statements attributed to White. The General Counsel also moved to consolidate Cases 1-CA-26394, 1-CA-26561, and 1-CA-26660 with Case 1-CA-27243.

A motion to amend complaint in Case 1-CA-27243 (the amended complaint) issued on March 14, 1991. Essentially the amendment identified the subcontractor to whom the work was assigned in April and alleged it to be a single employer with Respondent. The April 1990 subcontracting of bargaining unit work and the discharge of the bargaining unit was alleged to constitute a violation of Section 8(a)(1) and (3) of the Act and the April 1990 withdrawal of recognition of the Charging Party was alleged to violate Section 8(a)(1) and (5). The amended complaint also alleged Quabbin Labor Pool, Inc. to have been, since its creation in September 1990, an alter ego and disguised continuance of Respondent. Prior to the close of the hearing herein, Erin Distributors Inc. was also added to the complaint as an alter ego and disguised continuation of Respondent.

Prior to the commencement of the hearing in these matters, Respondent, among other things, filed a motion to strike the consolidated complaint. By its motion, Respondent asserts that the allegations contained in the consolidated complaint are barred by the 6-month statute of limitations proviso of Section 10(b) of the Act. Respondent further maintains that it has not fraudulently concealed operative facts, or evidence thereof, from either the Union or the General Counsel that would warrant the tolling of the 10(b) period within the meaning of the Board's decision in *Ducane Heating Corp.*, 273 NLRB 1389 (1985), enf'd. 785 F.2d 304 (4th Cir. 1986).

Respondent also argues that the settlement agreement in Case 1-CA-26660 was not properly set aside. Finally, Respondent asserts that the allegations in the motion to amend the complaint in Case 1-CA-27243 are barred by Section 10(b) as they are not closely related to the allegations contained in the original complaint.

A hearing was held on these matters on March 25 to 29, April 1, 17, and 18, and May 8, 1991. Because of the 10(b) issues raised by the consolidated and amended complaints, including the legal issue of the alleged fraudulent concealment, the hearing in these matters closed on May 24, 1991, under the following terms. Respondent has conditionally amended its answer to the amended complaint to now admit all of the factual allegations in paragraphs 1-23. If the consolidated complaint is dismissed as time barred under Section 10(b), Respondent's amended answer will be effective. If, on the other hand, the consolidated complaint is not dismissed pursuant to Section 10(b), the hearing shall resume for the purpose of the Respondent presenting a defense to all of the allegations of the consolidated and amended complaints.

#### I. JURISDICTION

It was admitted and I find that Girardi Distributors, Inc., Suburban Contract Carriers, Inc. (Suburban), Commonwealth Labor Pool, Inc. (Commonwealth), Metrowest Warehousing, Inc. (Metrowest), Quabbin Labor Pool, Inc. (Quabbin) and Erin Distributors, Inc., all Massachusetts corporations, were, at all times material to this proceeding, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE INVOLVED LABOR ORGANIZATION

It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

The issues presented for determination in this proceeding are as follows:

1. Has General Counsel established a prima facie case concerning Respondent's bad-faith bargaining as alleged in the consolidated complaint and if so,

2. Is the statute of limitations period of Section 10(b) of the Act tolled by Respondent's fraudulent concealment of operative facts, or,

3. Are the allegations of Respondent's bad-faith bargaining closely related to the Respondent's unlawful 8(a)(1) conditional promises to employees, which were the subject of a properly set-aside settlement agreement?

4. Are the allegations contained in General Counsel's motion to amend the complaint in Case 1-CA-27243 barred by the statute of limitations period of Section 10(b) of the Act?

5. Are the legal conclusions drawn from the factual allegations that were plead in the amended complaint and admitted by the Respondent warranted?

#### A. Prefatory Statement Concerning Credibility Resolutions

Depending on the Board's determination of the 10(b) elements of this case, this decision will either mark the end of this dispute as it presently stands, or merely the halfway point in its trial. As noted above, only the General Counsel has submitted evidence to this point. The Respondent has estimated that it will present evidence requiring hearing of equal or greater length than that held thus far in the event the Board's ruling on the limitations question is adverse to it. The Respondent's evidence, if presented, will obviously have a great bearing on credibility resolutions presented, many of which cannot even be identified at this stage. Any serious attempt to make binding credibility resolutions now can only be said to be folly.

Therefore, for the purpose of reaching an ultimate decision on the limitations issues, I have decided to accept the General Counsel's recitation of fact as the operative facts to determine the issues presented. As I believe that the limitations provisions of Section 10(b) are not tolled in the circumstances presented herein, and thus most of the serious allegations of violations of the Act are not reached for a decision on the merits, I will accept General Counsel's recitation of facts as presented on brief virtually unchanged in order that General Counsel's case can be viewed in the light most favorable to him. The only exception to this method of presentation will be if evidence I deem relevant to the issues has been omitted.

In the event that the Board determines that the limitations provisions of Section 10(b) are tolled, and thus further hearing is required, I will not be bound in any fashion by this recitation in making final credibility resolutions.

#### B. Recitation of Facts

##### 1. Background

Respondent is a distributor of Anheuser Busch products, beer, and liquor; a related company, Regal Eagle, Inc. (REI) collects and processes empty containers under the Massachusetts "bottle bill." The Companies' geographic territory encompasses northern Worcester County and Franklin County,

two relatively rural areas in northwestern Massachusetts. As of 1989, Respondent operated the following facilities: Athol, Massachusetts, which housed Regal Eagle operations and corporate headquarters; Leominster, Massachusetts, which was the base of operations for Worcester and Franklin Counties beer distribution; Greenfield, Massachusetts, which was engaged in Anheuser Busch beer and liquor distribution and Pittsfield, Massachusetts, which is a separate bargaining unit<sup>7</sup> engaged in distributing Anheuser Busch beer in Berkshire County.

George "Buddy" Girardi Jr. owns the Company (including REI), which was founded by his grandfather, and run by his father George Girardi Sr. until approximately 1985, when he took over. Prior to 1985, there were harmonious labor management relations. For example, long-term employee and union bargaining unit member Richard Chasson described George Girardi Sr. as a friend as well as a boss. By all accounts this changed when Girardi Jr. took over. Chasson testified that Girardi Jr. told him soon after assuming control that the Union was forced upon his father and one of his priorities was to get rid of the Union.<sup>8</sup> Chasson indicated that this was common knowledge and that various management persons had indicated to him over the years that they wanted to get rid of the Union. He testified that Girardi would from time to time try to persuade the union personnel that they would be better off with the benefits the Company gave to nonunion personnel than with the union benefits. Kenneth White likewise testified that during this general time period Girardi Jr. told him one of his goals in the business was to be "Union free." After taking over the business, Girardi first moved liquor and wine distribution from the Athol union operation to the nonunion Pittsfield plant, and later transferred the suburban Franklin County Anheuser Busch deliveries from Athol to Pittsfield. The Union grieved this action, which was referred to arbitration. The arbitration award dated July 12, 1988, referred to the transfer of work out of the bargaining unit as "a decision that undermines the Union and attacks the integrity of the bargaining unit," and suggests that the transfer was not made in good faith. The award ordered the work returned to the bargaining unit.

Kenneth White was employed by Respondent for 25 years, starting as a helper on a beer truck and working his way up in the organization. At the time of his separation, on May 15, 1990, he was operations manager, overseeing receiving and shipping of all Anheuser Busch products, in which capacity he directly supervised the bargaining unit involved in this case, which consists of warehouse employees, truck-drivers, and helpers. As first-line supervisor, White was the first management official in the grievance procedure.

<sup>7</sup>This bargaining unit voted to decertify the Union some time before the events herein involved occurred.

<sup>8</sup>Chasson was approached in March 1991 by persons from the NLRB to give testimony in this proceeding. He was not so approached at any time while the charges of bad-faith bargaining were pending. White was likewise asked about his knowledge of the events surrounding bargaining only after he came forth and volunteered information with respect to the subcontracting issue. No reason was given why these men or any other employees of Respondent were not interviewed with respect to the earlier charges filed by the Union.

## 2. Bargaining

White testified that Girardi learned of West Coast through an industry newsletter, and was impressed with the union concessions and decertification which the organization had obtained for other employers in the industry. Girardi told White that he was going to hire West Coast to negotiate contract concessions in the upcoming round of negotiations.

After West Coast was hired, a team was formed to review the collective-bargaining agreement "to take things out and to add things that we wanted to change in the contract." The team consisted of West Coast Attorney Wayne Peterson, Girardi, General Manager Robert Curran, Advertising Manager Mark Dusay, White, and occasionally Warren Barnett, the Company's accountant. The team met approximately six times before beginning bargaining with the Union.

One of Girardi's goals was to alter the form of compensation, changing from an hourly rate to an incentive system. John Blake from the Denver Management Group was hired to devise an incentive system. He met twice with members of the Girardi team prior to bargaining. He was originally instructed to convert the employees' present incomes to a per case payment. Blake calculated that this converted to 22 cents per case for a one-person truck, and 32 cents per case for a truck with a driver and helper. He also recommended a quarterly bonus. Girardi did not like Blake's plan because the compensation was too high, and prepared his own plan providing for compensation of 10 cents per case, with no provision for a bonus. Girardi objected to the bonus because it was going to cost him too much money.<sup>9</sup> It was decided that in actual bargaining they would start off at roughly 75 cents per case and gradually move up, leaving a "paper trail" of all movement. In its June 6, 1989 statement of position filed in response to Case 1-CA-26394, Respondent alluded to "three or four complete offers on its economic proposals . . . . [E]ach of the offers were more generous than the previous one," and stated that the wage structure was fashioned to provide a "competitive rate" for the area.

During the prebargaining meetings of the management team it was decided that management would propose eliminating the Union's health and welfare and pension plans, and propose replacing them with the Guardian Health Insurance Plan (which was in effect for other Girardi employees) and a 401(k) pension plan.<sup>10</sup> The management team thought this change would result in a substantial loss to the Union, which in turn would cause the Union to recommend a strike. Indeed, West Coast's representative throughout, Warren Peterson, expressly predicted, "They're going to strike us on this one."

At one point during the initial meetings of the management team White proposed removing the union-security

<sup>9</sup>White testified that in explaining his plan to the team, Girardi wanted to show how the men could make fairly decent money by delivering x number of cases, and could make more money by doing it in less hours. Reducing the Company's labor costs was evidently not a matter of economic necessity. However, the Company did prepare a study that demonstrated, at least to it, that its union work force was overpaid in relation to other workers in its area.

<sup>10</sup>According to Chasson, Girardi had been proposing this change to the men since he took over the Company. Although it is not clear, this may well have been a formal company proposal in the negotiating for the 1986 contract.

clause, but Peterson rejected the idea "[B]ecause the Labor Board would jump all over us."

White testified that Girardi wanted a contract he could "live with, by cutting out everything and getting concessions from the Union that he could live with, knowing that they [the Union] wouldn't like it, and possibly strike us." White also testified that the management team intended to go in with a low contract:

THE WITNESS: Mr. Girardi said it, I said it, I think Mr. Dusay said it. It was a pretty low contract that we were starting to negotiate. This was just to start negotiating.

JUDGE NATIONS: What do you remember Mr. Girardi himself saying on that issue, on that subject?

THE WITNESS: Word for word I can't be sure, but what I just said, going in with a low contract, that they wouldn't really like it. And if they should strike us, anybody, like this thing was, the expression that day and that time was that anybody in their right mind would strike us with this contract.

JUDGE NATIONS: That's what Mr. Girardi said?

THE WITNESS: I can't be sure, but Mr. Girardi and Mr. Peterson, Mr. Dugay, or myself, or Mr Curran.

According to White, "Girardi wanted them [the Union] to strike so he could replace the union personnel with non-union men and advertise to do it." No one else said this in the prebargaining meetings.

The management team engaged in strike preparations well before actual face-to-face bargaining with the Union began. Peterson distributed two documents, a strike preparation manual and bargaining check list at approximately the second team meeting. The check list enumerated duties for the various management officials in preparation for a strike. For example, section I, "Pre-bargaining," includes the following enumerated duties: "12. Potential strike replacement requirements form . . . 18. Office duties after strike . . . 24. Select hiring site . . . and 26. Develop final company proposals, Section II, in conjunction with bargaining included: 1. Begin bargaining; 2. Run ad; and 3. Interview and screen applicants. Check references . . . Section III Post Strike included: 1. New employee orientation and operations; and 2. Start up and run." The strike preparation manual was distributed for review by team members, but was then taken back and redistributed at "crunch time" when implementation was imminent and a strike was anticipated. It is a detailed description of procedures to be followed in the event of a strike.<sup>11</sup>

White testified that in the management meetings Peterson expressly described West Coast's approach as showing a lot of movement and leaving a paper trail for the Labor Board. Respondent's bargaining notes and the truncated testimony of Union Agent Harold Berry verify such movement and meticulous recordkeeping by Respondent.

Respondent's bargaining notes show movement, especially with regard to the proposed management-rights clause. Management began bargaining by submitting to the Union a lengthy contract proposal containing numerous changes in not only the basic form of compensation and benefit pack-

<sup>11</sup>White testified that the strike manual was distributed "just to get ready, just in case there was a strike, what we could do, what we couldn't do."

age, but also extensive changes in contractual language. The management-rights clause included the right to subcontract all bargaining unit work:

[T]o subcontract work in the event this becomes a consideration of the Employer, then the Employer agrees that before doing so, they shall notify the Union prior to, and at the request of the Union to discuss and explain its reasons or basis for that consideration.

On June 2, 1989, Respondent agreed in a side memorandum not to subcontract "beyond current levels." Respondent alluded to this "concession" in its statement of position submitted in Case 1-CA-26394:

Finally, at this session, the Company also presented to the Union a side memorandum dramatically restricting the right of the Company to subcontract in an attempt to allay the Union's fears that bargaining unit work might be subcontracted out from underneath the employees.

As planned, the initial incentive rate proposal provided for payment of 75 cents per case.

Shortly after the commencement of bargaining White met with Special Response, the security force which was to be employed during a strike.

White testified that he attended three of the negotiating sessions, one of which concerned the Guardian Health Insurance Plan. At the May 18, 1989 session the Union pointed out, and management agreed, that the Guardian Policy was actually more expensive. Respondent's bargaining notes contain the following entry for the May 18 session:

M-We have a better plan; willing to pay more, is there anything in your plan that is not offered in Guardian?

U-We're self insured & our costs are high; have trouble keeping costs in line; don't know how you can do it.

M-Guardian Rep. explains size of Company and fact it is profitable. (Gen. discussion about plan.)

U-indicates it wants to keep own plan.

M-indicates its plan is better and wants men to have a better plan, even though it may cost more.

U-says it doesn't want a better plan, give men wages instead since M is cutting them; never seen a Company willing to voluntarily give increase.

M-we want pay competitive wages, but also know how important health plan is to men.

U-we don't want a change.

In May 1989, after the Company proposed incentive pay, management planned interviews for replacement employees. Advertisements were taken out in several area newspapers. These ads sought drivers and helpers offering starting pay of \$10 to \$12 per hour for drivers and \$9 to \$10 per hour for helpers, with substantial benefits. Nothing in the ads indicated the positions were other than permanent. White explained the reason for that testifying "They got the Company figure, that [the Union wasn't] going to accept it, and they were going to strike us." Between May 10 and 17, 1989, White and Dugay interviewed approximately 500 individuals

at two locations and compiled a list of 50 possible replacements. Interviewees were told that the Company was in negotiations with the Union, and that if the Union struck, they would be hired as full-time, permanent replacement workers.

White testified that the Union never accepted the incentive plan and that the Company's final offer was implemented on September 4, when the parties reached impasse at the bargaining table. White testified that management was shocked when the Union did not strike at implementation.

Daniel Maroni owned a tire dealership in Athol which serviced the Respondent. After Maroni's business closed, he was hired by White in May 1989. Maroni knew messengers Curran, Dugay, King, and White through his tire business, and perhaps because of this was given work assignments throughout the Company. Specifically, he cut brush around the Athol facility, went out on trucks, performed miscellaneous REI work, painted the Greenfield warehouse, was a night watchman for the Leominster facility, and assisted in the April 1990 move from Leominster to Athol.

As noted, when Maroni was hired negotiations had only recently begun, and a wage proposal calling for dramatic reduction in pay had been made by the Company. According to Maroni, he and all other nonunion, nonmanagement employees at Girardi's were viewed by distrust by unit employees. He appears to have enjoyed the confidence of management, and he had numerous conversations about the Union with various members of management, and notwithstanding their distrust, had similar conversations with union employees. The first occurred within a few weeks of his hiring when he encountered Curran in the Athol warehouse and described to Curran the verbal abuse he had received from the union men. Curran's response was "in our process of busting the union . . . things may get worse, but if you stick in there and stick with us and do your job . . . they'll be a job for you in the end."<sup>12</sup>

White testified that under the implemented incentive system the top men would do as well or better than before, but that there was "no way" that the men who were lower on the seniority list could match their previous wages. In this regard Maroni testified:

When they implemented the incentive contract and went to the piecework type pay, it was a considerable cut in pay for me, and—and I questioned Ken White as to, you know, well, why should I go on a delivery truck and—and work 14 hours for \$65 when, in fact, I could go back to the Athol warehouse and cut brush, for instance, for eight hours and make \$80.

<sup>12</sup> Maroni also stated at several points in his testimony that all conversations at about this time, whether it be with management or members of the bargaining unit, revolved around "the fact that it was well known that there was a union/labor dispute with the ultimate outcome hoping that Girardi would bust the union." Either prior to or during negotiations, he had a conversation with the Union's steward at Girardi and was told by the steward that Girardi's aim in negotiating was to bust the Union. He also testified that White told him that there was going to be a strike, but never told him that he hoped there would be a strike. The substance of his testimony in this regard, and specifically his testimony about management personnel volunteering to him that they were out to "bust the Union" was told to the Union's attorney in an interview held in August or September 1990.

You know, it was that type of—of instance that I was losing money by staying on the delivery truck, and—and Ken White's answer to me was just to stick with it, bear with it and that in the end, it would be worth it again. I heard that many times.

Q. From who?

A. Ken White, Bob Curran, Mark Dugay, Dave King.

I mean, it's part of what's going on within this company, you know. Why do I have to work under this incentive plan? Well, you got to do this. You have to stick with this and—and once the union is out, things will change.

Q. Who said that?

A. Again, at one time Mark Dugay, Ken White, Bob Curran and Dave King. At one point in time, each one of them have said that, conveyed that to me in one form or another.

Union Shop Steward Tom Williams was on vacation during the first week of operations under the incentive contract. When he returned to work he demanded that White explain the new system of compensation, and a heated exchange occurred during which time no one began work. The next day Curran ran into Maroni and asked him to describe what had happened. According to Maroni, in the course of that conversation, Curran said, "I can't wait until we get rid of the Union." During the conversation Curran also remarked that the Union is going to be upset with actions, and as such, for Maroni, "it was going to get worse before it gets better"; but that "it would get better when the union is gone." In fact, Curran promised Maroni one of the jobs of the union men after management got rid of the Union.

Respondent's Pittsfield employees were paid on an hourly basis. White testified that after the incentive rate was put into effect, the employees assigned to Leominster complained about the drastic reduction in their pay and he told them, "I suppose if you were non-union, you'd be getting the same pay Pittsfield is getting." Also, shortly after implementation various drivers complained to White that unlike the Regal Eagle employees, they were not permitted to wear shorts. White's response to the complaints was "If you were probably non-union, you could probably wear Bermuda shorts." According to White he made the statement because Girardi had earlier told him that "If they vote to get out of the Union, they'd get the same pay as Pittsfield."<sup>13</sup>

The implemented contract did not provide for arbitration. According to White, Curran on a number of occasions said "let (the Union) write the grievances, because its going to stop at my desk anyway."

### 3. Subcontracting

In approximately late January 1990, DeVito and Murphy learned from Jimmy DeSilva, the owner of another trucking company, that Respondent was looking for somebody to take over some contract work because of "Union problems."

<sup>13</sup>In connection with the charge filed over these statements, the Board took the affidavit of unit member, Peter Lyman. Lyman swore, inter alia, "We all knew the Company would like us to go non-union."

DeSilva himself was not interested in the work because he had other negotiations going on with Local 170 in Vermont.

Both DeVito and Murphy spoke to Curran and arranged to meet in Athol. Curran told Murphy that the meeting would have to be held in the evening because he did not want any of their employees to know what was going on. Curran further stated "[W]e would prefer that you didn't come with a vehicle with a company name on it."

The first meeting was between messengers DeVito, Murphy, Girardi, and Curran. Girardi began by saying they came "very highly recommended." DeVito and Murphy described their produce business.<sup>14</sup> According to DeVito, after some general conversation, Girardi said "let's cut the bullshit, I want to let you know why you guys are here . . . we're having difficulties and problems with the Unions and we're trying to get rid of the son-of-a-bitches . . . I've been trying to get the bastards to strike for the last two months and I've been unsuccessful."

Murphy also testified that at the first meeting Girardi said he had "tried to get the Union to strike on a couple of occasions and [the Company was] really hoping they would." Murphy further testified:

They had tried, Girardi had tried and was hoping that the Union would strike—you know—point blank. And he said that Berry isn't as stupid as he looks, because they never turned around and strike. And they couldn't you know—he just couldn't believe it. He figured they would any time.

Girardi then referred to beating the Union in Labor Board cases and announced "We're going to get rid of the Union."

Q. Did he say how?

A. Yeah. Through his attorneys, through his attorneys, because like I say, they were the best of the best. According to Mr. DeVito, Mr. Girardi also stated:

I think he said Washinton, once, and they had another meeting that was coming up, if in fact they could get them to strike, which he was trying to make them do. And he was unsuccessful, because he was cursing them. He kept calling them, "No good son-of-a-bitches," he says, "If I can get them to strike, you guys can start the very next morning. "And said, "What if you can't get them to strike?" He says, "you can start anyway." I said, "Okay. Let's talk about the money."

Girardi used the blackboard to set forth the nature of the operation and the numbers involved, including the seasonal nature of the business, the rural area included in the sales territory and the number of employees needed. Although DeVito and Murphy were "overwhelmed" by the presentation, they were interested.

Although the two men both recalled the opening part of the initial meeting, their recollections varied as to the particular meeting at which various events occurred. Either at the first meeting (according to DeVito) or at the second meeting (according to Murphy), the costs of operating the

<sup>14</sup>DeVito trucking companies gross over \$15 million a year, operating 25 tractor-trailers in a nationwide produce purchase and hauling operation.

delivery operation were set forth in detail, and a formulation was presented which left them with a \$100,000 profit. DeVito described the ensuing exchange:

I said, "What's the matter with that . . . don't entice me to come the fuck up here and drive three hours and bring a crew here to work. For a hundred grand, you know?"

He says to me, "Well, well, wait now." He says, "How about Blue Cross Blue Shield, a K-5 plan, all this health insurance bullshit." He says, "Warren," he says to Bob, because Warren wasn't there. "Bob, get Warren Barnett on the phone. "So, he calls downstairs to Warren."

He says, "Warren, how much do we pay for the Blue Cross and the Blue Shield and the health and benefit package, the whole thing?"

So, Warren says, "Give me a minute."

So a couple of minutes goes by, we're just sitting studying the numbers, Dave and I. And Warren comes up. He says, "\$7600 a man," he had it all listed on a piece of paper. "That's what it costs us per man to give them the health and benefits."

"I'll give you that," he says.

"How much is 14 men times \$7600," he says, for calculation, he went up to the blackboard again, he says, "\$106, 000. I'll give you that \$106,000 but I can't give you that \$106,000 in the contract."

I said, "Why can't you give me the \$106,000?"

He says, "Because we're going to get into that right now. I need to show the Union and the Labor Board economic savings versus what I'm paying now with the increase that the Union's looking for. I can give you the \$106,000, but this contract can only show for the \$100,000."

After DeVito agreed that he would perform the work for that amount, DeVito testified to the following exchange:

Girardi says, "But, we have to figure a way to make this an arms length transaction."

I didn't know what the fuck he was talking about.

I says to him, "You come with the 206, stand over there, pass it to me, and that's arms length, what do I care. I'll do whatever you want me to do," I told him.

So he started laughing and he put his arm around me and he said, "I like you," he says.

The discussion regarding "arms length" continued; Murphy testified that at one point Girardi indicated:

He was going to put his daughters in business and do the game thing basically we were going to do, but the National Labor Board would be able to see right through it, being his daughters and everybody else. And they needed somebody that wasn't close to them, somebody that wasn't from Athol. Because if not, he had other key people in his organization that he could turn around and front.

Well, the ultimate, the whole goal of everything is to get rid of the Union, make sure it's all non-union—you know—it's a arms length transaction, and you have to protect yourself doing it also.

We don't want the Union back.

Murphy testified that Girardi was not concerned about the comparative cost:

If I needed cars, if I needed anything, he said he didn't care, point blank, if it cost the same or a little more as long as he got rid of the fucking Union. Quote, unquote, that's it.

Q. The same or a little more than what?

A. Of whatever the Union was charging. He didn't care, he just wanted them out. He spent too much time, he spent too much money.

Like he kept saying, he'd turn around and he'd say, "That's why you people are here. That's why I hired the best attorneys money could buy."

I admired the man because he knew one thing, point blank, he wanted to do it first class, he would have done it, except he got amnesia when it came to paying.

Murphy and DeVito devised a system that they believed would meet everyone's needs, and presented the plan to Curran and Girardi. Three corporations were to be formed, Suburban Contract Carriers (Suburban), Metro West Warehousing (Metro West), and Commonwealth Labor Pool (Commonwealth). Suburban was to perform the actual delivery and warehouse work. Commonwealth was to "lease" labor to Suburban. Metro West Warehousing was originally conceived to "warehouse the product."

At the meeting to discuss the arrangement further details were worked out. DeVito pressed Girardi on how the \$106,000 was to be paid, since it was not to be in the contract.

DeVito testified to the following exchange:

Warren Barnett says, "Well Buddy, you know we can't pay them out of Girardi, because the Labor Board for the Union comes in and audits our books and sees a direct payment to these guys, we're in deep shit. And they will come in and audit."

So, Buddy turns to him and says, "Very, very good point."

So, Bob Curran says, "Well, what's the difference, we go other corporations. We got Regal Eagle, we can pay them . . . out of there."

There was a corresponding need to hide the receipt of the \$106,000; Murphy testified to how that was to be handled:

Oh, that there, we turned around and that's what Metro West was for. It was a vehicle to funnel the money.

We turn around and—whatever the contract would read, okay, which we had no idea at the time, whatever the contract would read, whenever they needed to go before the Labor Board, I would turn around and we would take the payments, whatever it would be and any monies for overages or any cars or anything whatsoever, they would write the check to Metro West.

Q. What did you need a funnel for?

You needed to turn around and show it's an arms length transaction.

So, when you turn around and when the Judge asks me, when I go in before him, "How much did Suburban Contract Carriers make out of this deal?"

I can look him right in the eye and tell him the truth.

It made whatever it was, 570, and it's no one's business, because I'm not Metro West.

The parties continued to meet on a regular (weekly) basis to refine the plan. Curran requested proposals from the various corporations controlled by DeVito and Murphy:

A. Curran needed proposals to give to Wayne Peterson to show to the Labor Board the economic savings by switching to the company if in fact it was going to be us and he'd have all the figures in the proposal. This would all be done for him.

We brought him A & D Trucking, we brought him DeVito Trucking Company, and then again we brought some more Suburban and some more Metro West, because he needed four or five different proposals for Wayne Peterson to show to the Labor Board why he chose us.

Curran says, "No, go there's no misunderstanding, we're going with you guys, we made our mind up. We need these proposals on different letterheads to show them this is why we chose you."

Murphy admitted in his testimony that the stationery had to be given to Girardi because "I don't know how to write a proposal like this, I've never been out in this position," and that it was needed "to document Wayne Peterson's case."

According to DeVito, it was also at this meeting that they saw the handwritten "proposal" for the first time:

From that point on, after they agreed that they were going to pay for all that, and there was no problem with that, Bob Curran handed me a long sheet of white paper, five or six of them all folded and stapled together, as an agreement, which said A & D on it.

He said to me, "This is what you signed."

So I took it and I looked at it and I said, I didn't sign it. I gave it to Murphy.

So Murphy got it, flipped the pages, started to read it and he started laughing, and he says to Curran, "What the fuck is this, where did you get this language?"

So Curran started laughing, he says if you read it close, a lot of it came out of the Ryder proposals, that's where I got the language.

DeVito testified that he laughed at the final paragraph, which read, "We guarantee it will be the start of a long lasting relationship that will be to our mutual benefit."

According to DeVito, Girardi expressly agreed beforehand to cover all legal fees associated with the arrangement:

A. I said to Buddy Girardi, "You're going to have to pay for all that. You're going to have to pay to set these three corporations up and you're going to have to pay the bill from the attorney for the setting up of the ICC, the DPU, and the ABC."

He says, "I have no problem with that."

Murphy testified that Attorney Michael Kelley was retained for the incorporation and regulatory work because he wanted to hold his trial attorney, Richard Chambers, in reserve to be used in the expected NLRB trial.

DeVito gave the following account of Girardi's original plan of how to terminate the work force:

Girardi calls me up about two days later and he says to me listen, "How fast can you move my warehouse from Leominster to Athol, without anybody knowing about it."

So, explain in detail, how many case there?

We figured out it was about 20-25 trailer loads. He wanted it done early in the morning, 1 o'clock, 2 o'clock in the morning on a Saturday.

So, when the Union guys were done working on Friday, he would empty out the warehouse in Leominster, bring it all to Athol and we would start Monday morning and he said, "And fuck them guys."

And Curran says, "Well, you should give them a week's notice, send a letter. Wayne Peterson's going to tell you to do that.

"Fuck them, give them nothing," he says. "Element of surprise," he says, "Fuck them. They'll all be standing in Leominster and we'll be delivering in Athol."

Murphy testified that Girardi was dissuaded from this approach by Curran, and that he participated in a conference call with Peterson in which Peterson assured Girardi that a final bargaining session would be scheduled, after which they would be free to put the plan into effect. During that evening, Murphy testified the following comments were made:

Buddy was anxious because his whole life he felt was in a turmoil. He told me, he spent too much money and time trying to oust the Union.

A. Wayne turned around and said that he was going to send out a letter to the lawyers, no, a letter to the Union saying he was going to give them three more dates to meet with him.

Q. Okay.

A. And this would be the last time he meets with them to reach a contract or whatever you call it there, to reach an agreement.

Buddy was afraid that the Union—"What if the Union turns around and accepts Murphy's proposal within ten percent?"

Bob Curran turned around and said, "There's no fucking way they can do it. The numbers speak for themselves, there is no way they can do it."

Nobody could live with that.

The handwritten "proposal" from A & D Trucking was thereafter typed on Suburban stationery, dated March 7, 1989, and bears the signature of Murphy. According to Murphy, Curran personally typed the document on stationery he had earlier provided and affixed his signature and mailed it to him. DeVito testified that when the typewritten "proposal" was received he again laughed since they knew it was not Murphy's signature.

Between the time of the call to Peterson and the commencement of services on April 14, 1990, Murphy and Curran met frequently. During this time Murphy requested "front money," and was given \$16,380 to cover the expense of workers compensation and general liability insurance. The check was drawn on the account of Regal Eagle and payable

to Commonwealth. DeVito testified that when Curran hand delivered the check to him at his Everett, Massachusetts office, Curran explained why this was done:

Q. Did Curran say why it was a Regal Eagle Check?

A. Because then he says again, "We couldn't write it out of Girardi, because we are expecting the Labor Board and the Union to come in and audit our books, and we don't want to show any payments to anybody over and above what that contract is going to be for."

Q. Who said it to you?

A. Bob Curran.

Q. What did he say?

A. We do not want the Labor Board or the Union to trace any of these payments to show that we financed this operation.

Also during the meetings the identity of the work force was discussed. Murphy gave the following account:

Girardi said he wanted people that weren't intimidated easily. . . . He had advertised in a local newspaper, using the Holiday Inn as an office because of fear of a strike or whatever, they wanted applications from people . . . .

He had 50 that he narrowed it down would be the best suited for his operation and he would turn them over to us.

But we told him and he agreed, that we didn't feel comfortable with hiring people from the Athol area, because number one, we had to keep it an arms length transaction. Everything was supposed to be top secret.

So, we suggested bringing the people out of Boston where we could control the atmosphere. He agreed to it and we said, Okay, when we get to the local help, he would have a lot of influence as far as who would and would not be working there.

Q. What was said about the kind of person you were looking for in this initial period?

A. Well, he just want basic warriors if you really want to know the truth.

DeVito's account of the discussion on that point was as follows:

Girardi said, "Can you supply me with the 14 people from Boston while all this is going on?"

Q. All what?

A. He at that point said he was having all kinds of difficulties with the Union again.

He said he was trying to get them to strike and he was telling me all about the different meetings with the Labor Board and the Union and it didn't really mean too much to me, those were his problems. But he kept stressing to me that he wanted me to bring people from Boston. He wanted me to bring people from Boston that could not be intimidated.

I said, "Well, what do you mean, I'm not going to bring any choir boys here."

As noted, Girardi had initially told DeVito he wanted to employ the "element of surprise" in firing his employees but Peterson told Girardi not to do it that way. Suburban had,

however, already hired a work force which Girardi agreed to begin paying even before they actually performed any service. The first invoice was dated March 23, 1990.

By letter dated<sup>15</sup> December 1, 1989, Girardi withdrew its offer due to "changed economic circumstances." Harold Berry on December 5, 1989, requested an explanation, and Union Counsel Donald MacCalmon on December 6, 1989, posed additional questions. West Coast on December 13, 1989, explained that the changed economic situation was due to a shift in the balance of power, and on January 8, 1990, West Coast informed the Union that it was in the process of putting together a proposal, and suggested a meeting in late January or early February.

On March 7, 1990, Peterson informed the Union that it had been "approached by several companies offering to perform the bargaining unit work and REI work. The letter emphasized that no decision had been reached, but enclosed a "cost evaluation study" prepared by BDO Seidman Co., which showed the yearly cost savings of \$621,347 if the work was contracted out. The costs included labor, truck leases, and fuel. The letter contained the following passage:

Although the savings are significant, the Company is willing to retain the work in-house if the Union is willing to make concessions that would bring distribution costs within ten percent of the projected savings from contracting out. By this I mean, if the Union makes cost concessions of \$559,212, the Company will not contract out the work.

After an exchange of correspondence concerning possible dates to meet for bargaining, the Union on March 23, 1990, requested the full BDO Seidman cost study and the subcontracting proposals. On March 26, 1990, West Coast informed the Union that the study would be provided, and enclosed a copy of the subcontracting proposal, with the only deletions being those items pertaining to the subcontractor identity.

The parties again exchanged correspondence concerning possible dates to engage in bargaining. On April 2, 1990, the Union requested the name of the subcontractor and a copy of the contract which was to "govern the relationship" with the subcontractor.

On April 3, 1990, West Coast informed the Union that the name of the subcontractor was not relevant or necessary to the bargaining process, and further stated no contract had been entered into but that the proposal encompassed the scope of the work and economic basis of the offer. West Coast explained the proposal was the source document for any contract that may be drawn up if a decision to subcontract was made.

On April 3, 1990, Peterson confirmed an April 5 bargaining date, and stated that the "company wished to initiate subcontracting on April 9, 1990 if the economic justification was confirmed."

As noted earlier, Murphy testified that he was told that Peterson was pressing the Union to meet with Regpondent for one last bargaining session. The purpose of the meeting was to give the Union an opportunity to come with 10 percent

<sup>15</sup> With regard to the following exchange all dates refer to the date appearing on the document, not the date the document was received.

of the cost set forth (at that point) in the proposal, later to become the agreement.

At the April 5 bargaining session MacCalmon hand delivered a letter reiterating the demand for the subcontractor's identity and the actual signed contract. Peterson's notes contain the following description of the exchange at the bargaining table:

U—Info Request

U—We have the right to determine the validity of the contract and to know the name of the company subcontracting.

M—Disagree, Don't think it is necessary or relevant.

U—Think it is.

M—Don't have a contract since no decision yet, gave you proposal with scope of work and economics. Sufficient.

U—Don't want to call you a liar but no name on contract and can't bargain on behalf of client without info since Girardi could have get the company himself or it might be a double breasted operation. Would be remiss in duties to client to bargain.

M—Disagree, do you have a proposal for us. Not doublebreasted.

U—Our proposal is for the information. Threshold issue and have no other proposal.

M—The name has no relevance. The reason we believe you want it is to try to coerce the company.

Murphy, who as earlier noted was already being paid by Respondent, had arranged with Peterson to meet with the management team when they broke for lunch "to let me know what the game plan was going to be, how much more time." As planned, Murphy met with the team. Peterson expressed surprise that the union negotiators "walked out" after 5 minutes, giving the Company the opportunity to go forward with the subcontract. At one point Curran excused himself and the following exchange occurred:

And, Wayne Peterson said to me, "You're getting a contract shortly." And his only hope was, he said, "My only hope is that you can make money."

I told him, I said to him, "Well, I got a separate deal here I got the six weeks cost plus, I got the hundred plus 106," Whoa, he hemorrhaged in the chair.

Whoa, he says, "Stop."

Point blank, he said, "If it's illegal, I don't want nothing to do with it." Point blank, "I don't want anything to do with it because I won't defend something that's illegal. If it's legal," he says, "You got any side deals there with Girardi." I understood right from that point on what kind of an attorney he is.

Q. Have you had dealings with attorneys like that?

A. There's some you can tell everything to, and there's some you can't. There's some that won't go into a court and just say what—you know—if he doesn't know about it, he'll defend you.

There's others you can turn around and talk to like he's your brother, you know.

I knew where he was coming from, I knew what was happening.

On April 11, 1990, Peterson notified the Union that inasmuch as its "bargaining obligations" had been met Respondent intended to subcontract the work as of April 16, 1990. On April 10, 1990, the Union renewed its demand for the name of the subcontractor and on the same date, Peterson responded:

I have searched for authority on this but find nothing on point. The subcontractor has asked that his identity not be revealed because of the potential for illegal conduct, and I feel compelled to honor that request.

The subcontractor is an independent Massachusetts corporation with no ties to Girardi Distributors. In short, there is not a scintilla of evidence to suggest that the subcontractor has been set up in business by Girardi Distributors or that the operations may be double breasted.

In the absence of any evidence that the proposed subcontracting relationship is anything other than an arms length relationship, your request for the subcontractor's name does not appear to be relevant and necessary.

Contrary to Peterson's representation, Murphy testified that on numerous occasions he told Curran that Suburban Contracting Company could be identified as the subcontractor.

Q. Do you remember any other time you told them, okay, go ahead and give our name or was that the only time.?

A. No, I said it right along, kept telling Curran, "Give'em the name." But I knew Wayne Peterson had his own methods.

In its statement of position in Case 1-CA-27243, dated May 35, 1990, West Coast referred to the chronology of correspondence, noting the April 3 response that "[A]n actual contract had not been executed since a final decision had not been reached." It referred also to the April 5 bargaining session, and the Company's position that "it did not wish to identify the subcontractor pursuant to the subcontractor's request." In summary, West Coast, *inter alia*, stated:

The Union had the complete factual economic package upon which to formulate proposals . . . the Company was not obligated to provide the name of the subcontractor because the subcontractor had specifically requested the Company not do so in fear of union retaliation.

Regarding the "factual economic package," the statement continued:

When considering whether information is relevant and necessary, one must look to the facts of the case. From the outset, the economic basis of the subcontracting proposal was provided to the Union, including the cost of keeping the work in-house and the contractor's projected cost.

On the issue of the identity of the subcontractor and the nature of the relationship, the statement asserted:

At the bargaining table on April 5 . . . The Company's representative indicated to the Union that it was an arms length relationship and an independent Massachusetts corporation and was refusing to provide the name of the subcontractor, pursuant to the subcontractor's request in that it feared union retaliation. In fact, the Union had no evidence upon which to base its supposition that a double-breasted operation could have been established. There is not a scintilla of evidence to establish that the Union had any reason to suppose this was the case.

West Coast then went on to state that once it had decided to subcontract the work it had no ongoing duty to bargain with the Union, for there were no longer any employees for whom the Union would serve as bargaining agent. It asserted that the bargaining throughout was in good faith, as demonstrated by its offer as early as March 7 to provide a "severance package." Regarding regard to its action in withdrawing the implemented "offer," West Coast stated:

The Company implemented its final offer on September 4, 1989, after reaching impasse with the Union. The implementation was challenged by the Union and certified as appropriate by the Board. Some three months after the Company's implementation of its final offer, the Company sent a letter to the Union withdrawing its offer. This withdrawal was based on changed economic circumstances. It is important to note that neither party had made any proposals during the three month interim period between September and December, 1989. The Company indicated that, based on the changed economic situation, i.e., the Company was in a stronger position in December, it was considering "more efficient options for delivering our product" and was willing to meet with the Union.

After complaint issued, West Coast submitted another statement of position, this time directed to the General Counsel. In it West Coast "expressed concern" about both the decision itself, and "the coercion inherent in getting a trial date six months in the future." The argument section began by restating its earlier position that the name of the subcontractor was not necessary for bargaining, reiterated that there was an "arms length" relationship. ("If the Company was guilty of double breasting, the Union had recourse by filing an unfair labor practice charge. The NLRB would conduct a thorough investigation on and determine the merits of the charge.") West Coast also set forth the "dire consequences to the Employer of a make whole remedy . . . [T]he work structure of the Company was substantially altered as a result of the subcontracting, and at this point it would be unduly difficult, if not impossible to reconstruct the operation as it was prior to subcontracting . . . [T]rucks used to transport the company's product have been turned over to the subcontractor and are no longer the Girardi Distributors vehicles." Finally the case was characterized: "The issue in his case is very narrow and the facts are not in dispute," and urged an "expedited hearing date."<sup>16</sup>

<sup>16</sup>White testified that around the first of May 1989, shortly after subcontracting had begun, he asked Girardi why he wanted to subcontract when he had such an advantageous arrangement with the

A "Contract Carrier Agreement" (the agreement) was prepared by Respondent's counsel's law firm and signed by Murphy and Curran. The economic terms of the agreement are those contained in the proposal. Murphy testified that he proposed various clauses during his numerous meetings with Curran and there were discussions concerning the number of men required for beer distribution and the number of trucks which would be used. According to Murphy his initial interest in the terms which would be included in the contract waned as time went on; the only substantial question he raised when presented with the document he eventually signed concerned the liquidated damages and bonding clauses. Once again the reason for this lack of concern in the terms of the arrangement are described by Murphy:

A. I was going to get the \$10,960.62, per week, each and every week, and whatever I billed for overages. In other words, if I had extra help.

You see, everything at the beginning was based on six trucks, two men per truck and two warehouse personnel.

Curran said, "You're right, this isn't a bus company where you can turn around and say there's X amount of stops, there's this—we'll go in for the first six weeks, let's do the first six weeks, let's get that over with. We'll go in at cost plus.

After that, we'll figure out what's actually what. If we need to do this, if we need to do that, we're not sure if the Regal Eagle pick-ups on the truck are going to work . . . .

A. That was nothing—I hate to say it, I don't know if there's any criminal action come out of it, and don't want a party of it, that's why I was dead set against coming here. But this contract was nothing but a fraud to get the Union out. And I went along with it.

DeVito testified that he signed the agreement without being fully aware of its contents:

A. In the third meeting, I did sign the contract, because Bob Curran put it in front of me, he said, will you sign this?

And I looked him in the eye, that's when I brought up the point about the blank—the two blank lines. And I says, to him, I looked him right in the eye, and says, "Do you want me to sign this contract, do you need me to sign this contract?"

He said, "Yes."

I said, "Then I'll sign it."

A. I asked Girardi about the fuel, I asked him, he says, "Fuck it, they'll never figure it out, that's a bonus, just gas up at the pumps out there."

Q. Well, why would you sign a contract that doesn't represent the arrangement.?

A. Because I believed him.

Under the "side deal," the weekly billing of \$10,960.62 was supplemented by Metro West billings for the difference between allotted payroll and actual payroll, as well as other associated expenses. Barnett at one point prepared a break-

Union. According to White, Girardi replied that he wanted to get rid of the Union.

down of these overages and computed the total owed as of May 18, 1990. A check dated May 25, 1990, was drawn upon Regal Eagle for \$26,552 and was made payable to Metro West.

On April 14, 1990, Suburban tractor-trailers moved the entire contents of the Leominster warehouse to Athol. The displaced union men appeared frequently at the Athol facility under the watchful eye of employees from Respondent's contract security personnel from Special Response. According to Murphy, he implored Curran to dismiss Special Response, because they provoked the men on the picket line, but the Company had other reasons for their presence:

And I told him, get rid of them, me and my people do not need protection. I'm telling you right now, they won't start no shit at the gate.

He said, "Well, let's try it, Buddy wants them here." He agreed, Buddy wanted to make a statement and the statement was—Buddy really wanted to see violence. The guy really wanted—I'm dead serious from day one, he wanted us up there just to kick ass, and that's it. Leave a statement, Buddy's the king of the hill. And that's the way it was always presented to me. And, he wanted to be king of the mountain and he was, except it didn't go his way. But when the shit hit the fan, he took off.

The work force of "warriors" assembled by DeVito and Murphy may have initially pleased Messengers Curran and Girardi, but the infatuation was short lived:

A. Oh, they were getting weeded out within 3 weeks to the end of 2 months, they were all gone I believe.

Q. How did they get weeded out?

A. Well, one instance right off the top of my head was Bob Curran didn't like Fox, John Fox, because he had a pony tail and an earring.

He said my men had more jewelry on them than all the girls in Athol.

Maroni continued to work for Girardi after Suburban took over beer distribution. Maroni testified that after Suburban took over, King said to him, "We've busted the union and now we can get back on track." Maroni also recalled that Curran expressed relief "[N]ow that we're done with the union."

Murphy testified that Barnett counseled against wearing shirts bearing the Girardi logo, because it would appear that theirs was not an arm's-length transaction:

Well, you're supposed to be the contractor and it looks like you're an employee.

And my remark to him was, "Well, we are."

After a period of time Curran informed Maroni that he was being laid off from Girardi, but was to start work immediately for Suburban:

On Monday morning, I reported to work for Suburban, and I was doing the same thing that I had done on Friday. It was like I didn't get laid off, only that now my check is going to come from a different place.

During the period of his employment with Suburban, Maroni served as assistant warehouse manager, in which capacity he worked with the same management people as he had during his employment with Respondent, in setting up loads and routing the trucks. Murphy testified that he was impressed with Maroni's work habits and devotion to the Company, but that Girardi disliked him because Maroni's grandfather sold Miller beer in a bar located across the street from the Athol facility. Although Murphy resisted Girardi's suggestion that he discharge Maroni, he did agree to assign him to deliveries. Maroni also testified that he was put back on the delivery truck because Girardi did not want him to have keys to the warehouse. Maroni, unhappy with the assignment, thereafter suffered a back injury and had to stop working.

Murphy testified that after beginning work for Respondent he had another exchange with Peterson.

Any problems?

I said, "Just the usual stuff, you know the guys on the picket line, nothing I couldn't handle."

And, again he said to me, that his only concern with me was that I could make money.

And I tried to tell him again at that time about it [the side deal] and he stopped me again. He said, "I don't want to hear nothing, that's between you and Girardi." And I said, "Okay, fine."

Murphy testified that after performing Regal Eagle work, Curran raised the possibility of also taking over the Greenfield operations because "Curran was also afraid . . . they were going to jump to the Union." Girardi also referred to "Union problems up there [in Pittsfield], years ago and he bought out the Union and Kenny White was the bagman."

White was terminated on May 15, and given a severance package. Murphy testified that he was present when Girardi proposed outright firing without the severance pay. The following exchange ensued in that regard:

Curran says, you can't just do that, he says, "You're right. What if he runs to the Union?"

He said, "The 25 grand, the Company car will hold him back, we'll give it to him in severance pay."

So, then he turned around and said, "We'll give it to him over a period of time. This way here, we always have his hooks. If he turns around and runs to the Union or runs to anybody, we can always stop paying him."

In its response to an age discrimination case filed with the Massachusetts Commission Against Discrimination, Respondent asserted that it had offered White another position (truckdriver), but White "opted for a generous severance package," including use of a Chevrolet Blazer and maintenance of his benefits package for 30 weeks. His severance "package" therefore was to end on or about December 10, 1990.

As noted, the oral agreement was that Suburban would operate on a cost plus basis for 6 weeks and then "analyze the whole situation." However, in late April Girardi went on vacation, and upon his return Curran went on vacation. Then the "numbers man" Barnett went on vacation. Murphy testified that between April and August, Suburban billed the con-

tractual weekly \$10,960.62, and all “overages” were billed through Metro West:

A. Because we, in the event that the . . . Labor Board or the Union could turn around in the future, get a subpoena to subpoena the records of Suburban, we could honestly show that that’s all the money they gave us, each and every week was \$10,960.62.

I wasn’t going to make—see, were there, I had a basic, we had a hand shake deal . . . I had the contract, which I was going to bill for. Anything over above that contract, I’d bill them through Metro West, at cost, I wasn’t going to make a quarter on it, not a penny, because I knew that’s what we were going to get out of this deal. We were going to get—because we weren’t going to pay the benefit, that 401K program or whatever it was. We weren’t going to pay that, so we were going to come out, me and Peter, whacking up \$206,000 and change.

All labor above the basic six person crew, whether they were engaged in constructing the warehouse office or assigned to Regal Eagle, was billed, with payroll records attached showing the name and hours worked for each individual.

In late August, a meeting was held between messengers Girardi, Curran, Barnett, King, DeVito, and Murphy to discuss the outstanding bills for the overages. The meeting did not go well. Before the meeting the outstanding Metro West bills were totaled and sent to Girardi. When Girardi was shown the bill for \$99,439.37, he “flew off the handle” according to DeVito. According to Murphy, Girardi then read from a “hit list” of deficiencies in the operation, which infuriated both DeVito and Murphy, since Girardi had been completely absent from the operation. A physical confrontation was averted when Girardi left the room. When he returned, DeVito accused him of getting amnesia, and the meeting again ended on a strained note. On the way back to their Everett office, DeVito pointed out to Murphy that it had perhaps been unwise to simply present Girardi with such a large bill. Murphy said they had better go back and read the agreement because “I think they are going to hold us to it.”

DeVito spoke by telephone to Girardi to arrange another meeting. During their conversation, DeVito expressed concern about the method of payment for the \$106,000, since Girardi had said “he couldn’t have it on his books.” until after the NLRB hearing, then scheduled for November 17. DeVito proposed that Respondent pay off their indebtedness on a house they had purchased in the Athol area. Since that was not acceptable, DeVito suggested that the amount be set off again the approximately \$110,000 charges for the Ryder Trucks (which under the agreement were to have been transferred to Suburban). Girardi liked the idea since he would not have to cut a check.

The parties then met again, this time without Girardi present. Barnett presented a spread sheet listing what Respondent was willing to pay, which included a set off for the Ryder trucks. DeVito exclaimed: “Wait a minute. I already discussed this with Buddy.” Curran replied, “Well, Buddy’s not here.” DeVito became angry, and he expressed his feeling in not uncertain terms. DeVito then demanded the payment of the undisputed amount, which Barnett then summa-

rized on a sheet of paper. While Barnett went downstairs to prepare a check for the \$35,658.64 which Respondent agreed it owed, DeVito retrieved the summary from the wastebasket. The total includes \$22,405.36 undisputed overages for the labor, and attorney’s fees for Kelly’s services.

DeVito unsuccessfully tried to contact Girardi after the meeting, and finally spoke to Curran:

I said, Look, Bob, how about the difference in the check, I want the money. He says to me, I don’t know what you’re talking about, none of that is in the contract.

I said, none of the other stuff that you just gave me the check for was in the contract either, but yet you still wrote a check. And that’s the way we left it.

Since Barnett, who prepared the spread sheet has not testified in the case, it is not entirely clear what the numbers represent. Schedule 1, “Summary of Labor and Fringes Succeeded”: and “Regal Eagle Direct Payroll,” which would indicate that Girardi was not contesting the entitlement to these categories, only the amounts. Murphy testified that Barnett revised the percentages charged for fringes. Schedule 5 (bottom of page) referred to a “new weekly payment” of \$12,301.61.

DeVito and Murphy decided that if Girardi was going to follow the letter of the agreement, they would too, and would “deliver the beer and that’s it.” Michael Cafferty, who was in charge for Suburban, was informed that he was to tell Curran that no further Regal Eagle help would be supplied. A disagreement between Cafferty and Curran ensued, and DeVito was called a number of times, during one of which he heard Curran yell, “You tell that Ginny [sic] bastard . . . that I won’t pay him he’ll never get another fucking check out of me.” DeVito instructed Cafferty to close up the warehouse, send the men home and return to Everett.

Dugay testified that on the final day it was he who gave the orders to Cafferty. Cafferty told Dugay shortly thereafter that he would not perform the requested Regal Eagle work or pick up empties. Dugay conveyed this information to Curran. Dugay then saw Cafferty send the men home. As the men left the premises they asked Dugay if they would have any more work, and he informed them that he did not know. Dugay locked up the warehouse and then left the facility to perform his sales work.

#### 4. The new subcontractor

When Dugay returned to the Athol facility later in the day, he was asked by Curran if he would like to run the beer warehouse. Since he had already been doing this work on a part-time basis, he accepted the assignment. He was told that he would be reporting to Curran, would be working for Erin, and would have authority to hire a work force. He was also told by Curran what the employees would be paid: \$9 per hour for helpers, \$11 per hour for drivers, and no benefits.

That evening Dugay called the former Suburban employees and told them to report to work the next day. They began work without completing employment applications or other paperwork. Dugay testified that other than his replacing Cafferty, there was absolutely no change in the operations between Suburban operations on Monday and Erin on Tuesday—the same men used the same trucks to deliver the same

products, and the invoice and order system remained as before.

Dugay's workday consisted of dispatching the Erin employees between 6 and 8 a.m., then performing his draught beer and sales work for Respondent. When he returned to the facility in the afternoon, he devoted the late afternoon hours again to Erin work such as receiving the orders and getting up the loads Dugay testified that he was unaware of the existence of Quabbin until he received his first paycheck (which was handed to him by Barnett) which bore its name. Barnett explained to Dugay that the Quabbin check was compensation for his work for Erin.

*C. Is the Consolidated Complaint Barred by the Limitations Provisions Contained in Section 10(b) of the Act?*

As noted in the statement of facts, the Union filed a number of charges between May and September 1989 alleging, inter alia, violations of Section 8(a)(1), (3), and (5). Almost from the start of bargaining, the Union contended that Girardi was engaged in bad-faith bargaining. It filed its first unfair labor practice charge (Case 1-CA-26494) on May 19, 1989, asserting that Girardi had violated Section 8(a)(1), (3), and (5) of the Act. The Regional Director dismissed this charge. On August 4, 1989, the Union filed a second unfair labor practice charge (Case 1-CA-26561) again asserting that Girardi was engaged in unlawful bargaining in violation of Section 8(a)(1), (3), and (5) of the Act. This charge was also dismissed by the Region. On September 8, 1989, the Union filed a third charge (1-CA-26660) asserting that Girardi had violated Section 8(a)(1), (3), and (5) of the Act. This charge also contain an independent 8(a)(1) violation alleging that the certain statements made by Kenneth White were unlawful. This part of the charge was the subject of a settlement agreement approved by the Regional Director on February 22, 1990. The Regional Director dismissed the remaining allegations of the charge, including all portions of the charge dealing with Girardi's alleged unfair bargaining. An appeal to this dismissal was denied on January 24, 1990. On this date, there was no pending unfair labor practice charge against Girardi alleging that the Company was engaged in unlawful bargaining.

As noted earlier, the Regional Director on March 15, 1991, issued a consolidated complaint against Girardi based on the three dismissed charges. The consolidated complaint alleged, inter alia, that Girardi had not bargained in good faith and that a bona fide impasse had not existed as of the date of implementation of Girardi's final offer, September 4, 1989. The Respondent has objected to the resurrection of the charges on the grounds that they are barred by the limitations provisions of Section 10(b).

Both Respondent and General Counsel agree that the charges are subject to the applicable limitations provision and cannot be resurrected absent special circumstances in which Respondent fraudulently concealed operative facts underlying the alleged violation,<sup>17</sup> or unless the charges are closely related to an existing, timely filed charge.<sup>18</sup> Each of these theories will be discussed in detail. First, however, it should be determined if General Counsel has made a prima

facie case in support of the allegations of the consolidated complaint.

1. Has General Counsel made a prima facie case in support of the alleged violations of Section 8(a)(1), (3), and (5)?

In general terms the consolidated complaint alleges that Girardi bargained in bad faith and unlawfully implemented its "final offer" before impasse. In support of these allegations, General Counsel submitted evidence<sup>19</sup> that Respondent's owner, Buddy Girardi, had expressed from the outset of his taking over management of Respondent an intent to get rid of the Union. This desire and intent was expressed to Maroni by Girardi and other management personnel prior to and during the 1989 negotiations. Respondent had also previously tried to take bargaining unit work away from the unit, which resulted in an arbitrator finding on July 12, 1988, that Respondent's action attacks the integrity of the bargaining unit and was not made in good faith.

Respondent hired as its bargaining agent for the negotiations a firm, West Coast, that had a nationwide reputation with the Union as a "union buster." General Counsel has shown that among Respondent's bargaining proposals were a change from the Union's health and retirement programs to ones provided through the Company, and an incentive wage proposal that resulted in significantly lower wages for many of the bargaining unit members than they enjoyed under the expired contract, and lower than the wages paid to Respondent's nonunion personnel performing similar tasks.<sup>20</sup> Though the testimony of White indicates that Respondent was seeking a contract that it "could live with," and not necessarily the dissolution of the bargaining unit, I believe that the facts adduced to date show it wanted more than just a contract it could live with. Evidence of this can be found in Respondent's withdrawal of its implemented final offer, certainly a situation Respondent should have been able to live with as

<sup>19</sup> Again, for purposes of this decision on the limitations question, General Counsel's presentation of facts is accepted as the operative facts, with the caveat that I am not bound by these facts in the event this proceeding is remanded for the presentation of Respondent's defense to the allegations of the consolidated complaint.

<sup>20</sup> Though it may be argued that incentive wage proposals are common in the beverage industry, the level of incentive in Respondent's proposal appears very low. Indeed the expert who aided Respondent in preparing this proposal recommended an incentive rate per case more than twice as high as the one contained in Respondent's final offer. Further, if Respondent, for nondiscriminatory reasons, wanted to institute an incentive plan in its operation, it could have chosen to institute such a plan in its nonunion operation in Pittsfield without the necessity for bargaining. It could also have offered the prospective strike replacements such a compensation plan, but instead offered them an hourly wage. One aspect of the incentive plan that did not escape the Union when it was proposed, but evidently did escape the Board's scrutiny at that time, is that it does not address the highly seasonal nature of Respondent's business. The bulk of the cases sold and delivered by Respondent are in the warm weather months of the year. During that time, extra, casual delivery personnel are hired, and extra trucks put on. Thus the unit members would not get the extra money that one would expect them to get in those months. In the cold weather months, the case deliveries are substantially down and the incentive plan just would not provide anywhere near the level of income the drivers were enjoying under their existing hourly pay system.

<sup>17</sup> *Ducane Heating Corp.*, 273 NLRB 1389, 1147 (1985).

<sup>18</sup> *Redd-I, Inc.*, 290 NLRB 1115 (1988).

the final offer contained just what Respondent said it set out to obtain.<sup>21</sup>

General Counsel has shown that management expected its proposals to provoke a strike by the bargaining unit and prepared for a strike prior to negotiations beginning.<sup>22</sup> After only a few bargaining sessions, Respondent advertised for and interviewed prospective permanent replacements for the union employees. Though, as noted often by General Counsel, Respondent did show much movement and left a “paper trail” during negotiations, it did not make any significant movement on the major issues of health and retirement benefits and wages. After negotiations stalled, and it can be credibly argued they stalled because the involved employees did not want to take a significant cut in pay absent any economic necessity on the part of the Employer, Respondent implemented its “final offer,” which cut the pay of all but the most senior of the bargaining unit members. This implemented wage rate was lower in almost all cases than the wages offered prospective permanent strike replacements, and lower than the wage rate of Respondent’s nonunion personnel at Pittsfield.

Again, according to General Counsel’s evidence, management expected implementation to provoke a strike and result in the replacement of the bargaining unit with nonunion personnel. The expected strike did not occur, but complaints about the wages and other differences in treatment of Respondent’s Union versus nonunion employees were voiced to Ken White. He, acting on information given him by Girardi, advised the men they could have the benefits afforded the nonunion personnel if they decertified.

In a case where surface or bad-faith bargaining is alleged, the Respondent’s intent is paramount. An employer is obligated to enter into bargaining with an intent to reach agreement. One must look at all the actions taken by the Respondent to determine whether reaching an agreement or “busting the Union” was its true intent. Given the expressed intent of Respondent to rid itself of the Union, its proposal of a wage that discriminated against union employees as compared with nonunion employees and the implementation of that discriminatory wage rate without any economic need being shown, the preparation to hire permanent replacements in case of a strike, the expressed belief that the bargaining proposals or implementation of those proposals would provoke a strike, and the clear message from White that wages and benefits equivalent to Respondent’s nonunion employees could be obtained through decertification, I believe that General Counsel has made a prima facie case that Respondent’s bargaining was in bad faith, impasse had not been reached, that implementation of the final offer was unlawful, and the wage reduction and constructive discharges which followed implementation were similarly unlawful.

Having found that General Counsel has made a prima facie case with respect to the allegations of the consolidated complaint, it is necessary to explore the two theories ad-

vanced by him in support of his position that limitations do not bar consideration of these allegations.

## 2. Did Respondent fraudulently conceal operative facts regarding the dismissed charges?

The Board recently expanded the application of the doctrine of fraudulent concealment as a basis for reinstating previously dismissed charges in *Ducane*, supra, where it held that a dismissed charge may be reinstated when a Respondent fraudulently conceals the operative facts underlying the alleged violation. Where there is fraudulent concealment, the limitations period begins to run when the charging party knows or should have known of the concealed facts.<sup>23</sup>

General Counsel concedes that Respondent did not affirmatively conceal any operative facts relating to the dismissed charges. In virtually all the cases decided subsequent to *Ducane*, wherein the Board has found fraudulent concealment, there has been a finding that the Respondent did affirmatively conceal operative facts.<sup>24</sup> Recognizing that such a situation does not exist in this proceeding, General Counsel advances the theory that Board has adopted or should adopt another type of fraudulent concealment, that involving “self concealing” fraudulent concealment. He cites as the leading case on this theory *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), in which the court applied this theory to an action brought under a civil rights conspiracy statute. In explaining the self concealing test, the court wrote that “a defendant who contrives to commit a wrong in such a manner as to conceal the very existence of a cause of action, and who misleads plaintiff in the course of committing the wrong may be found to have concealed the wrong.” 737 F.2d at 33. The court stated that to establish a self concealing wrong “the defendant must engage in some misleading, deceptive or otherwise contrived action or scheme, in the course of committing the wrong that is designed to mask the existence of a cause of action.” 737 F.2d at 34. The court further explained that the deception may be as simple as a single lie or as complex as [a scheme] so long as the defendant conceals “not only their involvement, but the very conduct itself.” 737 F.2d at 34–35 (quoting *Richards v. Mileski*, 662 F.2d 65, 70 (D.C. Cir. 1981)). The *Hobson* court compared the self-concealing wrong to an antique dealer who knowingly sells a fake vase as a real antique. 737 F.2d at 34 fn. 102. In this

<sup>23</sup> General Counsel contends that the alleged fraudulent concealment is applicable to the Board as well as to the charging party, citing *Kanakis Co.*, 293 NLRB 435 (1989). Even though that appears to be the law, it does not make any difference in the context of this case as nothing was shown to have been affirmatively concealed by the Respondent from the Board or the Union. During the timeframe when the dismissed charges were being considered by the Board, Respondent submitted position papers in support of an unfair labor practice charge it filed against the Union alleging bad-faith bargaining on the part of the Union. These position papers do affirmatively state that Girardi was engaged in good-faith bargaining. However, these exclamatory statements, by themselves, do not constitute fraudulent concealment. “The mere fact that a party makes exclamatory representations does not, by itself, constitute fraudulent concealment or serve to toll the 10(b) period.” *O’Neill Ltd.*, 288 NLRB 1353 fn. 10 (1988), citing with approval the judge’s analysis in *Al Bryant, Inc.*, 260 NLRB 128, 133–135 (1982).

<sup>24</sup> See *Garrett Railroad Car*, 275 NLRB 1032 (1985); *Strawsine Mfg. Co.*, 288 NLRB 553 (1986); *Kanakis Co.*, supra; *Brown & Sharp Mfg. Co.*, 299 NLRB 586 (1990); *O’Neill*, supra.

<sup>21</sup> Though the withdrawal of the implemented offer took place in December 1989, after charges had been filed, this act would certainly have been part of the evidence presented in support of a complaint had one been issued on the Union’s charges.

<sup>22</sup> I disagree with the General Counsel’s position on brief that it has been established that Respondent made the proposals with the clear intent of provoking a strike.

regard, the Court noted that that type of deception affects the behavior of another and the change in behavior allows the would be offender to carry out the scheme. Consequently, the statute would not be tolled until the buyer discovers or should have discovered the deception.

General Counsel relies on the Board's decision in *O'Neill*, supra, for the proposition the the Board has previously adopted this test. In that case, the Board upheld the judge's finding that the respondents engaged in an elaborate scheme designed to evade a lawful contractual obligation with employee bargaining representatives and the duty to bargain under the Act. As part of this scheme, the O'Neill entities purported to close a meat plant and then reopen it through apparently nonrelated corporations that were, in fact, "fronts" controlled by the O'Neill entities. The Respondent's entire scheme was marked by efforts at concealing the operative facts regarding the closing and reopening of the meat plant.

The union involved filed charges over the respondents' conduct alleging that it was attempting to avoid its negotiated agreement with it by "engaging in a series of devices or subterfuges to claim separate entity status." 288 NLRB at 1389. The Regional Director for Region 32 dismissed the union's charges, having concluded that there was insufficient evidence of communality of ownership among the various companies to support a finding that the respondent was attempting to avoid its agreement with the union by the establishment of alter ego companies. The Regional Director's decision to dismiss the charge was subsequently upheld on appeal. Thereafter, "newly discovered evidence" came to the Regional Director's attention causing him to reinstate the earlier dismissed charges and issue a complaint. The new evidence generally consisted of statements from former supervisors or managers of the respondent and a long-term customer. One former agent of the respondent described remarks the respondent's president, O'Neill, had with his labor relations consultant about a plan to get rid of the Union, assurances he (the agent) received of future employment, assignments he was given prior to the resumption of operation, instructions O'Neill gave concerning operational details of the plant after it resumed operations and the involvement of the respondents' officials in the other plants. Another former official testified to remarks O'Neill made about getting rid of the union, outlined the involvement of officials in establishing one of the four companies and the lack of involvement the alleged owner of that company had in its management, described the preparation of sham corporate papers, described meetings O'Neill had with supervisors of the various companies wherein he gave detailed operating instructions, described O'Neill's control of finances in the resumed operations and asserted that O'Neill ran the whole show. Finally, a long-term customer of respondent offered testimony to the effect that O'Neill stated to him that one day he (O'Neill) would tell the customer the slick way he got rid of the union by getting up new paper entities. The customer further testified as to the way O'Neill held himself out as executive in charge of the newly established companies.

The Board affirmed the judge's conclusion that the respondent's scheme to evade its bargaining obligation with the union was fraudulently concealed warranting the tolling of the 10(b) period until the union learned of the plot. The judge concluded "that . . . O'Neill's scheme of closing the

meat plant and resuming its operation utilizing . . . fronts for his dominant involvement in the continuation of this meat processing operation, when coupled with the misrepresentations concerning the nature of the resumed operation during the effects bargaining—all for the object of evading a lawful contract obligation with the employee bargaining representatives and the duty to bargain under the Act constituted a fraudulent plot of the self-concealing variety within the meaning of Federal law concerning the tolling of statutes of limitations." Citing, inter alia, *Hobson v. Wilson*, supra.

The Board also stated at 1355, "Further, in finding fraudulent concealment, we also rely, as did the judge, on the misrepresentations made by Respondents to [the union] during the effects bargaining." During the bargaining Respondents' attorney was asked if O'Neill was going out of the meat packing business with no intention of returning, and responded affirmatively. Respondents' attorney was asked if the meat plant was going to be leased and was told that they were trying to work out a lease when in fact a lease had been previously signed. Finally, the Board stated, "Here, as in *Burgess* and *Strawsine*,<sup>25</sup> the respondents' misrepresentations served to mislead [the union] regarding the closing and reopening of the meat plant.

Thus, the Board, even in *O'Neill*, relies on some affirmative act, the attorneys' affirmative misrepresentation concerning operative facts, to find fraudulent concealment. Although I find the facts and holding of the Board in *O'Neill* to be pertinent to the enlargement of the complaint in 1-CA-27243 (the subcontracting issue), I do not believe it or the courts holding in *Hobson v. Wilson* are dispositive of the question of the consolidated complaint.

First, it has not been shown that there were affirmative representations made (exculpatory statements aside) with respect to the dismissed charges,<sup>26</sup> and second, there does not

<sup>25</sup> *Burgess Construction*, 227 NLRB 765 (1977), and *Strawsine Mfg. Co.*, 280 NLRB 553 (1986).

<sup>26</sup> On brief, General Counsel points to two statements made by Respondent's representative in position papers submitted in connection with Case 1-CA-26394 which he contends are misrepresentations. First, in part of its response to the legality of advertising for strike replacements, Respondent submitted to the Board:

"Lastly, it is not a violation of the law for the Company to take appropriate precautions in the event a strike were to take place—such an action by the Employer is a legitimate form of self-help. The Union has repeatedly told the Company at the table that it would report to all means at its disposal to exact concessions and thus the Employer is entitled to prepare for such exigencies."

I cannot determine whether this is or is not a misrepresentation. General Counsel points out that strike replacement plans were made well in advance of the first negotiation session. I agree that West Coast gave Respondent a strike preparation manual in advance of negotiations. However, negotiations began in April 1989 and advertisements for strike replacements were not placed until sometime in May. Whether the decision to place the ads at that time was triggered by something said at the table or not is not developed in this record.

General Counsel also argues that in the same position paper, Respondent, in support of its position that it was bargaining in good faith, points out that it entered into a side deal with the Union not to subcontract unit work. He points to the withdrawal of Respondent from that deal in December 1989 to assert that this was a misrepresentation. It was not a misrepresentation at the time made, and the withdrawal of the subcontracting offer in December did not result in the Union filing new charges or the Region reconsidering its deci-

appear from the evidence to have been a self-concealing scheme in place until the decision to subcontract was made in December 1989. If I agreed with the position of the General Counsel, virtually every surface bargaining case would be potentially exempt from the strictures of Section 10(b), needing only some newly discovered evidence of intent to surface. From my experience, virtually all surface bargaining cases turn on intent, and that intent is almost always determined from looking at the totality of Respondent's observable conduct. Never have I gone to trial on such a case when there was a "smoking gun" such as an admission from a principal of the respondent that its intent was to thwart the bargaining process.

What has General Counsel newly discovered in the evidence offered by the witnesses in this proceeding that was not known or not reasonably discoverable at the time the original charges were dismissed. He argues that the bargaining, declaration of impasse and implementation of the final offer, withdrawal of that offer, and subcontracting were all part of an involved scheme to get rid of the Union. I cannot find that the evidence supports such a scheme theory. There is no proof, new or otherwise, that Respondent had some master plan of contingencies that would be triggered by unfolding events. No one testified that if bargaining failed to provoke a strike, the Company would implement its last offer; if implementation failed to provoke a strike or decertification, then the final offer would be withdrawn and the bargaining unit work subcontracted out. All the evidence reflects is Girardi's ongoing desire to get rid of or "bust the union."

The matter of Girardi's desire to rid his Company of the Union was a matter of common knowledge among the employees from the minute he took over the Company. Chasson was a union member and Girardi expressly told him of his feelings about the Union. Thus this important matter of intent was known to the Union and evidence of it was readily available at the time the decision to dismiss was made. Indeed, the Board had available at that time a sworn statement of a bargaining unit member given in relation to White's unlawful statements, that says the Company was seeking to get rid of the Union. This statement was evidently not further investigated. If it had been, there is no doubt in my mind that evidence such as that presented by Maroni could have been developed as management officials were freely discussing their intention to get rid of the Union with apparently anyone who would listen.

The intent of the Company going into negotiations is no more clear today than it was in the fall of 1989. White testified at one point that the Company hired West Coast because of its success in achieving concessions from the Teamsters Union. He testified that the Company planned its proposals to seek significant concessions from the Union and reach a "contract we could live with." Later in his testimony, he said that Girardi wanted to force the Union to strike so he could permanently replace the union employees. However, he did not testify that this was a goal of negotiations or the intent of any bargaining proposal.

There was significant evidence available in the fall of 1989 which would lead one to believe that forcing a strike was Respondent's intention. It had obtained a strike manual

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sion to dismiss the earlier charges, which were not then barred by limitations.

from West Coast to prepare itself for a strike. This manual was not hidden from the Board in 1989; however, evidently no one at that time asked for Respondent's documents on the subject of strike preparation. The Company advertised for and interviewed replacement workers at the outset of negotiations. It did this publicly. It entered into talks with a security company. No effort was made to hide this information.

It offered the potential strike replacements higher wages than it was offering the vast majority of its union employees in negotiations. This fact was pointed out to the Board by the Union on several occasions, including its appeals of the Region's dismissals of its charges.

DeVito and Murphy both testified about conversations with Girardi wherein he admitted he was trying to get the Union to strike. However, the only testimony on this subject specific as to date or method is that of DeVito who testified that Girardi said he had been unsuccessfully trying to get the Union to strike for 2 months. This would have placed the efforts in or about December 1989.

Thus, I do not believe that the General Counsel's "newly discovered evidence" establishes anything new and significant with respect to the dismissed charges that was not known or could not have readily been discovered at the time the charges were dismissed. In this regard, the General Counsel has the burden of showing what efforts were made by the Board to discover the operative facts regarding the matters contained in the dismissed charges. There is no evidence in this record relating to this issue. Considering the openness with which Respondent's management expressed its desire to do away with the bargaining unit, I believe this is a significant omission. For example, there was not shown to be any statements taken from Girardi or Curran, in which they could have admitted or denied any unlawful intent. There was shown to be only one statement taken from a bargaining unit member, and that one strongly indicated unlawful activity and unlawful intent. No requests were shown to have been made for materials relating to the strike issue or the bargaining process. I believe, given what was apparent from the bargaining process, what was supplied to the Board by the Union, and the proof the Board had of the unlawful statements of White following implementation, the Board would not have been going on a mere hunch, rumor or suspicion, as General Counsel suggests, in fully investigating the matters raised by the dismissed charges.

In conclusion, I do not believe that it has been proven that Respondent fraudulently concealed operative facts with regarding the dismissed charges from either the Union or the General Counsel and thus this exception to the limitations provisions of Section 10(b) cannot be relied upon to revive the dismissed charges, embodied in the consolidated complaint.

3. Are the allegations in the consolidated complaint closely related to the 8(a)(1) statements which were the subject of the set-aside settlement agreement?

The charge filed in Case 1-CA-26660 on September 8, 1989, alleged, among other things, that Respondent, through Kenneth White, offered its employees improved wages and working conditions if they renounced the Union. Prior to the issuance of a complaint in Case 1-CA-26660 concerning White's statements, Respondent entered into a unilateral agreement approved by the Regional Director on February

22, 1990. By that settlement agreement, Respondent agreed to post an appropriate notice. Although Respondent apparently complied with the posting requirement, the Region never closed the case and the charge remained pending, because of the pendency of the charge in Case 1-CA-27243. Thereafter, the Regional Director, vacated and set aside the settlement agreement. The Board has held that a settlement agreement will be set aside if its provisions are breached or if postsettlement unfair labor practices are committed.<sup>27</sup>

The General Counsel contends that the settlement agreement was properly set aside and that under the Board's holding in *Redd-I, Inc.*, 290 NLRB 1115 (1988), the allegations of the consolidated complaint may be added to the 8(a)(1) allegations involved in the settlement agreement. Respondent disagrees on both points. In support of the Regional Director's decision to set aside the settlement agreement, General Counsel contends that the evidence uncovered with respect to the subcontracting indicating that unlawful activity was occurring during the posting period of the agreement warrants the settlement being set aside. I agree with this position. I also agree that Respondent's behavior at least with respect to the subcontracting reflects contempt for the Board's processes and the Act and demonstrates that it did not intend to comply with the intent of the settlement agreement, that is, not to engage in further unfair labor practices.<sup>28</sup> However, I do not believe that a set-aside agreement is a proper vehicle to resurrect the dismissed charges as sought by General Counsel.

Although the statements attributed to White and which are the basis of the settlement agreement are clear violations of Section 8(a)(1) of the Act, and may in my opinion be properly used to bolster the General Counsel's case in 1-CA-27243, I do not believe the 8(a)(1) violations involved are closely related to the dismissed 8(a)(3) and (5) allegations contained in the dismissed charges within the meaning of *Redd-I, Inc.*, supra. The Board has allowed the amendment of complaints to add allegations if they are closely related to allegations of a timely filed charge and occurred within 6 months before the filing of that charge. When determining whether allegations are closely related, the Board looks at whether the untimely allegations are legally and factually related to the allegations of the timely charge. In *Redd-I, Inc.*, supra, the Board set forth the test for establishing whether a proposed amendment was closely related to a timely filed charge:

In deciding whether complaint amendments are closely related to allegations in the charge, the Board and the courts have looked to whether the amendments are factually and legally related to the charge. In *National Licorice* the Supreme Court held that various complaint allegations were related to the charge when the violations alleged in the complaint were "of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects." The Second Circuit has said that "the complaint issued by the Board must deal with the same subject matter and sequence of events . . . although the specific events stated in the complaint may proceed or follow

those state in the charge." Finally, the Board has found complaint allegations closely related when they "arise from the same factual situation, are of the same class as, and clearly related to, the allegations . . . set forth in the charge."

Subsequently, in *Nickles Bakery*, 296 NLRB 927 (1989), the Board summarized the three factors that must be looked at in determining whether the proposed amendment relates back:

First, the Board will look at whether otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge. Second, the Board will look at whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge. Finally, the Board will look at whether a Respondent would raise similar defenses to both allegations.

Though generally it has been held that any allegations of violations that are sought to be added must involve violations of the same section of the Act, the Board has made exceptions when the violations sought to be added arise out of the same subject matter, same factual situation and sequence of events, and involve related legal theories.<sup>29</sup> I do not believe that to be the case here. The alleged unlawful statements of White arose from complaints about wages and the refusal of Respondent to let its union personnel wear shorts in the summertime. Thus to the extent that the bargaining alleged to be in bad faith involved wage proposals and the implemented final offer set the wages complained of, there is some subject matter relationship. General Counsel would go farther and have me hold that the statements of White were part of the overall "scheme" to get rid of the Union and thus, any allegation involving this "scheme" would be related.

I cannot find that the statements uttered by White are part of a "scheme." There just is no evidence to that effect. White testified in a very hostile manner toward Respondent, yet he did not say he was told by Girardi or any other management official to make the statements in furtherance of Respondent's desire to get rid of the Union or as part of any "scheme" to that effect. They appear to me simply isolated statements reflecting the common knowledge of all Girardi's employees that Girardi would like to get rid of the Union.

Certainly the legal theory and defense involved in White's violation of Section 8(a)(1) is far different than that involved in the constructive discharge and surface bargaining charges the General Counsel seeks to tie in. Simply making the statements is unlawful and the only defense to the alleged statements is a factual denial that they were made. A defense to the 8(a)(3) and (5) allegations would involve at the least an explanation of every step the Respondent took from the outset of negotiations through the implementation of its final offer. It would require determinations on the issues of bad-faith bargaining and whether impasse was reached, with the only tie-in with the 8(a)(1) statements being their bearing on the issue of intent. I do not find this to be sufficient to meet the *closely related* test.

<sup>27</sup> *Universal Blanchers, Inc.*, 275 NLRB 1544, 1545 (1985).

<sup>28</sup> See *Norris Concrete Materials*, 282 NLRB 289 (1986).

<sup>29</sup> *Whitewood Oriental Maintenance Co.*, 292 NLRB 1162 (1989); *Nickles Bakery*, supra; *Castaways Management*, 285 NLRB 954 (1987).

Finally, on this point, General Counsel asserts that Respondent could defend itself on the matters contained in the dismissed charges because it or West Coast has copious notes involving the bargaining process. I believe, though I am not sure, that he is correct in his assertions about the notes being preserved. However, memories are involved as well, especially on the critical events surrounding the preparation for bargaining, and the decision to declare impasse and implement the final offer. Two years have passed since the events in question occurred and this passage of time must also be considered in any equitable consideration of due process before the dismissed charges are resurrected. For all the reasons set forth above, I would sustain Respondent's motion not to allow the allegations set forth in the dismissed charges and the consolidated complaint to be added to the complaint allegations underlying the set-aside settlement agreement. I grant Respondent's motion to strike the consolidated complaint.<sup>30</sup>

*D. Is the Amendment to the Complaint in Case 1-CA-27243 Barred by the Provisions of Section 10(b)?*

The original complaint in Case 1-CA-27243, issued on June 28, 1990, alleged that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union with necessary and relevant information concerning the name of the subcontractor it was considering using to replace the unit employees and by its subsequent subcontracting of all of the unit work. As a remedy, the complaint requested reinstatement of the bargaining unit as it existed prior to the subcontracting.

The 8(a)(1), (3), and (5) allegations concerning the subcontracting of unit work to Suburban, Commonwealth, and Metrowest are single employers with the Respondent, the 8(a)(1) and (3) discharge of unit employees and the 8(a)(1) and (5) withdrawal of recognition, all of which are the subject of the General Counsel's motion to amend the complaint in Case 1-CA-27243, are objected to by Respondent as time barred by Section 10(b). For the reasons set forth below, I disagree, and find the amendment is proper and Section 10(b) tolled under the fraudulent concealment exception.

The recitation of evidence, as set out above, establishes that Respondent engaged in a complex and ongoing effort to oust the bargaining unit by purporting to subcontract out the unit work for legitimate reasons and in an arms-length transaction. Based on the evidence adduced in this proceeding, this activity was marked by bad faith, unlawful intent, concealment of virtually all operative facts, and affirmative misrepresentation of those operative facts. The decision to subcontract appears to have been truly a decision to get rid of the unit. Figures were developed to provide economic justification for the subcontracting, and the figures used were shown to have been substantially lower than the actual moneys to be paid the subcontractor. Numerous corporations were set up to disguise the identity of the subcontractor and the scheme by which the subcontractor was to be paid. Payments in excess of the amounts disclosed to the Union were made to these corporations by various of Girardi's existing corporations.

<sup>30</sup> Based on this ruling, I would recommend that the set-aside settlement agreement be reinstated.

It is clear that Respondent sought to hide its unlawful activity by refusing to supply the name of the "subcontractor" and affirmatively stating to the Union on a number of occasions that no alter ego operation or double-breasted operation was being set up. As noted, it supplied false financial information to the Union to support its decision to subcontract, and purported to bargain with the Union over the issue at a time when it had already struck a deal, set up the corporations necessary to carry out the unit work, and had the "subcontractor" hire a work force.<sup>31</sup>

Because of the level of concealment, including the refusal to provide the name of the subcontractor, and the affirmative misrepresentations made by Respondent, neither the Union or the Board could have discovered the true facts of the situation, and there was no lack of due diligence on their part in this matter. All of the matters contained in the amendment are part and parcel of a unified attempt to unlawfully eliminate the bargaining unit and should be considered with the allegations of the original complaint. Since Quabbin and Erin are an outgrowth of Suburban, Metrowest, and Commonwealth and neither the Union nor the Board had any knowledge of Quabbin until Murphy and DeVito came forward, and there was no knowledge of Erin until the hearing on these matter, Respondent's concealment of its operations warrants tolling the 10(b) period to those allegations as well.

*E. Legal Conclusions that Flow from Respondents' Amended Answer to the Amended Complaint in Case 1-CA-27243*

Although Respondent, by its amended answer admitted all of the factual allegations set forth in paragraphs 1-23 of the amended complaint, Respondent did not admit the legal conclusions set forth in paragraphs 24-28, which flow from the admitted factual allegations, in order to preserve its argument that the motion to amend the complaint in Case 1-CA-27243 should be denied. As noted above, the amendment is proper and allowed. As described below, sufficient facts were plead and admitted to establish the violations alleged in the amended complaint.

1. The unlawful refusal to provide information

By its amended answer, Respondent admits that since on or about April 13, 1990, it has failed and refused to provide the Union with the name of the subcontractor it had contemplated using to perform the work of the bargaining unit. It was admitted that the Union made this information request to Respondent on or about April 3, 1990, and that the information requested was necessary for and relevant to the Union's performance of its function as the exclusive collective-bargaining representative of the unit employees.

Based on the foregoing admitted facts, Respondent has breached its duty to bargain in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act. It is well settled that the duty to bargain in good faith requires a respondent to furnish a union with requested information that is relevant to and necessary for the union's performance of its function as collective-bargaining representative of unit em-

<sup>31</sup> It should be remembered that Respondent Girardi paid the costs, including legal fees, for the setting up of these corporations, provided the equipment to begin operations, and supplied its personnel to aid in the operation.

ployees. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Indeed, the Board has held that a respondent who fails to supply a union with information similar to that which the Union in this case requested, violates Section 8(a)(1) and (5) of the Act. See *Wallace Metal Products*, 244 NLRB 41 fn. 2 (1979); *Fawcett PrintinG Corp.*, 201 NLRB 964, 970 (1973); *Transcript Newspapers*, 286 NLRB 124 fn. 2 (1987).

#### 2. The discriminatory transfer of unit work and discharge of unit employees

By its amended answer, Respondent has admitted that it and Suburban Contract Carriers, Inc., Commonwealth Labor Pool, Inc., and Metrowest Warehousing, Inc. are single employers within the meaning of the Act. Respondent has further admitted that it and Quabbin Labor Pool, Inc. and Erin Distributors, Inc. are single employers and alter egos within the meaning of the Act. It is further admitted that on or about April 13, 1990, the Respondent subcontracted all of the unit work to Suburban, Metrowest and Commonwealth and discharged all of the unit employees, and that on or about September 1990, Respondent subcontracted all of the work of the unit to Quabbin and Erin. Respondent admits it took that action because of the union activities of its employees and because it wanted to discourage such activities. Based on the foregoing admitted facts, Respondent has violated Section 8(a)(1) and (3) of the Act by its subcontracting of the work and discharge of unit employees. *SMCO, Inc.*, 286 NLRB 1291 (1987); *Hydro Logistics*, 287 NLRB 602 (1987); *Sands Motel & AMM*, 280 NLRB 132 (1986).

#### 3. The unilateral implementation of the decision to subcontract work

By its amended answer, Respondent has admitted that the Respondent subcontracted the unit work to Suburban, Commonwealth, Metrowest, Quabbin, and Erin without having afforded the Union an opportunity to negotiate and bargain to a bona fide impasse as the exclusive representative of Respondent's employees with respect to such acts and conduct and effects of such acts and conduct. The Respondent has further admitted that the issue of subcontracting is a mandatory subject of bargaining as it relates to wages, hours, and other terms and conditions of employment of the unit. By the foregoing admitted facts, the Respondent has violated Section 8(a)(1) and (5) of the Act. The Board has specifically held that when the decision to relocate work is motivated, as Respondent has admitted, by antiunion reasons, the Employer is not exempt from a bargaining obligation under *First National Maintenance v. NLRB*, 452 U.S. 666 (1981); *SMCO, Inc.*, 286 NLRB at 1296, citing *Strawsine Mfg. Co.*, supra; see also *Hydro Logistics*, supra.

#### 4. The unlawful withdrawal of recognition

By its amended answer, the Respondent has admitted that on or about April 16, 1990, it withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit. Under the circumstances presented by the Respondent's factual admissions in this case, its withdrawal of recognition violates Section 8(a)(1) and (5) of the Act. Respondent's withdrawal of recognition of the Union was based on the discriminatory discharge of the unit employees. Under those circumstances, the Board has found the withdrawal of

recognition violative of Section 8(a)(1) and (5). *SMCO*, supra.

#### CONCLUSIONS OF LAW

1. Respondents Girardi Distributors, Inc., Suburban Contract Carriers, Inc., Commonwealth Labor Pool, Inc., Metrowest Warehouse, Inc., Quabbin Labor Pool, Inc., and Erin Distributors, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondents are alter egos of one another and single employers within the meaning of the Act.

2. The Union is a labor organization within the meaning of the Act.

3. At all times material to this decision, the following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All checkers, warehouse employees, helpers, foremen and stockmen, fork truck operators and drivers, including shippers and receivers employed by the Respondent at its Athol facility, but excluding all supervisors and office personnel.

4. At all times material, the Union has been the designated exclusive collective-bargaining representative of the employees in the above described unit, had been recognized as such representative by Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms for the period May 19, 1986, to May 19, 1989. At all times material, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by:

(a) Failing and refusing since on or about April 13, 1990, to provide the Union with relevant and necessary information requested by it on or about April 3, 1990.

(b) Subcontracting the work of the unit for discriminatory and antiunion reasons since on or about April 13, 1990, and failing and refusing to bargain in good faith to a bona fide impasse with the Union over the decision to subcontract and the effects of this subcontracting.

(c) Withdrawing recognition of the Union on or about April 16, 1990, as a result of its unlawful and discriminatory discharge of all unit employees.

6. Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by subcontracting all of the unit work on April 13, 1990, and discharging all unit employees, and further subcontracting the unit work on or about September 1990.

7. The unfair labor practices found to have been committed by Respondents are ones affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. The consolidated complaint and notice of hearing issued on March 15, 1991, in Cases 1-CA-26394, 1-CA-26561, and 1-CA-26660 is barred by the limitations provisions of Section 10(b) of the Act.

9. The allegations contained in the consolidated complaint issued on March 15, 1991, are barred from consideration by

the limitations provisions of Section 10(b) of the Act and are not closely related to the 8(a)(1) allegations contained in a settlement agreement set aside by the Regional Director for Region 1 in Case 1-CA-26660.

#### THE REMEDY

Having found that Respondents have committed violations of Section 8(a)(1), (3), and (5) of the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

Respondents collectively are ordered to cease and desist from their unlawful subcontracting of unit work, and Respondent Girardi Distributors, Inc. is ordered to re-extend recognition to the Union as the exclusive representative for purposes of collective bargaining of its employees in the unit, restore the status quo ante to the date such illegal subcontracting began and recognition was withdrawn. Respondent Girardi Distributors is ordered to reinstate its unit employees, unlawfully discharged on or about April 13, 1990, discharging if necessary any employees hired to replace them, and all Respondents are jointly and severally ordered to make the unit employees whole for any loss of wages or other benefits, including health, welfare, and retirement benefits, to which they would have been entitled had they not been unlawfully discharged.<sup>32</sup> Respondents are also ordered to make whole any unit employees unlawfully discharged for any losses they may have suffered by virtue of having lost their insurance benefits. Backpay is to be determined to be due under the provisions of this Order will be determined pursuant to the Board's directions in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>33</sup>

#### ORDER

The Respondents, Girardi Distributors, Inc., Suburban Contract Carriers, Inc., Commonwealth Labor Pool, Inc.,

<sup>32</sup>General Counsel urges that this make-whole remedy be extended to the various employees who performed unit work under the guise of the various subcontracting schemes begun on or about April 13, 1990. He asks that their wages be redetermined under the implemented provisions of the final offer under which the discharged unit employees worked, and that the insurance provisions and pension contributions required under the implemented final offer be extended to them. I decline to do so. These employees were benefited, wittingly or unwittingly, by the unlawful subcontracting scheme. They entered into their employment with Respondents based on the wages and benefits, or lack thereof, offered to them. To extend these benefits to them at this date would serve no useful purpose and would to the contrary serve just to punish Respondents, perhaps to the detriment of the true victims of Respondents' unlawful activity, the unit employees. The potential liability resulting from the imposition of an order requiring Respondents to pay insurance claims for the nonunit employees used in the subcontracting scheme is unknown and might conceivably financially injure Respondents to the point that no meaningful remedy is available to the unit employees.

<sup>33</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Metrowest Warehouse, Inc., Quabbin Labor Pool, Inc., and Erin Distributors, Inc., Boston, Massachusetts, their officers, agents, successors, and assigns, shall

#### 1. Cease and desist from

(a) Failing and refusing since on or about April 13, 1990, to provide the Union with relevant and necessary information requested by it on or about April 3, 1990.

(b) Subcontracting the work of the unit for discriminatory and antiunion reasons since on or about April 13, 1990, and failing and refusing to bargain in good faith to a bona fide impasse with the Union over the decision and effects of this subcontracting.

(c) Withdrawing recognition of the Union on or about April 16, 1990, as a result of its unlawful and discriminatory discharge of all unit employees.

(d) Subcontracting all of the unit work since on or about April 13, 1990, and discharging all unit employees, and further subcontracting the unit work on or about September 1990.

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

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

(a) Immediately restore the status quo ante to the date recognition of the Union was withdrawn, re-extend recognition to the Union as the exclusive representative of the unit employees and offer immediate reinstatement to the unit employees unlawfully discharged on or about April 13, 1990, discharging if necessary any employees hired to replace them. The unit employees will be reinstated to their former positions and if such positions no longer exist, to substantially similar positions, with no prejudice to their seniority or other rights and privileges, and they shall be made whole for any loss of wages or other benefits, in the manner described in remedy section of this decision.

(b) On request, bargain in good faith with the Union, over the decision to subcontract unit work and the effects thereof, and over all other mandatory subjects of bargaining.

(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) Post at each of their various Massachusetts facilities copies of the attached notice marked "Appendix."<sup>34</sup> Copies of the notice, on forms supplied by the Regional Director for Region 1, after being signed by Respondents' representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

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

<sup>34</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."

## APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT refuse to provide the Union with information relevant to and necessary for its duties as exclusive representative for purposes of collective bargaining of our employees in the following described unit:

All checkers, warehouse employees, helpers, foremen and stockmen, fork truck operators and drivers, including shippers and receivers employed by us at our Athol facility, but excluding all supervisors and office personnel.

WE WILL NOT subcontract the work of the above-described unit for discriminatory and antiunion reasons and WE WILL

NOT fail or refuse to bargain in good faith to a bona fide impasse with the Union over the decision to subcontract and the effects of this subcontracting.

WE WILL NOT withdraw recognition from the Union as the exclusive representative of our unit employees because we discharged our unit employees by unlawfully subcontracting unit work.

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

WE WILL immediately re-extend recognition to the Union as exclusive representative of our unit employees.

WE WILL immediately reinstate all our unit employees who we unlawfully discharged on or about April 13, 1990, discharging if necessary any employees hired to replace them, and restore our unit employees to their former positions, or to substantially similar positions if their former positions no longer exist, and WE WILL make our unlawfully discharged unit employees whole for any losses they may have suffered by reason of our discrimination against them, including payment of lost wages, or other benefits, with interest.

WE WILL restore the wages and other working conditions of our unit employees to those that existed at the time they were unlawfully discharged.

WE WILL, on request, bargain in good faith with the Union over the decision to subcontract unit work and the effects thereof, and over all other mandatory subjects of bargaining.

GIRARDI DISTRIBUTORS, INC., QUABBIN  
 LABOR POOL, INC., ERIN DISTRIBUTORS, INC.,  
 SUBURBAN CONTRACT CARRIERS, INC., COM-  
 MONWEALTH LABOR POOL, INC., METROWEST  
 WAREHOUSING, INC.