

**Silver Brothers Co., Inc. d/b/a The Good Life Beverage Company and Victor W. Dahar, Trustee-in-Bankruptcy and Chauffeurs, Teamsters & Helpers Local Union No. 633 a/w International Brotherhood of Teamsters, AFL-CIO<sup>1</sup>**

**Hospitality Holdings Corporation, debtor-in-possession; and David Murray; and Erin Food Services, Inc. and Michael Weingarten, Trustee-in-Bankruptcy and Erin Realty Company, Debtor-in-Possession and Chauffeurs, Teamsters & Helpers Local Union No. 633 a/w International Brotherhood of Teamsters, AFL-CIO. Cases 1-CA-25521 and 1-CA-25864**

October 15, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On October 11, 1991, Administrative Law Judge Arline Pacht issued the attached decision. The General Counsel, the Charging Party, and Respondents Hospitality Holdings Corporation, David Murray, and Erin Realty Company filed exceptions and supporting briefs; and the General Counsel and the Respondents filed reply briefs.

The National Labor Relations 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,<sup>2</sup> and conclusions only to the extent consistent with this decision.

The complaint alleges that Respondent Silver Brothers violated the Act by renegeing on an agreement to meet at a certain location, by refusing to provide financial information, by unilaterally implementing a final contract proposal absent an impasse in negotiations, and by locking out employees.

The judge found that although Silver Brothers retreated from its agreement to meet for bargaining at a union building, the action did not constitute an unfair labor practice because Silver Brothers made genuine efforts to find a mutually acceptable meeting place. We agree for the reasons stated by the judge.

The judge further found that Silver Brothers unlawfully refused to provide financial information supporting the contention that its financial condition required contract concessions, that consequently no legally cognizable impasse in bargaining occurred, and that there-

fore Silver Brothers' unilateral implementation of its final contract proposal and the lockout were unlawful. The judge also found that the Respondents constituted a single employer, but that David Murray as an individual and David Murray d/b/a Erin Realty were not jointly and severally liable for the unfair labor practices. For the reasons that follow, we find that the Respondent never reached the point of refusing to provide the financial data in question because bargaining over conditions that might accommodate the Respondent's expressed confidentiality concerns was thwarted by the Union. Hence, the Respondent did not unlawfully refuse to provide the information. Because the other unfair labor practices found by the judge were dependent on the information violation, we dismiss the complaint.<sup>3</sup>

I. FACTUAL FINDINGS RELATED TO THE  
INFORMATION REQUEST AND THE RESPONDENT'S  
RESPONSE

Prior to the onset of negotiations, Silver Brothers' labor counsel, Herbert Bennett, wrote to Union Business Agent Thomas Noonan advising that the Employer would not extend the terms of the existing contract beyond the expiration date because of its "extremely critical financial condition." At the first bargaining session on March 4, 1988,<sup>4</sup> Silver Brothers gave a verbal and slide presentation demonstrating its precarious financial condition. Bennett told Noonan that Union auditors could review the data supporting the presentation.

On March 29, the union auditors met with Silver Brothers' accounting firm and were shown a draft of an audited consolidated financial statement for Silver Brothers and subsidiaries for 1987. To determine whether funds were being siphoned off or whether there was a legitimate financial problem, the union auditors requested the following further specific information: (1) an analysis of Silver Brothers' interest expense;<sup>5</sup> (2) a breakdown of salaries by officers, office, selling and delivery, and other; (3) a summary of the cost of goods sold; (4) a breakdown of general and administrative expenses, delivery and selling expenses, accounts payable and accrued expenses, and accrued compensation (to be specified in the same manner as salaries); and (5) the 1986 financial statements for Sil-

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

<sup>3</sup>The unilateral implementation and unlawful lockout findings are premised on the finding of the unlawful refusal to furnish information. Given our finding that Silver Brothers did not refuse to furnish the information, we shall also reverse and dismiss the unilateral implementation and unlawful lockout allegations. Further, we find it unnecessary to pass on the single-employer finding or the joint and several liability findings.

<sup>4</sup>All subsequent dates refer to 1988 unless specified otherwise.

<sup>5</sup>The consolidated statement contained a single line-item of \$11,408,264 for "[p]rincipal payments on note to former stockholders, long-term debt, capital lease and revolving line of credit."

ver Brothers and its subsidiaries. Silver Brothers' controller promised to get them further information. Although the union auditors believed that the data would be sent to them directly, Silver Brothers' vice president Mead testified that this information was to be furnished at the next negotiation session.

On March 31, Noonan learned at the outset of a negotiating session that Bennett was backing away from his commitment to meet at a Union building for negotiations. Bennett proposed numerous alternative neutral sites, and even proposed a bargaining session to discuss the bargaining site issue. The Union refused to meet further without a guarantee of some future meeting at a union location. The parties never met again because Noonan refused to meet anywhere but at a union building.

On April 23, in a newspaper article quoting Bennett regarding the Company's financial status, Bennett attributed the Employer's large losses to the union pension fund. On April 25, in a newspaper article quoting Noonan regarding the same subject, Noonan revealed that Silver Brothers had paid several hundred thousand dollars to Murray's other companies.

Following the cessation of bargaining, Noonan received a letter from one of the union auditors specifying financial information that had not yet been received from Silver Brothers' accountants. On May 3, Noonan sent Bennett a letter requesting the specific financial documentation listed above. On May 6, Bennett sent Noonan a letter stating:

With regard to your letter of May 3, 1988 requesting further financial information, please be advised that I will be happy to discuss your request with you at our next bargaining session. At this time I am concerned that you did not keep confidential the financial information we previously disclosed to you, and I am unaware of any legitimate need for you to have further financial information from the company.<sup>6</sup>

The judge found that the information requested by the Union on March 29 and in Noonan's May 3 letter was relevant to the Union's duty to bargain collectively. The judge stated that Silver Brothers should have turned over the information no later than mid-April when it was in Vice President Jack Mead's possession,<sup>7</sup> in accordance with the March 29 request. The judge also found that Bennett's May 6 letter "rejected" the request for information. Accordingly, the judge concluded Silver Brothers bargained in bad faith by withholding the information.

<sup>6</sup>The confidentiality concern referred to the April 25 newspaper article.

<sup>7</sup>The judge also stated that the information was gathered within 2 or 3 days of the March 29 request.

## II. ANALYSIS

Even assuming the information requested was relevant to the Union's performance of its duties as collective-bargaining representative, Silver Brothers was not automatically obligated to furnish the information if it had substantial and legitimate confidentiality concerns regarding that information. The Board has held:

[I]n dealing with union requests for relevant but assertedly confidential information, we are required to balance a union's need for such information against any "legitimate and substantial" confidentiality interests established by the employer, accommodating the parties' respective interests insofar as feasible in determining the employer's duty to supply the information. The accommodation appropriate in each individual case would necessarily depend upon its particular circumstances.

*Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 30 (1982), enf. sub nom *Oil Workers v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). The Board has also held that an employer is entitled to bargain with a union to resolve confidentiality concerns. *Id.* at 32.

For the following reasons, we find that the requested information raised confidentiality concerns that justified Silver Brothers' delay in immediately turning over the information to the Union. We further find that Silver Brothers was entitled to discuss the confidentiality concerns with the Union before turning over the information.<sup>8</sup> Finally, we find that it was the Union's tactics after the dispute over a bargaining locale occurred that prevented bargaining over issues including the information request.

Union requests for financial information frequently raise difficult confidentiality questions. See, e.g., *Dubuque Packing Co.*, 303 NLRB 386 fn. 26 (1991). Indeed, there seems to be no question that the additional information the union auditors sought on March 29 was confidential information. Moreover, the auditors requested a great deal of detail. Given the confidential and detailed nature of the information sought, we find that there were substantial and legitimate confidentiality concerns regarding that information.

The parties, however, never discussed the Respondent's confidentiality concerns, because only 2 days after the union auditors' detailed request, the parties were unable to agree on a location for further bargaining. The judge found that Silver Brothers made "ardent efforts to bring the Union to the bargaining table" following the March 31 dispute over the bargaining session locale. The judge further found that Noonan's

<sup>8</sup>Even though Silver Brothers in fact did reveal some financial information to the union auditors, it did not by doing so waive confidentiality concerns about the further information requested.

insistence on the union site for bargaining “suggests that he, rather than [Silver Brothers], was using the meeting place issue as a red herring to avoid resuming negotiations.” Finally, as the judge found, by the time Silver Brothers had prepared the requested information, “the imbroglio over the meeting place had begun.”

Given these circumstances, we find that Silver Brothers did not withhold or delay providing requested information in violation of the Act. The above precedent makes clear that Silver Brothers was not automatically obligated to furnish the requested information forthwith, but instead was entitled to discuss confidentiality concerns regarding the information request with the Union so as to try to develop mutually agreeable protective conditions for its disclosure to the Union. While these concerns were still outstanding and even before the information was prepared, the “imbroglio” over a bargaining site location occurred and the Union’s actions prevented the parties from meeting to bargain. Given Silver Brothers’ right to discuss the information request with the Union, its indication of willingness to meet for such discussions, and the Union’s actions preventing the parties from meeting to deal with the confidentiality concerns, we find that Silver Brothers did not unlawfully withhold or delay providing the requested information. See *Dallas & Mavis Forwarding Co.*, 291 NLRB 980, 984 (1988).<sup>9</sup>

The judge found that Bennett’s May 6 letter was a rejection of the Union’s information request. We do not agree. Although Bennett’s letter stated his belief that the Union might not be entitled to the information,<sup>10</sup> he offered to discuss the information request.

<sup>9</sup>Our dissenting colleague concedes that a 5-1/2-week delay in responding to an information request is “not necessarily . . . excessive.” Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good-faith effort to respond to the request as promptly as circumstances allow. See, e.g., *E. I. Du Pont & Co.*, 291 NLRB 759 fn. 1 (1988).

Although our dissenting colleague states that he agrees with the judge’s decision, he accords little, if any, weight to the judge’s finding that it was the Union’s refusal to meet at a neutral location that prevented further bargaining subsequent to the Union’s March 29 information request. In light of the background set forth above of willing cooperation on the Respondent’s part and improper tactics on the Union’s part, our dissenting colleague’s thesis that the Respondent unreasonably delayed in responding to the March 29 request has tenuous support in the record. We simply do not know what position the Respondent would have taken in mid-April with respect to the information request had the Union agreed to meet. We are unwilling to find that the Respondent acted unreasonably and in bad faith at that time when it was attempting to arrange further negotiations and the Union was responsible for obstructing such attempts.

Finally, our dissenting colleague’s reliance on the Respondent’s implementation of its final offer and lockout of its employees is misplaced. Prior to taking these actions, the Respondent properly notified the Union of its revised contract proposal and advised that if the Union refused to meet at a neutral location, the proposal would be implemented as the Respondent’s final offer.

<sup>10</sup>Bennett also mentioned his concern that the Union had failed to keep information it had received confidential. The judge described

As we stated above, given Silver Brothers’ substantial and legitimate confidentiality concerns, it could lawfully request discussing the confidentiality questions. Therefore, Bennett’s offer to discuss the information request cannot be seen as bad-faith bargaining.

In sum, we find that Silver Brothers was entitled to discuss confidentiality concerns with the Union because of the nature of the information requested, that Silver Brothers offered to meet and discuss the concerns, and that the Union failed to accept Silver Brothers’ offer. Accordingly, we find, contrary to the judge, that Silver Brothers did not unlawfully withhold financial information.<sup>11</sup>

#### ORDER

The complaint is dismissed.

MEMBER DEVANEY, dissenting in part.

Contrary to my colleagues, I agree with the judge that the Respondent violated Section 8(a)(5) and (1) by refusing to provide the Union with the requested financial information. It is not disputed that the Respondent asserted at the outset of negotiations that it was in an “extremely critical financial condition” and would require contract concessions because it was unable to continue paying the existing wage rates. Nor is it disputed that under such circumstances the Union is entitled to financial information substantiating the claimed inability to pay. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). My colleagues, however, would excuse the Respondent’s failure to provide the information because, as a result of the breakdown of negotiations, the Respondent’s purported concerns regarding the confidentiality of the information remained unresolved.

The chronology of events here is critical. In accordance with an agreement made at the March 4, 1988 initial bargaining session, two accountants designated by the Union reviewed and took notes from a draft audited consolidated financial statement pertaining to the Respondent. The record is not clear regarding what, if any, arrangements were made by the parties concerning the confidentiality of the information. The Respondent’s labor counsel, Bennett, testified that the Union’s representative, Noonan, had promised to keep the data confidential, but Noonan denied such a promise. The record does indicate that the accountants were not provided copies of the documents or allowed to see the related work papers of the Respondent’s accountants because the audit had not been finalized. At that time, the Union’s accountants also submitted to the

this concern as disingenuous. Given our findings above regarding the nature of the information sought, we do not agree with the judge’s assessment.

<sup>11</sup>In light of our finding that there was no unfair labor practice, we find it unnecessary to consider the judge’s finding that the information was necessary and relevant to the Union’s collective-bargaining duties.

Respondent's controller a list of additional information that they believed was necessary to support the Respondent's representations regarding its dire financial condition. The Respondent's accountants compiled the information within 2–3 days of the request and forwarded it to Mead, the Respondent's financial vice president. At approximately the same time, on March 31, contract negotiations broke down over the issue of the location of future bargaining sessions.<sup>1</sup> On April 13, the Respondent sent the Union its final bargaining proposal. Although, as the judge found, the Respondent had the requested information available at least by that time, the Respondent did not furnish it to the Union. Nor did the Respondent notify the Union of any confidentiality concerns that impeded the release of the data.

The current collective-bargaining agreement expired on April 20. The following day the Respondent locked out its employees and implemented its April 13 proposal. A newspaper article published on April 23 included a statement by Bennett that a major reason for the Company's losses was its contribution to the Union pension plan. Two days later, another article quoted Noonan as attributing the losses to specified intercompany payments. On May 6, in response to the Union's written request for the information it had not yet received, the Respondent stated that the matter could be discussed at the next negotiating session, expressed its concern that the Union had not kept previously disclosed information confidential, and noted that it was unaware of any legitimate need for the additional information. The first time the Respondent expressed any reservations about providing the information based on confidentiality was in its May 6 letter. The judge specifically found that this concern pertained to Noonan's release of financial information in the April 25 newspaper article.

Although my colleagues adopt the judge's finding that the Respondent's confidentiality concerns stemmed from the April 25 disclosure, their view necessarily depends on an unsubstantiated assumption that such concerns existed throughout the time that the Union's request was pending. The majority begins by finding that the information sought was confidential and, relying on the May 6 letter, that the Respondent had legitimate confidentiality concerns. My colleagues conclude that, without the opportunity to bargain over

<sup>1</sup> I agree with my colleagues that the Respondent did not unlawfully renege on its agreement regarding the meeting location. However, my colleagues make too much of the judge's reasons for dismissing this allegation, and allow them to overshadow her finding that the Respondent acted in bad faith with respect to the Union's information request. Regardless of the relative merit of the parties' positions regarding the location of continued contract negotiations, the judge found, and I agree, that "[t]here is no rule which sanctioned the Respondent's withholding the [requested] material until Noonan appeared at a bargaining table of Respondent's choice."

these concerns, the Respondent was not "automatically obligated" to furnish the information. What they do not find—and cannot find based on this record—is that the Respondent ever had any reservations about confidentiality prior to the April 25 article or that it expressed such concerns before May 6.<sup>2</sup> Thus, the majority is in essence willing to accept the post hoc rationalization asserted by the Respondent for withholding the information from the Union.

I do not agree with this result. Although the Respondent would not have been "automatically obligated" to provide the information in the face of legitimate and substantial confidentiality concerns, if such concerns in fact existed and were communicated to the Union, the Respondent is not privileged to rely on *subsequent events* to justify its earlier failure to provide requested and available information. I agree with the judge that, once the Respondent had the information available, it should have furnished it to the Union. In the alternative, the Respondent was obligated to promptly raise and bargain about any reservations it may have had concerning the confidentiality of the data.<sup>3</sup> The Respondent failed to take either of these appropriate courses of action with respect to the Union's request.<sup>4</sup> I would therefore find that the Respondent violated Section 8(a)(5) and (1), and order that the Respondent provide the information to the Union.<sup>5</sup>

<sup>2</sup> As noted above, the Respondent had previously furnished the Union certain financial information in support of its asserted inability to pay, under conditions that it must have considered satisfactory at that time. The Respondent had also invited the union accountants to note any additional information that they may need.

<sup>3</sup> Approximately 5-1/2 weeks elapsed between the Union's initial request for the information and the Respondent's May 6 letter. I would not necessarily find such a delay excessive in all cases. In this case, however, during the time that the Respondent withheld the information from the Union, thus depriving the Union of the opportunity to fully assess the Respondent's financial status, the Respondent submitted and implemented a final concessionary proposal and locked out its employees. I find the Respondent's delay during the crucial period surrounding these events unreasonable.

<sup>4</sup> Although Mead testified that he believed that the information was to be furnished to the Union when the parties resumed negotiations, as noted supra, I find no legitimate basis for awaiting the Union's return to the table as a condition for compliance with its information request. Moreover, the judge found it "difficult to understand" why Mead would have believed that the material requested by the accountants was to be delivered instead to Noonan, and noted Mead's concession that the accountants could reasonably have expected to receive the data directly. Unlike my colleagues, I find it unnecessary to wonder what the Respondent's position concerning the Union's request would have been if the parties had met in mid-April, because I find that the Respondent had an obligation to raise any concerns that it may have had, whether or not the parties were otherwise meeting to negotiate, and that it failed to do so.

<sup>5</sup> In its exceptions, the Respondent contends that it should not be required to furnish the Union the working papers of its accounting firm or information concerning executive salaries. Although I have rejected the Respondent's belated general assertion that the data sought by the Union is confidential, I find that an employer's obligations with respect to these two specific areas have not been thor-

*Continued*

oughly considered by the Board, and that they may well present particular issues with regard to confidentiality. Therefore, concerning these two areas, I would order that the Respondent raise and bargain with the Union about any confidentiality concerns that it may have.

Having found that the Respondent unlawfully withheld the requested financial information from the Union, I also agree with the judge, for the reasons set out by her, that the Respondent's lockout of its employees violated Sec. 8(a)(1), (3), and (5), and that the Respondent is a single employer. Although the judge further found that the Respondent's implementation of its April 13 proposal was unlawful, I find merit in the Respondent's exception asserting that the General Counsel withdrew this allegation at the hearing. I agree with the judge's conclusion that the circumstances here do not warrant piercing the corporate veil in order to hold David Murray personally liable for the Respondent's violations. However, I note that as the sole proprietor of Erin Realty, which was found to be part of the single employer, Murray is liable for the obligations of that entity without regard to the circumstances normally giving rise to individual liability on the part of corporate officers or agents. See *Wayne Electric*, 241 NLRB 1056 (1979).

*Michael T. Fitzsimmons, Esq.*, for the General Counsel.<sup>1</sup>  
*Lawrence C. Winger, Esq. (Herbert H. Bennett & Associates)*, of Portland, Maine, for the Respondents.  
*Gabriel O. Dumont Jr., Esq. (Dumont & Morris)*, of Boston, Massachusetts, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. On charges filed by the Chauffeurs, Teamsters & Helpers Local Union No. 633 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO (the Union or Local 633) on May 19, 1988,<sup>2</sup> and amended<sup>3</sup> in Case 1-CA-25521 against Silver Brothers Co., Inc. d/b/a The Good Life Beverage Company (Respondent Silver Brothers) and on charges filed in Case 1-CA-25864 on October 18,<sup>4</sup> against Hospitality Holdings Corporation (Respondent HHC), Erin Food Services, Inc. (Respondent Erin Food), Erin Realty Company (Respondent Erin Realty), and David Murray, a second amended consolidated complaint and notice of hearing issued alleging that the Respondents committed unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondents filed timely answers denying certain allegations.

The case came to trial in Boston, Massachusetts, on April 2, 3, and 4, 1991, during which time the parties had full opportunity to examine and cross-examine witnesses, to introduce documentary evidence, and to argue orally.<sup>5</sup> After considering the witnesses' demeanor, the parties' posttrial briefs,

<sup>1</sup> Hereinafter referred to as the General Counsel.

<sup>2</sup> Unless otherwise specified, all events took place in 1988.

<sup>3</sup> Amended charges in Case 1-CA-25521 were filed on May 26, July 7 and 3, 1989.

<sup>4</sup> Amended charges in Case 1-CA-25864 were filed on December 8 and July 3, 1989.

<sup>5</sup> At the outset of the hearing, I approved a settlement agreement entered into by the General Counsel, the Union, and two of the Respondents in the above-captioned case—Silver Brothers Co., Inc., and Victor W. Dahar, Trustee-in-Bankruptcy, and Erin Food Services, Inc., and Michael Weingarten, Trustee-in-Bankruptcy.

and on the entire record,<sup>6</sup> pursuant to Section 10(c) of the Act, I make the following

## FINDINGS OF FACT

### I. JURISDICTIONAL FINDINGS

Respondent Silver Brothers, a corporation with offices and places of business in Londonderry and Gorham, New Hampshire, has at all times material engaged in the wholesale distribution and sale of beer, wine, and related products. Respondent Erin Food, a corporation with an office and place of business at 608 Chestnut Street, Manchester, New Hampshire, at all material times operated a chain of Burger King restaurants as well as a few full-service restaurants. Respondent HHC, a corporation with an office and place of business at 608 Chestnut Street, Manchester, New Hampshire, functioned as a holding company, owning 100 percent of the stock of Silver Brothers and Erin Food. At all times material, Respondent Erin Realty, a sole proprietorship with an office and place of business at 41 Brook Street, Manchester, New Hampshire, engaged in the ownership and rental of real estate.

During the calendar year ending December 31, 1988, Respondent Silver Brothers, in the course and conduct of its business operations described above, purchased and received at its Londonderry and Gorham facilities products, goods, and materials valued in excess of \$50,000 directly from points outside the State of New Hampshire. During the same calendar year, Erin Food had gross revenues on excess of \$500,000 and purchased goods valued in excess of \$50,000 directly from points outside the State of New Hampshire. During the same calendar year, Erin Realty derived gross revenues in excess of \$100,000 of which more than \$25,000 was derived from Erin Food.

Based on the foregoing facts, I find that Respondents Silver Brothers and Erin Foods were at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Overview: *The Parties' Contentions*

The issues in this case grow out of collective-bargaining negotiations for a new labor agreement between Silver Brothers and the Union in 1988. When bargaining for a new agreement commenced, Respondent advised the Union that it would seek extensive concessions in a successor contract. At the third bargaining session, the Union requested that some of the forthcoming negotiating meetings be held at a Teamsters site, the Northern New England Trust Building. According to the General Counsel and the Charging Party, the Respondent's attorney and chief negotiator initially consented to the proposed meeting place, but later reneged and refused to meet at that location. The Respondent, on the other hand, maintains that consent to the Union's proposed situs was

<sup>6</sup> Exhibits offered into evidence by the General Counsel will be cited as (G.C. Exh.) followed by the exhibit number; those offered by the Respondent will be cited as (R. Exh.), and references to the official transcript as (Tr.).

conditional, and that it subsequently decided against meeting there. The Union insisted that the Respondent abide by the alleged agreement to meet at the union building and refused to engage in further collective-bargaining sessions at any of the other locations suggested by the Respondent. The Respondent, in turn, refused to meet at the Union's preferred site. As a result of this standoff, negotiations ceased.

In accordance with a prior understanding between the parties, and just 2 days before the dispute over the meeting place erupted, union auditors reviewed certain financial materials provided by the Respondent's accountants to support its claim of economic distress. However, the union accountants were not furnished copies of the statements, the auditors' opinion letter, or their working papers. Moreover, the union accountants requested additional data which the Respondent subsequently failed to release. On April 21, the date the labor agreement expired, Respondent locked out the unit employees, but continued operating with replacement workers until it declared bankruptcy on June 23 and ceased doing business. The General Counsel and Union further contend, and the Respondents deny, that HHC, the holding company which owned Silver Brothers, Erin Foods, and Erin Realty are a single employer, and that David Murray, who owned all the Respondents, is personally liable.

From this spare precis of the facts, the following questions are presented for resolution:

1. Did Silver Brothers unlawfully refuse to meet and bargain with Local 633 at an agreed on location?
2. Did Silver Brothers improperly withhold necessary and relevant information from the Union?
3. Was Respondent's lockout of bargaining unit employees unlawful?
4. Is the amended complaint alleging that Murray, Murray d/b/a Erin Realty, Erin Foods, HHC, and Silver Brothers are a single employer time barred under Section 10(b) of the Act; and if it is not untimely, are these entities, and/or Murray in his personal capacity, liable for Silver Brothers' alleged unfair labor practices?

#### B. *The Relationship Among the Respondents*

Silver Brothers Co., a wholesale distributor of beer, wine, and other beverages, was the exclusive distributor of Miller Brewing Company products in New Hampshire which constituted 70 percent of its business. On December 31, 1986, Hospitality Holdings Company (HHC), an enterprise which existed solely to hold stock in subsidiary companies, purchased Silver Brothers in a leveraged buyout for \$11.1 million.<sup>7</sup> HHC also owned 100 percent of the stock of Erin Food Services, Inc., which in turn, owned and operated 27 Burger King franchises and a few full-service restaurants.

David Murray was the sole owner of all HHC stock. In addition, Murray, doing business as Erin Realty, owned various properties, including a facility which housed a Silver Brothers warehouse in Greenland, New Hampshire. As part of the purchase price for Silver Brothers, Murray mortgaged his own home to the lending bank for \$1 million and raised another \$950,000 through personal loans. Additionally, Murray guaranteed an \$8.5 million loan from the bank which served as the principal financier of the Silver Brothers acquisition and contributed a \$450,000 line of credit which Miller had extended to Silver Brothers. HHC also guaranteed the \$8.5 million separately. Moreover, in order to preserve a distributorship agreement, HHC and Murray personally were required to guarantee lines of credit in the amount of \$450,000 apiece to Miller. Further, HHC invested another \$1.5 million in Silver Brothers in 1988.

<sup>7</sup> Several subsidiaries of Silver Brothers also were included in the acquisition by HHC.

After the acquisition, three high-ranking HHC officials assumed the chief management positions at Silver Brothers. Thus, Murray became Silver Brothers' president; Perry Robson and Jack Mead, both of whom held executive positions with HHC, assumed positions as vice president-general manager and financial vice president, respectively. A third official, Thomas Martin, shifted laterally from controller at Erin Foods to the same position at Silver Brothers.

Following the acquisition of Silver Brothers, extensive financial transactions commenced among Murray's "entrepreneurial ventures" and continued for the next year and one-half until Silver Brothers filed for bankruptcy on June 23, 1988.<sup>8</sup> For example, Silver Brothers paid HHC a \$600,000 annual management fee at \$50,000 a month.<sup>9</sup> Each of these affiliated companies maintained intercompany accounts through which they frequently advanced funds to one another on a noninterest-bearing, unsecured basis, for brief periods of time. In 1987, these transactions totalled \$8.5 million. Further, Silver Brothers paid a \$99,000 maintenance fee to Erin Foods and an annual fee of \$282,000 to Murray d/b/a Erin Realty, as rent for the Greenland warehouse. These financial interrelationships led Michael Spector, treasurer for Silver Brothers and Erin Foods and chief operation officer for HHC, to testify in a separate proceeding that "All of the intercompany accounts are basically one intercompany account. It's all David Murray." (G.C. Exh. 14 at 127.)<sup>10</sup>

Apart from Mead's and Robson's transfer to Silver Brothers, midlevel managers who worked for the Company's prior owners remained in place. Moreover, there was virtually no contact on a day-to-day basis among the Silver Brothers labor force and employees of its sister companies, with the exception of some Erin Foods personnel who performed periodic services such as landscaping for Silver Brothers.

#### C. *Collective-Bargaining Negotiations*

When HHC purchased Silver Brothers, it assumed Silver Brothers' extant collective-bargaining agreement with Teamsters Local 633. The agreement which was effective from April 16, 1985, to April 20, 1988, covered a unit of approximately 100 drivers, helpers, warehousemen, and mechanics stationed at the Company's four warehouses in New Hampshire.<sup>11</sup>

In January, as Silver Brothers began to prepare for a successor contract, it found itself in dire financial straits. To re-

<sup>8</sup> See G.C. Exh. 14 at 3, memorandum opinion, *Miller Brewing Co. v. Silver Bros. Co.; Hospitality Holdings Corp.; David W. Murray* (U.S. D. C., D.N.H. June 22, 1988).

<sup>9</sup> Testimony was adduced that Silver Brothers failed to pay this fee in 1988.

<sup>10</sup> Spector testified at a hearing in the U.S. District Court, District of New Hampshire, on June 16, 1988, at a hearing on motion to enjoin Miller's effort to terminate its distributorship agreement with Silver Brothers.

<sup>11</sup> The Silver Brothers facilities were located in Londonderry, Keene, Gorham, and Greenland.

main viable, HHC and Silver Brothers' officials determined that cost savings would have to be achieved in part by obtaining major concessions from the Union.<sup>12</sup>

On February 20, Herbert Bennett, Respondents' labor counsel, wrote to Union Business Agent Thomas Noonan to confirm the parties' first agreed meeting date on March 4 at the Koala Inn in Manchester where HHC was headquartered and one of the Silver Brothers facilities was located. In the same letter, Bennett advised the Union that the Company would not extend the terms of the contract beyond its April 20 expiration date because of its "extremely critical financial condition." (R. Exh. 1-D.)

As agreed, the parties met on March 4 at a Koala Inn, with Murray, Bennett, Mead, and Robson attending on behalf of Silver Brothers. Noonan, who served as the Union's chief spokesman, and Shop Stewards Richard Legace and Edgar Smith represented Local 633. At the outset, Murray and Mead painted a grim picture of the Company's precarious fiscal position indicating that because it was in default on its loan agreements with the bank and experiencing great difficulty meeting the terms of its distributorship agreement with Miller, it could not continue under the terms of the current labor contract. To document its grave situation, Mead made a verbal presentation based on financial statements for 1985, 1986, and 1987 which were displayed on a slide projector for approximately 15 minutes. The statements showed, among other things, that Silver Brothers' operating losses were at a 3-year high of nearly \$3.5 million. Noonan's request for a copy of the financial statements was refused on the grounds that the information was sensitive and confidential. At the same time, Bennett assured Noonan that the Union's auditors could review the underlying data to verify the Company's claims of impoverishment. Before concluding, the parties agreed to eight additional meeting dates in March and April. Subsequently, Noonan contacted the Union's accountants and requested that they arrange to meet with the Company's accountants.

The next two bargaining sessions on March 14 and 15 also took place at the Koala Inn, with all the same persons present as before except Murray. Although Murray did not attend any other bargaining sessions, Robson and Bennett both kept him apprised of the progress of the negotiations. While Robson claimed to be the decisionmaker for Silver Brothers, Bennett stated emphatically that it was Murray who was in control; that he made the "final decision; absolutely . . . it was his company." (Tr. 281.)

For the most part, negotiations on March 14 and 15 was uneventful; the parties agreed to some items and disagreed with others. However, one seemingly harmless exchange between Noonan and Bennett on March 15 escalated from molehill to mountain, eventually causing the negotiations to collapse. According to Noonan, at the end of the meeting on either March 14 or 15, he proposed holding the first three meetings in April at a union building, the Northern New England Benefit Trust (NNEBT). Bennett allegedly agreed to this site without qualification and obtained directions there. Bennett, on the other hand, testified that he acquiesced to the meeting place but told Noonan he would have to obtain

Murray's approval. Both Noonan's and Legace's minutes of the meeting confirm the Union's position on this controverted issue while Mead, Robson, and Company Secretary Haffermehl testified in support of Bennett's assertion that his consent was given conditionally. Although Haffermehl served as Silver Brothers' official minute taker, her notes contain no reference to any discussion regarding a meeting site in April. In explaining this omission, Haffermehl testified that the exchange occurred after she had put away her notebook at the meeting's end.

By letter to Bennett dated March 18, Noonan confirmed that the April meetings would be held at the NNEBT. Bennett did not respond to this letter. Instead, at the outset of the March 31 meeting, which also was held at the Koala Inn, Mead handed Noonan a letter stating that Silver Brothers declined the offer to meet at the NNEBT, but would agree to sessions at a public facility, including any 1 of 10 hotels listed in an attachment. When Bennett admitted to Noonan that Murray had vetoed the union building as a meeting site, an argument erupted between the men. Noonan left the room fuming. Bennett followed him out and confided to Noonan that Murray was apprehensive that the Union could tap the NNEBT phones and overhear his and Bennett's discussions regarding negotiations. Bennett acknowledged at the hearing that this was his reason for refusing to meet at the union building.

Following the March 31 meeting, both sides dug in their heels and refused to compromise on a mutually agreeable meeting site. In an April 12 letter to Bennett, Noonan claimed that the Union was ready for meaningful negotiations, but insisted that they take place at NNEBT or, alternatively, at a Silver Brothers plant. Bennett rejected both locations on grounds that neither was neutral and again urged Noonan to select any 1 of 10 acceptable hotels. Subsequently, the Respondent proposed meeting in the Company's Greenland terminal since it was closed and no employees were on the scene. Noonan agreed to meet there but only if the following meeting was held at the NNEBT. The Company again balked at this. Instead, Respondent's counsel proposed going forward with the meeting at the Greenland plant and bargain there about a site for the next meeting. Noonan rejected this proposal, as well as a suggestion that the parties meet at any governmental facility in the State. As a consequence of this dispute, March 31 proved to be the parties' final bargaining session.

#### D. The Lockout

With the parties at a standoff on a meeting, in lieu of direct negotiations, Murray instructed Bennett to mail a revised contract proposal to Noonan patterned on a concessionary agreement between the Union and another beer distributor. In an April 13 cover letter accompanying the proposal, Bennett informed Noonan that if the Union refused to meet at a neutral location prior to April 21, the Company intended to implement the proposal as its final offer on that date.

Both sides remained obdurate, refusing to compromise on a mutually agreeable site. On April 20, the collective-bargaining agreement expired. The next day, Silver Brothers locked out the employees and replaced them immediately with approximately 70 replacement workers hired from a temporary service.

<sup>12</sup> Another cost-savings step entailed the closure of Silver Brothers' Greenland warehouse and the abolition of six management positions.

Bennett stated that he was not directly involved in the lockout decision; rather, it was Murray who chose that course at some point after the parties had locked horns on a satisfactory meeting place. Bennett stated emphatically that the purpose of the lockout was to induce the Union to return to the bargaining table and “make concessions so that this company could stay alive.” (Tr. 289.)

Robson explained that sometime in February, when the Respondent was considering its options and bargaining strategy, he decided as a matter of contingency planning to contact three or four businesses which provided temporary employees. Then, in early or mid-April, he selected one of the firms in the event a lockout became necessary. Contradicting Bennett, Robson claimed he alone made the lockout decision several days prior to April 21, and simply informed Murray that he had done so. He confirmed Bennett’s testimony that the primary reason the Company opted for a lockout was to compel the Union to meet. A secondary consideration was to prevent further vandalism to the trucks.<sup>13</sup>

#### *E. The Request for Information*

In accordance with the parties’ March 4 agreement that the Union could see Silver Brothers’ books and records, Richard Morella and Suzanne Smith, certified public accountants with Watchmaker & Co., went to the accounting firm of Ernst and Whinney to review information bearing on Silver Brothers’ financial status. At the outset, Morella and Smith were told they would not be furnished copies of the draft financial statements, nor be allowed to see the accountants’ work papers since the audit was not in final form. However, Mead suggested that they should note any additional information they might need.

Morella and Smith were permitted to see a draft audited consolidated financial statement for Silver Brothers and subsidiaries for 1987. Morella testified that he and Smith reviewed the 11-page document for approximately 1 hour, during which time they took handwritten notes. In addition to the difficulty that this manual process imposed, Morella pointed to other drawbacks which impaired their ability to conduct a thorough audit. First, Morella observed that no opinion letter accompanied the audit. He explained that every financial statement is accompanied by such a letter which sets forth the auditor’s view as whether the financial information has been verified so that it fairly represents the company’s financial position. The union accountants also found that many important items in the statement were set forth in general categories which did not provide insight into the precise ways in which the funds were allocated or spent. For example, the statement contained a single figure for a category designated “Cost of products sold.” (G.C. Exh. 16.) According to Morella, a breakdown of this category could reveal whether hidden costs were being charged against this category such as reimbursed expenses to company officials. Similarly, he noted that a composite sum of over \$4 million was given for “General and Administrative” expenses. Although notes accompanying the balance sheet purported to explain this item, they accounted for only \$1 million or one-fourth of the total sum. Finding they had a number of unan-

<sup>13</sup> Shortly before the lockout commenced, tires were slashed and glue was poured into the ignitions of six or seven of the Company’s vehicles.

swered questions, Morella and Smith compiled a list of additional information which they believed was required before they could determine whether the Company’s claim of financial destitution were bona fide. They submitted this list to Thomas Martin, Silver Brothers’ controller, who agreed to provide most of the information.<sup>14</sup> The union accountants believed that the data would be sent to them directly. Mead, on the other hand, stated that he thought it was to be given to Noonan at the next bargaining session, although he acknowledged that Morella and Smith might have reasonably assumed they would receive the data directly.

Martin gathered the requested information within 2 or 3 days of the March 29 meeting and turned it over to Mead. However, the data was not transmitted thereafter to the union accountants or to Noonan, for by the time the requested information was prepared, the imbroglio over the meeting place had begun.

In mid-April, Noonan learned from Susan Smith that the accountants had not received the promised information. He asked Smith to send him the list of the requests and, on receiving it, asked for the identical information in a letter to Bennett dated May 3. The letter identified the following data:

1. Analysis of interest expense
2. Breakdown of salaries by: Officers, office, selling and delivery and other
3. Summary of cost of goods sold
4. Breakdown of the following:
  - a. General and administrative expenses
  - b. Delivery and selling expenses
  - c. Accounts payable and accrued expenses
  - d. Accrued compensation (detailed in the same manner as #2 above)
5. 1986 financial statements for: Silver Brothers and its subsidiaries.

Bennett’s belief that the Union was entitled to review the Company’s financial records had eroded by the time he responded to Noonan’s letter. Thus, in his May 6 reply to Noonan, Bennett wrote that while he was willing to discuss the request at the next bargaining session, he was concerned “that [Noonan] did not keep confidential the financial information previously disclosed to [him]” and was “unaware of any legitimate need for you to have further financial information from the company.” (G.C. Exh. 13.)

Bennett’s reference to a breach of confidentiality pertained to the Respondent’s belief that Noonan had violated a vow of confidentiality ostensibly given at the March 4 bargaining session by revealing financial information about the Company which appeared in a Manchester newspaper on April 25. Noonan was quoted in the article as follows:

They say the company is bleeding to death with \$3.8 million in losses last year, but they fail to say that \$1.4 million of that total is simply what they owe in interest to the banks for Murray’s purchase of the company from Silver Brothers.

Murray is also paying \$500,000 in “management fees” to one of his his own holding companies, hospi-

<sup>14</sup> Martin testified that he believed it inappropriate to provide a breakdown of officer’s salaries.

tality holdings, and there was also a \$200,000 finder's fee for purchasing the company. [R. Exh. 6.]

Noonan denied that he had made any commitments about confidentiality at the March 4 meeting, but did not deny the newspaper comments attributed to him. Instead, he explained that in his view the Respondent itself had waived any claims of privacy regarding its financial status when Bennett was quoted in an article appearing in the same newspaper on April 23 that "During the last 15 months the company has lost nearly \$5.6 million," that "During the first year of operation [following Murray's purchase] there was a \$3.8 million loss," and that "The major reason for the company's financial losses . . . is the . . . \$280,000 contribution to the union pension fund." (G.C. Exh. 18.)

Consistent with the position taken in Bennett's May 6 letter, Respondent never released the requested information to the Union.

### III. DISCUSSION AND CONCLUDING FINDINGS

#### A. *The Respondent's Refusal to Meet at the NNEBT did not Violate Section 8(a)(5)*

Under Section 8(d) of the Act, parties are required "to meet at reasonable times and confer in good faith." Implicit in the duty to meet at reasonable times is the duty to meet at reasonable places.

The General Counsel and the Charging Party posit, and the Respondents deny, that the parties entered into an agreement to conduct a series of negotiating sessions at the NNEBT building, and that by subsequently refusing to meet there, Respondent breached its duty to bargain in good faith. Given the facts bearing on this issue and the parties' contentions, two thorny questions must be resolved: first, did Bennett agree to meet at the NNEBT building as the General Counsel and Charging Party contend; and second, if so, did Respondent violate its duty to bargain in good faith by subsequently refusing to honor that agreement?

After carefully culling the record, I conclude that it is more likely than not that Bennett did assent to meet with the union bargaining team at the NNEBT for the first three meetings in April. In reaching this conclusion, I rely, in part, on record evidence which shows that Bennett was empowered to enter into agreements about substantive contractual terms without consulting Murray. It is illogical to believe that Bennett had the authority to bind the Respondent in financial matters, yet not have the power to decide on a meeting place. Further proof that Bennett assumed he had the discretion to commit to a meeting site rests on the fact that he asked for and jotted down directions to the union building. If Murray had conditioned his agreement on Murray's acquiescence, it is unlikely he would have taken written directions until he knew, as a matter of fact, that he needed them.

Haffermehl's detailed, contemporaneous minutes of the parties' March 31 bargaining session also lend support to the conclusion that Bennett agreed, without reservation, to meet at the union building. Thus, her notes reveal that when Mead handed Noonan a letter on March 31 offering to meet at any 1 of 10 places, as long as it was not the NNEBT, Noonan reacted swiftly, and maintained that an agreement had been struck. The immediacy of Noonan's unequivocal response suggests that he was genuinely nonplussed by Respondent's

change of mind. Bennett, on the other hand, did not seize the occasion to remind Noonan that his acceptance of the NNEBT was conditioned on Murray's approval.

In contrast to Haffermehl's comprehensive reporting of Bennett's and Noonan's exchange about this issue at the March 31 meeting, her minutes of the March 14 meeting at which the agreement between Noonan and Bennett was struck, are curiously silent about a prospective meeting at the NNEBT. In explaining this anomaly, Haffermehl testified that she failed to record any comments about a location for the April bargaining sessions because they came at the end of the meeting after she had put her notebook away. However, thorough minutes of the March 14 meeting taken by the Union Steward Legace show that Bennett agreed to meet at the NNEBT prior to the time the parties began to review contract proposals, not at the very end of meeting as Haffermehl incorrectly recalled. Since Legace's minutes were taken at the time of the event in question and before the parties attached any significance to the meeting place, I find that they are a reliable record of what, in fact, occurred. Accordingly, given Haffermehl's faulty recollection of this matter, I cannot rely on her assertion, based on memory alone, that Bennett's approval of the NNEBT was made contingent to Murray's approval.

Robson, too, declared that Bennett did not give a final answer to Noonan regarding the NNEBT location. However, I find his testimony wholly unreliable. Contrary to Bennett's candid acknowledgment that Murray was his client and absolutely in control of the business, Robson asserted that Murray played no role in the negotiations following his attendance at the March 4 meeting. Instead, Robson asserted that he was the chief authority to whom Bennett turned for instructions and further, that he was the one who initially rejected the NNEBT because it was a nonneutral site.

Robson was contradicted at every turn. First, Murray admitted that he was responsible for rejecting the union building as an acceptable meeting site. Bennett did not hesitate in identifying Murray as his client, and conceded that Murray was the person who gave him his instructions throughout the negotiations. If Robson was in charge of the negotiations, as he claimed, then it is mystifying why Bennett did not simply turn to him during the March 14 meeting to confirm or reject the NNEBT as a meeting place. Robson's attempt to claim authority beyond that which he actually possessed in an apparent effort to absolve his former employer of responsibility, casts great doubt on all of his testimony.

In sum, I find that on March 14, Bennett agreed without qualification, and possibly with little forethought, to hold three of the April bargaining sessions at the Union Trust building. The General Counsel and the Charging Party submit that it follows from this conclusion that by retreating from its commitment to meet at the NNEBT, the Respondent unlawfully refused to bargain in good faith.

It is well established that it is necessary to look to the totality of circumstances in determining whether the repudiation of an agreement reached in the course of collective bargaining constitutes bad faith in contravention of a respondent's bargaining obligation. See, e.g., *Merrell M. Williams*, 279 NLRB 82 (1986). Given the totality of circumstances in this case, I am unable to conclude that the Respondent's refusal to meet at the NNEBT, standing alone, amounts to a refusal to bargain in good faith.

I reach this conclusion because the record evidence establishes beyond any question that the Respondent did not renege on its agreement to meet at the union office building in order to obstruct or delay the negotiations. To the contrary, apart from this one default, Respondent's representatives made ardent efforts to bring the Union to the bargaining table and resume negotiations. Thus, Mead's May 31 letter to Noonan proposed 10 alternative locations for a meeting, none of which imposed a hardship on the union negotiating team. Indeed, one of the alternative sites was the Koala Inn which Noonan had accepted before and found satisfactory in every respect. Further, Haffermehl's notes of the March 31 meeting indicate that Bennett proposed adding another meeting date in April to the six on which the parties previously had agreed.<sup>15</sup> Bennett's willingness to schedule extra bargaining meetings, reflects an eagerness to engage in negotiations, not the reverse.

Over the next several months, Bennett's correspondence to Noonan reveals that he made numerous efforts to woo the Union back to the bargaining table. He proposed that they meet at any neutral location, including any governmental facility in the State. He also suggested that they meet at Respondent's Greenwood terminal which had a conference room and was no longer operational, and there, engage in bargaining about the location for the balance of the negotiations. Noonan was willing to meet at this latter site, but only on condition that the next meeting take place at the NNEBT. His insistence on a location that he knew was an anathema to Murray, suggests that he, rather than the Respondent, was using the meeting place issue as a red herring to avoid resuming negotiations.

Murray's purported reason for rejecting the NNEBT building is far fetched. If he was genuinely concerned about the security of his conversations with Bennett, the two men could have agreed to converse only during recesses or in the evening when Bennett had access to a private phone. However, as bizarre as Murray's reason may seem for rejecting the union office building, he did not oppose any other site as long as it was neutral. Noonan, on the other hand, offered no excuse whatsoever for rigidly insisting that Respondent meet at a nonneutral site. He did not, and could not, claim that the Union had taken any irreparable action in reliance on Bennett's initial agreement to meet at the NNEBT. Although Noonan did reserve space at the union building, there was no evidence that cancelling those reservations almost 2 weeks in advance of the scheduled date would have caused any inconvenience to the Union. Surely, if Noonan was genuinely interested in bargaining, he could have met the Respondent on neutral territory and, at the same time, filed an unfair labor practice charge.

The General Counsel relies on *Proctor & Gamble Mfg. Co.*, 248 NLRB 953 (1980),<sup>16</sup> as precedent for the proposition that once a location for bargaining has been agreed on, it is a violation of Section 8(a)(1) and (5) to unilaterally change it. Counsel's reliance is misplaced, however, for that case clearly is distinguishable. The Board's holding in *Proctor & Gamble* rested firmly on factual findings that the Re-

spondent had discontinued a longstanding practice of making its premises available for contract negotiations as part of an unlawful stratagem to combat the union's including representatives of other labor organizations in the bargaining meetings. The circumstances in this case are far different: here, no past practice with regard to the choice of meeting site had been established, for Bennett was negotiating with the Union on behalf of a new owner. Further, there was no evidence here, as there was in *Proctor & Gamble*, that the Respondent's refusal to meet at the NNEBT was prompted by a devious desire to evade negotiations.

Subsumed in 8(d)'s requirement "to meet at reasonable times" is the duty to meet at reasonable places. *Burns Security Services*, 300 NLRB 1143 (1990). However, nothing in the Act suggests that there is only one reasonable location, or that having once agreed on a location, one party may not change its mind so long as the motive for the change is not to delay or avoid bargaining. Unlike a refusal to execute an agreed-on contract, which is a per se violation of the Act, renegeing on an agreement to meet at a particular location represents only one factor to be considered in determining good or bad-faith bargaining. See generally, *Merrell M. Williams*, supra at 83; *Reliable Tool Co.*, 268 NLRB 101 (1983). Consequently, after taking into account Respondent's genuine efforts to find a mutually acceptable meeting place, I am unable to conclude that its rejection of the NNEBT site rises to the level of bad-faith bargaining. See *Dilene Answering Service*, 257 NLRB 284, 292 (1981).

#### B. *The Respondent Unlawfully Withheld Information*

The amended consolidated complaint alleges in substance that since March 29, the Respondent has refused to provide information to the Union to substantiate its claimed inability to pay. The Respondent does not dispute the principle that where, as here, an employer seeks concessions based on assertions of economic hardship, the union is entitled to "some sort of proof of its accuracy." *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956). Rather, the Respondent contends that it satisfied the *Truitt* mandate by disclosing all the financial information to which the Union was entitled or needed to verify the Company's assertion and participate in meaningful bargaining.

As detailed above, the Respondent afforded the union negotiators a relatively brief glimpse of its unaudited financial statement for 1987 and audited figures for 1986 and 1985 at the parties' first bargaining session. Respondent's officials did not provide the Union with copies of these statements; instead, they specifically agreed that the Union's accountants could review its books and records. The union accountants, in turn, concluded that they could fulfill their obligation to the Union by reviewing audited materials compiled by the Silver Brothers' accounting firm, Ernst and Whinney. However, although the Union's accountants were permitted to review and take handwritten notes of the firm's draft financial statements, they, too, were denied copies of the material, thereby preventing more extended consideration. During their inspection, the union auditors asked to see Ernst and Whinney's opinion letter and the working papers underlying the audited statements. They also compiled a list of additional information which was prepared but never delivered to them. By letter of May 3, Noonan forwarded the union accountants' additional requests to Bennett who rejected it by

<sup>15</sup> Bennett previously agreed to an additional meeting which took place on March 31.

<sup>16</sup> Enfd. 658 F.2d 968 (4th Cir. 1981), cert. denied 459 U.S. 879 (1982).

letter of May 6, stating the Union had "no legitimate need . . . to have further financial information from the company." (G.C. Exh. 13.)

A respondent's duty to supply information in situations such as those presented here, is not satisfied by furnishing only the documents it deems are sufficient. Rather, the Board has long held that on request, the employer must supply the union with sufficient information to enable it to understand and intelligently discuss the issues raised in bargaining. *S. L. Allen & Co.*, 1 NLRB 714 (1936). The litmus test for determining whether documents should be produced is whether they can be justified as relevant and reasonably necessary for the union to properly represent its members in collective bargaining. *Teleprompter Corp. v. NLRB*, 570 F.2d 4, 8 (1st Cir. 1977); *J. I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958). In other words, information must be disclosed unless it is plainly irrelevant. On applying these principles to the circumstances of the instant case, I conclude that the requests made by the auditors, who were serving as the Union's agents, were reasonable, relevant to the Union's duty to bargain collectively on behalf of its members.

At the outset, it is well to recall that neither Mead nor Martin, the persons directly responsible for Silver Brothers' financial records, regarded the union accountants' requests as unreasonable or burdensome since the material was gathered together in fairly short order. Further, the explanations which Union Accountant Morella offered to justify each of his requests were wholly credible and persuasive. Thus, he pointed out that he and his associate, Smith, had agreed that they would not examine Silver Brothers' original books and records, but rather, Ernst and Whinney's audit of those records. Consequently, the auditors' opinion letter and working papers assumed special significance. As Morella explained, an opinion letter would have certified that Ernst and Whinney accepted professional responsibility for the validity of the figures presented and had not simply adopted what was found in the client's records. The working papers, too, presumably contained calculations verifying the client's underlying data. Since the union accountants were relying on Ernst and Whinney's audit and not Silver Brothers' original data, it is altogether reasonable that they would view the opinion letter and working papers as crucial in authenticating and validating the Company's claimed fiscal instability.<sup>17</sup>

The Respondent defends its failure to provide Ernst and Whinney's work papers by contending that accounting firms generally do not provide such material while an audit, such as the one involved, are incomplete. This defense is too facile and ultimately, is unresponsive. Ernst and Whinney never did prepare a final audit for the firm was not paid for its services. Thus, the financial statements shown to the union accountants became the final audit so that copies should have been included in materials prepared for the union accountants. Further, the opinion letter was completed on the very day that Morella and Smith were present at the Ernst and Whinney firm and could have been provided. The Respondent also submits that the union accountants had no need for the work papers or opinion letter since an Ernst and Whinney representative vouched for the figures in the draft audit. In

<sup>17</sup>The opinion letter appears as p. 1 of G.C. Exh. 16. Therefore, I assume that the Respondent has no further obligation to furnish it to the Union.

other words, the Respondent suggests that the union accountants should have trusted the verbal assurances of the Respondent's accountants. This is a rather naive and untenable position given the realities of the business world.

Morella also testified that he reviewed a consolidated financial statement covering both Silver Brothers and its affiliated companies, Donahue Beverages and One Seventy-Seven Granite Street, Inc. Information showing how assets and liabilities were distributed among the three companies was needed to determine whether only one or two of them was insolvent and incapable of paying union benefits. He further pointed out that notes accompanying the audit accounted for only 25 percent of the \$4 million allocated to administrative expenses. Since the Company claimed it was on the verge of financial ruin, the Union surely was entitled to know how an additional \$3 million of expenses could be justified. Similarly, Morella asked for a breakdown of officers' salaries since the audit did not show how much money individual officers were taking out of the Company or who they were. Without such a breakdown, he noted, it was impossible to tell if anyone was being unjustly enriched. He further explained that he requested an itemization of delivery and selling expenses for he has found that reimbursed expenses to officers often are concealed in this category. In a similar vein, Morella justified other inquests for breakdowns of financial totals so that he could determine what the true value of the Company's assets were or whether income was being diverted to nefarious ends. It takes little business acumen to recognize that it could be important for the Union to know whether the Company's officers were rewarding themselves handsomely while at the same time pleading poverty; whether the Company had sufficient assets to counterbalance cashflow shortfalls; or whether, if necessary, the Company could sell assets to offset its liabilities. As Noonan recognized, in order to understand his bargaining options, he had to rely on the evaluation and advice of the union accountants. They, in turn, "were unable to draw any conclusions, without access to the information requested." (G.C. Exh. 5.) Accordingly, I conclude that Morella and Smith, who were acting as the Union's agents, and on whose analysis and advice Noonan intended to rely, were justified in their requests for information.

It is difficult to understand why Mead should have believed that the material which Morella and Smith requested for their review was to be delivered to Noonan. Mead acknowledged that the union accountants reasonably could expect that they would receive the information directly, since they had requested it as part of their evaluation. Certainly, it was evident that Noonan would only turn it over to his accountants for analysis. Mead had the material in his possession no later than mid-April. At that point, Respondent should have submitted the material to Noonan or better yet, to the Union's accountants. There is no rule which sanctioned the Respondent's withholding the material until Noonan appeared at a bargaining table of Respondent's choice. Other methods of ensuring that the material was delivered promptly surely were available. Indeed, Bennett had no difficulty in mailing a new concessionary contract proposal to Noonan on April 13, 1 week before the extant agreement was to expire. Regardless of the parties' inexplicable differences over a suitable meeting place, the Respondent could not demand that the Union participate in bargaining,

impose deadlines for action, plead that the matter was urgent, and, at the same time, withhold information which the Union needed to formulate bargaining positions which best protected its members' interests.

Respondent's argument that Noonan forfeited any right to receive the material by disclosing confidential data about Silver Brothers' financial condition to the press is unpersuasive and somewhat disingenuous. Silver Brothers' own attorney was the first to divulge information to the same newspaper several days before the Noonan article appeared which was equally, if not more, damaging to the public's perception of the Company's fiscal stability. Moreover, by inaccurately attributing the Respondent's losses solely to the cost of the union contract, Bennett certainly bears some responsibility for provoking Noonan's response.

In light of the foregoing considerations, I conclude that by refusing to furnish the requested information to the Union, the Respondent hindered meaningful negotiations and thereby engaged in bad-faith bargaining in violation of Section 8(a)(5) and (1). *Sioux City Stockyards*, 293 NLRB 1 (1989), enf. 901 F.2d 669 (8th Cir. 1990); *Clemson Bros.*, 290 NLRB 944, 950-951 (1988).

Where, as here, an employer has failed to bargain in good faith, no legally cognizable impasse can occur. *Clemson Bros.*, supra at 951. Where no genuine impasse exists, an employer is not at liberty to unilaterally alter employees' terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736, 747 (1962). Notwithstanding the foregoing well-settled principles, the Respondent locked out its drivers and applied the terms of its April 13 contract proposal to employees hired to replace them. By prematurely implementing its final contract offer, Respondent violated Section 8(a)(1) and (5) of the Act.

#### C. The Lockout Was Unlawful

Respondent's witnesses offered two related reasons for locking out its employees. First and foremost was the Company's need, based on its asserted fiscally insecure condition, to obtain concessions in a successor agreement. Second, it hoped to lure the Union back to the bargaining table so that negotiations leading to its principal goal of securing concessions could proceed. An employer's lockout which is motivated by bad-faith bargaining violates Section 8(a)(1), (3), and (5) of the Act. See *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1258 (1989). With specific reference to this case, a lockout is unlawful which is initiated and maintained while an employer refuses to supply information in support of its demand for concessions. *Clemson Bros.*, supra at 945.

It cannot be disputed that the Respondent introduced and maintained the lockout primarily to compel the Union to accede to a concessionary labor contract, or as Bennett testified, "at least [to] meet and make concessions so that this company could stay alive." (Tr. 432.) Yet, at the very time the Company was insisting on concessions, it improperly withheld financial information which the Union needed before to fully understand and verify Silver Brothers' claimed inability to pay. Consequently, by locking out the unit members to gain its ends in bargaining, while at the same time obstructing the Union's ability to engage in meaningful negotiations, the Respondent further violated the Act.

Respondent's witnesses also acknowledged that the lockout was prompted in part by a desire to arrange a meeting

at a location other than the NNEBT. The General Counsel and Charging Party submit that because this motive was in furtherance of the Respondent's allegedly unlawful refusal to honor its agreement to meet at the Union Trust building, it, too, contributed to the illegitimate purposes of the lockout. However, as I found above, the Respondent's refusal to meet at the NNEBT did not rise to the level of an unfair labor practice. Accordingly, a lockout which is intended to accomplish a lawful purpose is not, for that reason alone, unlawful. However, even if the lockout was prompted in part by a legitimate consideration, this does not alter the fact that it was primarily designed to accomplish a prohibited purpose, and thereby retained its unlawful character. See *Movers & Warehousemen's Assn.*, 224 NLRB 356, 357 (1976), enf. 550 F.2d 962 (4th Cir. 1977), cert. denied 434 U.S. 826 (1977).<sup>18</sup>

#### IV. THE SINGLE-EMPLOYER ISSUE

##### A. The 10(b) Defense Lacks Merit

Paragraph 5 of the amended consolidated complaint alleges that HHC, Silver Brothers, Erin Food, and Erin Realty operated as a single-integrated enterprise and constitute a single employer within the meaning of the Act. Further, paragraphs 7 and 8 allege that Murray is personally liable for the unfair labor practices discussed above. The Respondents deny these allegations, and in addition, assert affirmatively, that the charges against all the Respondents except Silver Brothers were untimely filed and, therefore, barred by Section 10(b) of the Act.

Respondents misperceive the theory and purpose underlying their inclusion in the amended consolidated complaint. As I understand it, Respondents Murray, HHC, Erin Foods, and Erin Realty are not accused of committing unfair labor practices in their own right. Rather, they were identified as entities comprising a single employer and as such, may be held derivatively liable for the unlawful conduct of another part of the enterprise. If these companies are found to comprise a single employer, then valid service within the 10(b) period on one constitutes valid service on all. See *Electrical Workers IUE (Spartus Corp.)*, 271 NLRB 607 (1984).

It is well settled that liability for Board ordered remedies may be imposed on a party to a supplemental proceeding even though that party was not involved in the initial unfair labor practice proceeding, if the newly added party is sufficiently closely related to the person found to have committed the unfair labor practices. *Coast Delivery Service*, 198 NLRB 1026, 1027 (1972). This is true even if the 10(b) period has long since elapsed. *Alaska Cummins Services*, 294 NLRB 1 (1989). In *NLRB v. C.C.C. Associates*, 306 F.2d 534, 539 (2d Cir. 1962), the cogent analysis of the court of appeals resolves any doubts about the propriety of joining additional parties for purposes of determining derivative liability:

The question is properly raised whether under the N.L.R.A., the Board is empowered to consider derivative liability of new parties without beginning a new

<sup>18</sup>By the same token, if the lockout was motivated in part, as a stratagem to prevent vandalism, as Robson alleged, this would not compensate for the fact that it had an illegal purpose or convert it into a legitimate action. Id.

unfair-labor practice proceeding against them under 10(b) . . . . We find that it is so empowered. The Board in the present proceeding is not charging the new parties with any unfair labor practice of their own or participation in those of the original respondents; rather, it alleges only that they bear such relation to parties already determined to be guilty that they share with them the already adjudicated financial obligation to make certain employees whole for lost pay. Thus, these are not primary actions to determine violations of law, as are provided for in § 10(b), but rather ancillary enforcement proceedings.

In the same case, the court made it clear that in order to obtain adequate relief, the Board has no less power to join parties in an a supplementary compliance proceeding than it would if the same parties were named in the original case. *Id.* In other words, if respondents may be added properly even after the unfair labor practice trial has concluded, a fortiori, they may be included at an earlier stage of the litigation. Therefore, Murray, HHC, and Erin Realty may be found liable only if I conclude they are a single employer. If they are a single employer then they may be held accountable for any remedy which might be granted.<sup>19</sup>

*B. HHC, Silver Brothers, Erin Foods, and Erin Realty are a Single Employer*

The final substantive issue posed in this case is whether Murray in his individual capacity—Murray doing business as Erin Realty, HHC, Erin Foods, and Silver Brothers—constituted a single-integrated enterprise.

In order to prove that the remedial obligations of one corporation should be imposed on another, the General Counsel must show that “separate corporations are not what they appear to be, that in truth, they are but divisions or departments of a ‘single enterprise.’” *NLRB v. Deena Artware*, 361 U.S. 398, 402 (1960). Specifically, in determining whether two or more entities constitute a single enterprise, the Board considers evidence bearing on the following factors: the degree of common ownership, common management, centralized control of labor relations, and interrelation of operations. *Radio & Television Broadcast Union v. Broadcast Service*, 380 U.S. 255, 256 (1965). However, no one factor is controlling, nor need all of them be present, for “Single employer status ultimately depends on ‘all the circumstances of the case’ and is marked by an absence of an ‘arm’s length relationship found among unintegrated companies.’ Stated otherwise, the fundamental inquiry is whether there exists overall control of critical matters at the policy level.” *Penntech Papers v. NLRB*, 706 F.2d 18 (1st Cir. 1983).

The entire record in this case shows that David Murray was the linchpin of all the Respondent enterprises. He was the sole stockholder of HHC which owned 100 percent of stock in Silver Brothers and Erin Foods. He alone owned Erin Realty. Because of Murray’s ownership position, the finances of the various corporate entities named as Respondents

here were handled in a highly integrated manner, and somewhat to the detriment of Silver Brothers. For example, HHC existed as little more than a corporate shell which, apart from serving as a holding company, provided costly management services to its subsidiaries. In fact, the \$50,000 annual management fee paid to HHC was found to be one of the factors contributing to Silver Brothers operating loss of more than \$2 million in 1987, together with loans from Silver Brothers to other business entities in which Murray held an interest. (G.C. Exh. 15 at 5.) Further, money traveled back and forth between HHC, Silver Brothers, and Erin Foods without any written agreement in place and without interest being charged on the admittedly short term loans. As HHC’s financial officer, Spector, conceded: “All of the intercompany accounts are one intercompany account. It’s all David Murray.”

Murray’s, HHC’s, and Silver Brothers’ financial affairs were intertwined in other significant ways. Murray mortgaged his home to raise over \$1 million to purchase Silver Brothers. In addition, he personally guaranteed \$8.5 million of the Silver Brothers’ purchase price and contributed additional funds to the Company’s operations. HHC, too, guaranteed a substantial sum paid to acquire Silver Brothers and contributed over a million dollars to its subsequent operations. In light of Murray’s enormous investment in Silver Brothers, both individually and through HHC, it is impossible to believe that he was not wholly immersed in every important policy decision affecting these two corporate entities.

Thus, notwithstanding Murray’s attempt to cast himself on the sidelines in the critical area of labor relations and collective bargaining, I conclude that he was not simply a nominal president of Silver Brothers. As Bennett candidly acknowledged, Murray, not Robson, who had no previous personnel experience at all, was the decisionmaker. Although Robson attempted to aggrandize his role as to the direction of collective bargaining, he plainly was puffing, for Bennett acknowledged candidly that he looked solely to Murray for his instructions, stating unequivocally, “it was his [Murray’s] company.”

Thus, Murray attended a prebargaining strategy session where it was decided that Silver Brothers would demand major concessions from the Union. He also participated in a presentation at the first bargaining meeting and articulated the Company’s basic position regarding its inability to pay. Without a doubt, it was Murray, not Robson, who decided to reject the NNEBT as a meeting site. Robson was present at the meeting when Bennett agreed to meet there; yet, was not consulted by Bennett about the decision nor said a word in dissent. In explaining why the Respondent chose not to meet at the NNEBT, Bennett alluded solely to Murray’s aversion to the union site. Murray’s reason for rejecting the NNEBT is telling: if he was as remote from the give and take of collective bargaining as he claimed to be, he would have no need to maintain close contact with Bennett while negotiations were taking place, nor would he engage in conversations so critical that they had to be immunized from bugging. Murray’s concerns about the privacy of his telephone calls with Bennett suggest that he regarded such communications as sensitive, and so urgent that they could not be deferred. From this, it is reasonable to infer that Murray

<sup>19</sup> Prior to the commencement of this hearing, the General Counsel and Charging Party entered into settlement agreements with Silver Brothers and Erin Foods which specifically reserved the right to proceed against “any other party named in the proceeding as jointly and severally liable.” (G.C. Exhs. 1(2) and (3).)

was very much involved in and, in all likelihood, orchestrated the collective bargaining for Silver Brothers.

Given Murray's control over a matter as relatively innocuous as a meeting place, it is inconceivable that he would not be similarly implicated in a decision to withhold information from the Union. In support of this conclusion, it is noteworthy that during his testimony, Murray expressed displeasure with Noonan's having released confidential information to the press—the major reason cited by Bennett for refusing to honor the Union's request. By the same token, it is equally implausible that Robson, rather than Murray, would assume sole responsibility for imposing the lockout, at a time when Silver Brothers' financial status was imperilled. Given Murray's exclusive ownership of and substantial personal investment in Silver Brothers, through HHC, there can be little doubt that he dominated the management and business life of these companies, including the crucial area of labor relations. Robson may have had authority for day-to-day personnel relations, but this does not detract from the fact that Murray had exclusive control over the major decisions affecting collective bargaining. See *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030 (8th Cir. 1976).

In light of the foregoing discussion, substantial evidence supports the conclusion that HHC and Silver Brothers were a single employer within the meaning of Section 2(2) of the Act. The same evidence also leads to the conclusion that Erin Foods and Erin Realty also were included in Murray's integrated enterprise. Thus, Murray was the sole owner of Erin Realty and of HHC which provided management services for both Silver Brothers and Erin Foods. Significantly, all Murray's businesses maintained intercompany accounts, or as Spector acknowledged, one account covered all of them. Erin Foods' intercompany accounts with HHC and Silver Brothers provided the vehicle through which it frequently transferred and received interest free funds. The free flow of funds from one entity to another took place without the usual formalities, almost as a matter of course. If Silver Brothers needed cash, HHC saw to it that Erin Foods' funds were made available without security, documentation, or apparent time limits on repayment. By virtue of these transactions, Erin Foods' and Silver Brothers' fortunes were locked together since the cash flow of one company affected the cash flow of the other. Because Murray was the sole owner of these formally separate entities, Erin Foods and Silver Brothers were treated as if they had a single coffer. Thus, by virtue of their common ownership and centralized financial management, Erin Foods, Erin Realty, Silver Brothers, and HHC shared important characteristics of a single enterprise.

The additional task of deciding whether Murray may be held individually liable starts with the general rule that a stockholder is insulated from the debts and obligations of his corporation. *NLRB v. Deena Artware*, supra at 402–403. The Board has carved exceptions to this rule and held individual respondents and their corporate entities liable where the individual owned all the stock and personally controlled the integrated enterprise, personally guaranteed corporate indebtedness, controlled the daily affairs of the business including labor relations, solicited and procured business for the company, and personally decided to end the company's existence. *Dahl Fish Co.*, 299 NLRB 413 (1990); *Weldment Corp.*, 275 NLRB 1432, 1433 (1985); *Campo Slacks, Inc.*, 266 NLRB 492, 500 fns. 1 and 18 (1983); *Ogle Protection*

*Service*, 149 NLRB 545, 546 fn. 1 (1964), enfd. in pertinent part 375 F.2d 497 (6th Cir. 1967). The Board and the courts also require proof of a disregard of the corporate entity, injustice, fraud, or antiunion motive before piercing the corporate veil. See, e.g., *Dahl Fish Co.*, supra. *NLRB v. Fullerton Transfer & Storage*, 910 F.2d 331 (6th Cir. 1990); *Vanguard Tours*, 300 NLRB 250 (1990); *Contris Packing Co.*, 268 NLRB 193 (1983). In *Dahl Fish*, supra at 418–419, the administrative law judge summarized the relevant law in the following quoted passage from *Riley Aeronautics Corp.*, 178 NLRB 495, 501 (1969):

[T]he corporate veil will be pierced whenever it is employed to perpetrate fraud, evade existing obligations or circumvent a statute . . . . Thus, in the field of labor relations, the courts and Board have looked beyond organizational form where an individual or corporate employer was no more than an alter ego or a "disguised continuance of the old employer" . . . or was in active concert or participation in a scheme or plan or evasion . . . or siphoned off assets for the purpose of rendering insolvent and frustrating a monetary obligation such as backpay . . . or so integrated or intermingled his assets and affairs that no distinct corporate lines are maintained. [Citations omitted.]

Although this question is not altogether free of doubt, on applying the foregoing standards to the facts in this case, I am not persuaded that Murray may be held personally liable. I reach this conclusion notwithstanding the judgment that Murray was "[t]he real force behind the corporate structure involved herein . . . ." *Campo Slacks*, supra at 500 fn. 18. However, Murray's status as sole owner and corporate president is not, standing alone, sufficient to pierce the corporate veil. *Contris Packing*, supra at 194. Further, although Murray was the commanding, if unseen, presence controlling bargaining with the Union and personally dictated the decisions which led to the unfair labor practices found above, he did so protected by his status as Silver Brothers' president. Under *Contris*, individual liability may not be imposed in these circumstances. *Id.* at 195.

Unquestionably, Murray was heavily involved in the financial affairs of HHC, Silver Brothers, and Erin Foods. He personally funded Silver Brothers and guaranteed its indebtedness. He permitted funds to be transferred among these three companies as if they were one company. He dictated Silver Brothers' collective-bargaining strategy and was personally culpable for the Company's commission of unfair labor practices. If the standards articulated in *Ogle Protection Service* and its progeny alone governed the outcome of this issue, then Murray would be found personally liable. However, as the administrative law judge observed in *Dahl Fish Co.*, supra, the Board requires more—some evidence of wrongdoing or unlawful motive also must be present. There is no such evidence in the record of this case. Neither documentary nor testimonial proof was presented that Murray, or anyone working for him, commingled funds or that any transaction was off the books. Murray may have exercised bad business judgment in permitting Silver Brothers' funds to be used for new computer equipment, new trucks, and the like, but there is no suggestion that he consciously or fraudulently dissipated corporate assets. Neither was there any proof that

he manipulated the intercompany accounts to siphon off assets for any private motive or to evade the Companies' obligations under the Act. Moreover, while Murray was the architect of Silver Brothers' collective-bargaining strategy, the record is silent as to the extent of his participation in the management, operations, or labor relations of Erin Foods. In summary, the record in this case provides an inadequate factual basis for piercing the corporate veil and holding Murray personally liable for the acts of his corporate enterprise.

#### CONCLUSIONS OF LAW

1. Respondents, Hospitality Holdings Corporation, Silver Brothers Co., Inc., Erin Food Services, Inc., and Erin Realty Co., at all times material, were a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.<sup>20</sup>

2. Chauffeurs, Teamsters & Helpers Local Union No. 633 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Since on or about January 1987, and at all times material, the Union has been the designated exclusive bargaining representative of employees in the following appropriate unit:

All full-time and regular part-time drivers, warehouse employees, helpers, checkers and equipment operators employed by Silver Brothers at its Londonderry and Gorham facilities, as described in Article 1 . . . and 15 of the 1985-1988 contract between Silver Brothers and Local 633 . . . but excluding guards and supervisors as defined in the Act.

4. Respondent, through acts of its agents, failed to bargain in good faith in violation of Section 8(a)(1) and (5) by refusing to provide financial records requested by the Union since March 29, 1988, which were necessary and relevant to its

<sup>20</sup>The Respondent did not contest the propriety of the Board's jurisdiction over Silver Brothers. Where, as here, one entity within a single-employer enterprise meets the Board's jurisdictional standards, jurisdiction is properly asserted over the other corporate entities. See *Il Progresso Italo Americano Publishing Co.*, 299 NLRB 270 (1990).

function as the collective-bargaining agent of the Respondent's unit employees.

5. Respondent, through acts of its agents, violated Section 8(a)(1), (3), and (5) by locking out and replacing its employees in the above-described unit since April 21, 1988.

6. By unilaterally implementing changed terms and conditions of employment in the absence of a legally cognizable impasse, Respondent violated Section 8(a)(1) and (5).

7. Respondent HHC and Erin Realty are jointly and severally liable for the unfair labor practices set forth in paragraphs 4, 5, and 6.<sup>21</sup>

8. Murray in his individual capacity and Murray d/b/a Erin Realty are not jointly and severally liable for Respondent's unfair labor practices.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that Respondent be ordered to cease and desist, and take certain affirmative action to effectuate the policies of the Act.

Having found that the Respondent unlawfully locked out its employees, I shall direct that the employees be made whole for any losses of pay and benefits they may have suffered by reason of the lockout, to be calculated as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Whether the Respondent is liable for additional sums to be paid into the employee benefit funds in order to satisfy this "make whole remedy" may be addressed at the compliance stage of the proceeding. *Clemson Bros.*, supra at 945 fn. 13, citing *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[Recommended Order omitted from publication.]

<sup>21</sup>As a single employer, HHC and Erin Realty are liable for the conduct of their agents, i.e., the officers of its wholly-owned subsidiary, Silver Brothers. Since the General Counsel and the Charging Party entered into settlement agreements with Silver Brothers and Erin Foods, the conclusions of law regarding Respondents' commission of unfair labor practices and the remedial section of this decision do not pertain to them. By the same token, they are not included in the appendix attached to the decision.