

**Schmitz Meat, Inc. a/k/a Schmitz Food, Inc., a/k/a Schmitz Meat Company, a sole proprietorship, and a/k/a Schmitz Meat Company, a partnership, and a/k/a Schmitz Provisions Corp. and/or Schmitz Meats and Butchers Union, Local 120 United Food and Commercial Workers International Union, AFL-CIO**

**Schmitz Diversified Corp. d/b/a Schmitz Meat, Inc., a/k/a Schmitz Food Inc., a/k/a Schmitz Meat Company, a sole proprietorship, and a/k/a Schmitz Meat Company, a partnership a/k/a Schmitz Provisions Corp. and/or Schmitz Meats and Butchers Union, Local 120 United Food and Commercial Workers International Union, AFL-CIO**

**Kurt G. Schmitz Sr. in his personal capacity d/b/a Schmitz Meat, Inc., d/b/a Schmitz Food, Inc., d/b/a Schmitz Diversified, Corp., d/b/a Schmitz Meat Company, and d/b/a Schmitz Meats and Butchers Union, Local 120 United Food and Commercial Workers International Union, AFL-CIO**

**Kurt G. Schmitz Jr. in his personal capacity d/b/a Schmitz Meat, Inc., d/b/a Schmitz Food, Inc., d/b/a Schmitz Diversified, Corp., d/b/a Schmitz Meat Company, and d/b/a Schmitz Meats and Butchers Union, Local 120 United Food and Commercial Workers International Union, AFL-CIO. Cases 32-CA-12688, 32-CA-12780, and 32-CA-12809**

November 26, 1993

#### DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On July 21, 1993, Administrative Law Judge Jay R. Pollack issued the attached decision. Respondents Schmitz Food, Inc., Kurt G. Schmitz Sr., and Kurt G. Schmitz Jr. jointly filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the above-named excepting Respondents filed a reply to the Charging Party's answering brief.

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, and conclusions and to adopt the recommended Order as modified.

1. Although the judge does not separately rationalize or discuss it, he nevertheless appears to have recommended that Kurt G. Schmitz Sr. and Kurt G. Schmitz Jr. be held personally liable along with Schmitz Food, Inc. for remedying the instant unfair labor practices. We find that the record does not warrant holding these two individuals personally liable.

It is appropriate to "pierce the corporate veil" and hold a corporation's officers or owners personally liable for violations of the Act when the corporate form

is used to perpetrate fraud, evade existing obligations, or circumvent a statute.<sup>1</sup>

Kurt G. Schmitz Sr., as owner and vice president, and Kurt G. Schmitz Jr., as president, were the two principals in the newly created employing entity (Schmitz Food) which succeeded to, and is the alter ego of, Schmitz Meat, Inc. (Schmitz Meat), a partnership of Kurt Jr. and his brother, Paul.<sup>2</sup>

Schmitz Food initially (and, we agree with the judge, unlawfully) refused in late April 1992 to recognize and bargain with the Union and to abide by the Union's existing collective-bargaining agreement with Schmitz Food's alter ego and predecessor, Schmitz Meat. About 3 months later, however, Schmitz Food hired a labor relations consultant who advised the Schmitzes that Schmitz Food was obligated to recognize and bargain with the Union, and to abide by the still-current, but soon-to-expire collective-bargaining agreement between Schmitz Meat and the Union. The Schmitzes authorized the consultant to represent Schmitz Food, starting the next day, in negotiations with the Union over the resolution of outstanding grievances, current terms and conditions of employment, and a collective-bargaining agreement to succeed Schmitz Meat's contract with the Union.

Although Schmitz Food and the Union reached an accord by September 11 on the procedure for resolving outstanding grievances and on the applicability of the Schmitz Meat-Union collective-bargaining agreement to Schmitz Food's work force, a dispute soon arose over the sequence of satisfaction of conditions and steps for implementation of that September 11 accord. The accord was ultimately not implemented and negotiations for a successor collective-bargaining agreement broke down in late October 1992.

We agree with the judge, for the reasons he sets forth, that Schmitz Food is the alter ego of Schmitz Meat, that from the time of Schmitz Food's commencement of operations it was obligated not only to recognize and bargain with the Union, but also to apply the terms of the Union's collective-bargaining agreement with Schmitz Meat, and that it violated the Act in failing to do so. But we do not find that the record warrants holding the Schmitzes personally liable for remedying these unfair labor practices.

Thus, applying the principles of *Riley Aeronautics*, supra, we find that the record does not establish that Schmitz Jr. and his brother, Paul, dissolved their Schmitz Meat partnership as part of a scheme to avoid

<sup>1</sup> *Riley Aeronautics Corp.*, 178 NLRB 495, 501 (1969).

<sup>2</sup> Paul Schmitz in his personal capacity d/b/a Schmitz Meat, Inc., d/b/a Schmitz Food, Inc., d/b/a Schmitz Diversified, Corp., d/b/a Schmitz Meat Company, and d/b/a Schmitz Meats and Paul Schmitz and Kurt G. Schmitz Jr., a partnership d/b/a Schmitz Meat Company, a/k/a Schmitz Provisions Corp. and/or Schmitz Meats are the Parties in Interest in this proceeding.

their collective-bargaining obligations.<sup>3</sup> More significantly, there is no showing that the Schmitzes siphoned off corporate or partnership assets, for any purpose, much less for the purpose of, in *Riley's* terms, "rendering insolvent and frustrating a monetary obligation such as backpay."<sup>4</sup> Finally, there has been no showing that the Schmitzes integrated or intermingled their assets and affairs with those of Schmitz Food such that no distinct corporate lines have been maintained.<sup>5</sup> Accordingly, in light of all of these considerations, we find that the Schmitzes are not personally liable for remedying the instant unfair labor practices.

2. In his remedy, the judge incorrectly recommended that backpay be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). We correct that aspect of the remedy so that the Respondent, Schmitz Food, Inc., is required to make whole its employees, with interest, for any losses suffered by reason of its failure to abide by the 1989–1992 collective-bargaining agreement between the Union and the Respondent's alter ego, Schmitz Meat, Inc., with backpay for lost wages to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The Respondent is also required to make whole its employees by making all unpaid fringe benefit fund contribution payments since April 1992, as provided for by the above-mentioned collective-bargaining agreement,<sup>6</sup> and by reimbursing employees for any expenses ensuing from the Respondent's failure to make such contribution payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to the fringe benefit funds and the employees shall be made with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Schmitz Food, Inc., San Leandro, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

<sup>3</sup> It was Paul who instigated the dissolution of the partnership. On the second day of the hearing, the General Counsel withdrew the complaint allegations against Paul, and dismissed him as a Respondent. He remains a Party in Interest.

<sup>4</sup> 178 NLRB at 501.

<sup>5</sup> Id.

<sup>6</sup> Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make whole" remedy. *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

1. Delete the names Kurt G. Schmitz Sr. and Kurt G. Schmitz Jr.

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

#### APPENDIX

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

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

WE WILL NOT refuse to abide by the terms of our collective-bargaining agreement with Butchers Union, Local 120 United Food and Commercial Workers International Union, AFL–CIO.

WE WILL NOT refuse to bargain collectively with the above-named Union as the exclusive bargaining representative of the employees in the following unit:

All full-time and regular part-time jobbing butchers, sausage makers, miscellaneous employees, drivers, and driver salesmen; excluding office clerical employees, managerial employees, guards, and supervisors as defined by the Act.

WE WILL NOT unilaterally change any terms or conditions of employment of employees in the above unit during the life of any collective-bargaining agreement with the Union without first reaching agreement with the Union about such changes.

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

WE WILL, on request by the Union, recognize and bargain with the Union concerning the employees in the appropriate unit described above.

WE WILL, on request by the Union, rescind all unilateral changes made in the terms of employment in the wage, fringe benefit, arbitration, and union-security provisions of the 1989–1992 Master Labor Agreement, and the extension to October 31, 1992, between us and the Union.

WE WILL give retroactive effect to the wage, fringe benefit, arbitration, and union-security provisions set forth in the collective-bargaining agreement, and WE WILL make whole the unit employees, with interest, for any losses suffered by reason of our failure to comply with these provisions.

WE WILL make all contributions to the health and welfare and pension funds and pay the prescribed fees

to administer the funds, as provided by the collective-bargaining agreement.

SCHMITZ FOOD, INC., D/B/A SCHMITZ  
MEAT

*George Velastegui, Esq.*, for the General Counsel.  
*Stephen G. Chandler, Esq.*, of San Leandro, California, for  
the Respondents.  
*Andrew J. Kahn, Esq.*, of San Francisco, California, for the  
Charging Party.  
*Paul Schmitz*, of Alamo, California, pro se.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on April 13–16, 1993. On August 14, 1992, Butchers Union, Local 120, United Food and Commercial Workers International Union (the Union) filed a charge in Case 32–CA–12688 alleging that Schmitz Meat Company committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On October 15, the Union amended the charge in Case 32–CA–12688 to include as the named employer, Schmitz Meat, Inc., Kurt G. Schmitz Sr., and Kurt G. Schmitz Jr. Also on October 15, the Union filed the charge in Case 32–CA–12780 alleging that Schmitz Meat, Kurt G. Schmitz Sr., Kurt G. Schmitz Jr., and Schmitz Diversified Inc. had committed violations of Section 8(a)(5), (3), and (1) of the Act. On November 4, 1992, the Union filed an amended charge in Case 32–CA–12780 adding Schmitz Meat, Inc. and Gwyneth Schmitz as named employers. On October 29, 1992, the Union filed the charge in Case 32–CA–12809 alleging that Schmitz Meat Company, Schmitz Meat Inc., Kurt Schmitz Sr., Kurt Schmitz Jr., and Schmitz Diversified violated Section 8(a)(1) of the Act. On December 17, 1992, the Acting Regional Director for Region 32 of the National Labor Relations Board issued a consolidated complaint and notice of hearing against the above-named employers, excluding Gwyneth Schmitz (Respondents), alleging that Respondents violated Section 8(a)(5) and (1) of the Act. Also named as a respondent was Paul Schmitz, individually, through a partnership with Kurt G. Schmitz Jr., and under several company names. On March 9, 1993, the Regional Director issued an amended consolidated complaint against Respondents alleging that Respondents violated Section 8(a)(5) and (1). Respondents filed a timely answer to the complaint, denying all wrongdoing. At the hearing, the General Counsel amended the complaint to drop Paul Schmitz and his companies as respondents but to retain Paul Schmitz as a party in interest because the ownership of the business at issue here is the subject of a lawsuit between Paul Schmitz and Kurt G. Schmitz Sr.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Since April 21, 1992, Respondents, with a principal place of business in San Leandro, California, have been engaged in the business of selling meat and related goods on a wholesale basis. During the 12 months prior to April 21, 1992, the wholesale meat operation purchased goods and materials valued in excess of \$50,000 directly from suppliers customers located outside the State of California. During the 12 months subsequent to issuance of the complaint, Respondents purchased meat products valued in excess of \$50,000 directly from suppliers located outside the State of California. Accordingly, I find that Respondents are an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union has represented employees at the wholesale meat operation in San Leandro, California, presently operated by Respondent Schmitz Food, since 1974. From January 1986 until April 21, 1992, the meat business was owned and operated by a partnership of Paul and Kurt Schmitz Jr., brothers and the sons of Kurt Schmitz Sr. The partnership did business under the names of Schmitz Meat and Schmitz Meat, Inc. The last agreement between the Union and the partnership was executed in January 1990 and was to expire by its terms on September 1, 1992.

On April 21, 1992, Kurt G. Schmitz Sr., the sole shareholder of Schmitz Diversified, Inc., the landlord of the San Leandro facility, caused the partnership to be evicted. That same day, Kurt Jr. and Kurt Sr. returned to the facility and continued to operate the wholesale meat business. The same employees were used to perform the same jobs. The same equipment was used. The names of Schmitz Meat and Schmitz Meat, Inc., continued to be used. Sales continued to the same customers and purchases were made from the same suppliers. In February 1993, Kurt Sr. and Kurt Jr. learned that Paul had registered with the State as Schmitz Meat, Inc. and therefore, they changed their business name to Schmitz Food, Inc.

In September 1992, Michael Lynn, a labor relations consultant for Kurt Sr. and Kurt Jr., signed an agreement to recognize the collective-bargaining agreement previously agreed to by the Schmitz Meat partnership and to arbitrate certain grievances. Kurt Sr. and Kurt Jr. had not made contributions to the health and welfare trust or the pension trust since the eviction of Paul Schmitz. Respondents now contend that they are not bound by either the agreement signed by Paul Schmitz or that signed by their labor relations consultant.

The General Counsel argues that the wholesale meat business of Respondents Kurt Schmitz Sr. and Kurt Schmitz Jr., now operating under the name of Schmitz Food, is simply a continuance of the business operated at that location under various names. The General Counsel further contends that Respondents voluntarily recognized and bargained with the Union leading to an agreement executed by its labor consultant and approved by its two principals. The complaint alleges, in the alternative, that Respondents were a successor employer to Kurt Jr. and Paul Schmitz and were required to

bargain with the Union before changing terms and conditions of employment. Under all of these theories, the General Counsel contends that Respondent fraudulently entered into a written agreement to arbitrate certain grievances filed by the Union; failed and refused to arbitrate; failed to pay the contractual wage and utilized Kurt Jr., as their representative for collective bargaining but did not give him the authority to bargain on their behalf.

Respondents do not deny that Respondent Schmitz Food is a successor employer. Rather Respondents argue that they are only obligated to recognize and bargain with the Union; and that they were free to set the initial terms and conditions of employment. Further Respondents contend that Respondent Schmitz Food is an independent business entity and not a continuance of the partnership. They further contend that the labor consultant had no authority to bind Respondents to a contract but rather needed ratification by Respondent Kurt Sr.

### B. Facts

From 1974 to 1977, Respondent Kurt Sr. operated a wholesale meat business with his sons, Kurt Jr. and Paul, as a partnership doing business as Schmitz Meat Company. In 1977, the Company incorporated as Schmitz Meat, Inc. In October 1984, Paul Schmitz purchased the wholesale meat business from his father. Although operated as a sole proprietorship the business continued to use the names Schmitz Meat and Schmitz Meat, Inc. The actual corporation, Schmitz Meat Inc., had been suspended by the secretary of State for failure to pay franchise taxes. Kurt Schmitz Sr. was the sole stockholder of the dormant corporation. In January 1986, Paul formed an equal partnership with his brother Kurt Jr. They continued to do business under the names of Schmitz Meat and Schmitz Meat, Inc. During these changes of ownership the business remained the same. The businesses used the same employer tax number and the same permit from the Department of Agriculture. The wholesale operation continued with the same employees and equipment. Sales continued to the same customers. While Paul and Kurt Jr. were partners, Kurt Sr. visited the facility four or five times per year in which Kurt Sr. visited the business on a daily basis for periods in excess of 2 weeks. On these occasions he participated in the management of the operation. The owner of the building was Schmitz Diversified, Inc., a corporation of which Kurt Sr. was the only shareholder. Kurt Sr. and his wife leased the property to Paul and Kurt Jr. Kurt Jr. and Paul were officers of Schmitz Diversified until 1992. In 1987 both Paul and Kurt Jr. signed the collective-bargaining agreement with the Union. That agreement named Schmitz Meat Inc. as the employer. In 1990, Paul signed an agreement for the partnership again naming Schmitz Meat, Inc. as the employer.

In 1991, the business was experiencing financial difficulties. In April 1991, Kurt Sr. caused the partnership to be evicted from the San Leandro premises. Kurt Sr. allowed his sons to return to business at the facility on the condition that they manage the business in accordance with his wishes. Respondent Kurt Sr. dictated that the partnership cease buying boxed meat and instead purchase whole beef carcasses and then butcher them in its own plant. Kurt Sr. supplied the business with cattle and loaned the business in excess of \$250,000. According to Kurt Sr., his sons "never put a dime

of money into the business." The partnership owed Kurt Sr. an amount in excess of the partnership's assets.

In 1992, Paul notified his brother that he wished to dissolve their partnership as of April 1, 1992. The partnership was in the process of dissolution when Paul was evicted on April 21, 1992. In between April 1 and 21, Paul and Kurt Jr. were each separately selling meat from the same location. Paul operated under the name of Schmitz Provisions and retained a majority of the business' customers. Kurt Jr. operated under the names Schmitz Meat and Schmitz Meat, Inc. Paul had the majority of the business and used a majority of the employees. Some employees were intermingled. Paul Schmitz was the sole officer and sole stockholder of Schmitz Provisions, a California corporation. Prior to April 1, Schmitz Provisions had performed maintenance services for Schmitz Meat. The corporation was operated as a Subchapter S. Corporation and Kurt Jr. and Paul had shared profits and losses as partners prior to April 1.

As stated earlier, on April 21, Kurt Sr. had the Schmitz Meat partnership evicted for nonpayment of rent. Kurt Sr. took over the bank accounts and accounts receivable. After Respondents took over the business on April 21, the employees returned to their jobs that same day. There was no change in the equipment or the operation. Customers were notified that the business operation would remain the same but were given a new address for their payments. At all relevant times, including the period from April 1 to 21, the company name of Schmitz Meats was used with suppliers and customers. Respondents did not hire an additional employee until several weeks later. The employees then working for Paul and Kurt Jr. began working for Kurt Sr. and Kurt Jr. According to Kurt Sr., he told the employees that the Company was not a union shop and that they were no longer permitted to work overtime. He also announced that he would have his own health benefit plan. I credit Kurt Sr. that he made such statements to at least one employee but I am unable to find when and to whom such statements were made. Kurt Sr. stayed for some time and managed the business with Kurt Jr. Thereafter, Kurt Sr. returned to his home in Mexico and Kurt Jr. managed the business. Kurt Jr. testified that he was only an employee of the business but admitted that he had used his personal line of credit to borrow money for the business. Although in this case Respondents claim that the entity doing business is a corporation, in a collateral action, Kurt Sr. gave an affidavit stating he was doing business as a sole proprietor.

On May 1, Kurt Jr. notified Tim Hamaan, president of the Union, that Paul had been evicted and that he and Kurt Sr. were now operating the business. On July 28, 1992, Kurt Sr. and Kurt Jr. hired Michael Lynn, a self-employed labor relations consultant, to represent them in dealing with the Union. Respondents told Lynn that they believed they were not bound by the agreement Paul had signed. Lynn advised Respondents that their defense would not hold up and that it would be better to resolve the matter amicably rather than waste money on an unsuccessful legal proceeding. Lynn advised Kurt Sr. and Kurt Jr. to recognize the Union and seek to arbitrate the grievances that the Union had filed. Kurt Jr. had scheduled a meeting for July 29 and Lynn attended on behalf of Respondents. Lynn was informed that Kurt Jr. was president and Kurt Sr. was vice president of Schmitz Meat, Inc.

Lynn met with two union officials on July 29. Thereafter he spoke with Respondents Kurt Sr. and Kurt Jr. They jointly agreed to and approved of Lynn's strategy of agreeing to the current contract and resolving the grievances through arbitration. On September 11, 1992, Lynn signed an agreement on behalf of Schmitz Meat, Inc., in which Respondents agreed to accept the industrywide agreement until October 31, 1992, and to arbitrate the grievances previously filed by the Union. On October 19, Kurt Jr. told Lynn that Respondents were going to seek labor counsel elsewhere. At no time was Lynn told that he did not have authority to negotiate and sign an agreement on behalf of Respondents.

On October 20, 1992, Kurt Jr. met with the union negotiators in an attempt to negotiate a successor agreement to the collective-bargaining agreement set to expire on October 31. Hamaan asked whether Kurt Jr. had the authority to negotiate and sign an agreement. Kurt Jr. answered that he could not sign or accept any contract without his father's approval. Hamaan replied that the Company should call him "when somebody [could] negotiate on behalf of the company." The union officials then left the meeting. Although the Union's attorney has requested bargaining, the parties have not met since October 1992. Respondents have not made fringe benefit payments since April 1992 and apparently have also breached the wages, sick leave, and union-security provisions of the collective-bargaining agreement.

### III. ANALYSIS AND CONCLUSIONS

#### A. *The Successorship Issue*

The General Counsel contends that Respondents have operated the wholesale meat business in basically unchanged form, using the same employees who had previously worked for the partnership. Respondents admit that a majority of their employees were previously employed by the partnership. Respondents contend that Kurt Sr. started up a completely new business in changed form not bound by the actions of Paul Schmitz or the partnership of Kurt Jr. and Paul.

In *NLRB v. Burns Security Services*, 406 U.S. 272, 281 (1972), the Supreme Court stated:

[w]here the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of Sec. 8(a)(5) and Sec. 9(a) by ordering the employer to bargain with the incumbent union.

The Board has held where a new employer "uses substantially the same facility and same work force to produce the same basic products for the same customers in the same geographic area" it will be regarded as a successor. *Valley Nitrogen Purchasers*, 207 NLRB 208 (1973). The Board has utilized the following criteria:

Whether (1) there has been a substantial continuity of the same operations; (2) whether the new employer utilizes the same plant; (3) whether the new employer has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether the new employer employs the same supervisors; (6) whether the new employer uses the same machinery, equipment and

methods of production; and (7) whether the new employer manufactures the same product or offers the same services. *Border Steel Rolling Mills*, 204 NLRB 814 (1973).

In the instant case, Respondents meet all the *Border Steel* criteria for the finding of successorship. Respondents have substantially continued the same operations at the same plant. The same employees were doing the same jobs under the supervisors as they did when the partnership managed the business. Respondents were using the same machinery, equipment, and methods of production and manufacturing the same products as they did prior to the eviction of Paul Schmitz. The only change in Respondents' operation was that Paul was no longer one of the managers.

In *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), the Supreme Court upheld a Board finding of successorship despite a hiatus of 7 months between the predecessor's demise and the successor's startup. The Court affirmed the Board's approach in determining the successorship question based on a totality of circumstances. The Court found that the hiatus was only one factor in determining "substantial continuity" and relevant only where there are other indicia of discontinuity. There the Court found all the other factors suggested "substantial continuity" between the companies despite the 7-month hiatus. The Court noted that the hiatus may have been less than 7 months because the predecessor retained a skeleton crew and was seeking to resurrect the business or find a buyer. The Court concluded that "viewed from the employees' perspective, therefore, the hiatus may have been less than seven months."

I do not find that the 3-week period between the division of the Schmitz partnership and the takeover by Kurt Sr. and Kurt Jr. amounts to a hiatus. The partnership had not been formally dissolved. Kurt Jr. was still bound to the collective-bargaining agreement. At all times Kurt Jr. employed employees covered by the existing collective-bargaining agreement. The employees continued to work as they had done prior to the informal division of the partnership. The duration of the hiatus was so brief that employees noticed little, if any, change. Further, the incomplete nature of the hiatus, when viewed from the employees' perspective, would lead to the conclusion that little, if any, change occurred. A change was not noticed until Kurt Sr. evicted the business on April 21 and then directed the employees to return to work. Further, there was no break in the continuing relationship between the Union and the employing entity.<sup>1</sup> The division of the partnership and resumption of the business by Kurt Sr. and Kurt Jr. all took place during the term of the collective-bargaining agreement. I find that Schmitz Meat was obligated to recognize and bargain with the Union as of the takeover on April 21, 1992.<sup>2</sup>

<sup>1</sup>During the alleged hiatus, the partnership was bound by the collective-bargaining agreement, unless it had no employees. On dissolution of the partnership, both partners were still bound by the collective-bargaining agreement to the extent they were still an employing entity. Thus, Kurt Jr. was bound by the collective-bargaining agreement both before and after the eviction.

<sup>2</sup>Although in *Burns*, supra, the Court found a successorship obligation to bargain based, inter alia, on the fact that the Union was recently certified, the successorship doctrine is equally applicable even if the Union had not been recently certified. *Fall River Dyeing Corp. v. NLRB*, supra.

Even if the period from April 1 until the April 21 takeover of the business by Kurt Sr. and Kurt Jr. is considered a hiatus, the result here is identical. The duration of the hiatus was so brief that employees noticed little, if any, change. Further, the incomplete nature of the hiatus, when viewed from the employees' perspective, would lead to the conclusion that little, if any, change occurred. Kurt Schmitz Jr. continued to employ some employees and shared other employees with Paul Schmitz. Thus, this was no break in the continuing relationship between the Union and the employing entity.<sup>3</sup> Thus, Respondents would still be held to be a successor under *Fall River*, supra.

#### B. *The Alter Ego Issue*

The General Counsel contends that Respondents have operated the wholesale meat business in basically unchanged form, using the same employees who had previously worked for the partnership. The General Counsel argues that the change in ownership was a matter of form and not substance. Respondents admit that a majority of their employees were previously employed by the partnership. Respondents contend that their bargaining obligation, if any, should be limited to recognizing and bargaining with the Union under *Burns*, supra.

As found earlier, prior to April 21, 1992, the wholesale meat business was operated by Kurt Jr. and Paul Schmitz as a partnership. The partnership did business under the names Schmitz Meat and Schmitz Meat, Inc. After he evicted Paul Schmitz, Kurt Schmitz Sr. continued the business with Kurt Jr. under the name of Schmitz Meat Inc. Kurt Sr. was the sole stockholder of the suspended corporation. While Kurt Sr. remained at the facility for the first few weeks after the eviction, he later returned to Mexico and only visited the facility four or five times per year, just as he had done prior to the eviction.

The Board has found alter ego status where the two business enterprises have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, as well as ownership. *Denzil S. Alkire*, 259 NLRB 1323, 1324 (1982); *Advance Electric*, 268 NLRB 1001, 1002 (1984). Another factor which must be considered is "whether the purpose behind the creation of the alleged alter ego was legitimate or whether instead, its purpose was to evade responsibilities under the Act."

Applying the foregoing legal principles to the present case, I conclude that the two companies should be treated as a single entity for purposes of this case. Respondents have continued the same business in unchanged form at the same addresses. Respondents used the same employees and equipment to perform the same jobs as they did under the partnership. The bookkeeping and office workers were the same for both companies. Respondents had substantially the same management and had the same business names and purposes as the partnership. The purpose of forming Respondents' alleged new business was to continue the same operation minus Paul Schmitz and to protect Respondent Kurt Sr.'s financial investment. Respondents later sought to use the take-

over as a means of avoiding their obligations to the Union under the Act. Kurt Jr. was a manager of both the preeviction and posteviction operations. More importantly, Kurt Sr. directed the operation prior to and after the eviction. Kurt Sr. owned the building and all the equipment used by both operations.<sup>4</sup> Kurt Sr. took over the business without a sale of any kind and without any compensation to the alleged predecessor. Kurt Jr. is president of Schmitz Food and has used his personal line of credit to borrow funds for the business. The Board often treats ownership by other family members as "personal ownership." *Bryar Construction Co.*, 240 NLRB 102, 104 (1979); *Gilroy Sheet Metal*, 280 NLRB 1075 fn. 2 (1986). Common ownership by any family member satisfies the requirement of common ownership. *MP Bldg. Corp.*, 165 NLRB 829, 831 (1967), enfd. 411 F.2d 567 (5th Cir. 1969); *Campbell-Harris Electric*, 263 NLRB 1143 (1983), enfd. 719 F.2d 292 (8th Cir. 1983). According to Kurt Sr. he was the only person with an equity interest in the business both before and after the eviction.

Respondents utilized the partnership's equipment and offices. Although the property was leased by Kurt Sr. to both his sons, only half the rent was paid. Paul was evicted for failing to pay rent. When Respondents commenced work on the day of Paul's eviction, the employees were directed to continue working as usual. There was no break in service. The employees were paid by checks under the name Schmitz Meat, just as they had been prior to the eviction. The totality of the evidence leads to the conclusion that prior to April 21, 1992, the meat business was an enterprise of the Schmitz family, or Kurt Schmitz Sr., and that after April 21, the business continued in substantially the same form except that Paul Schmitz had been removed as an officer and manager. I, therefore, treat the two businesses as a single entity for purposes of deciding the unfair labor practice issues. Thus, the business operated by Kurt Sr. and Kurt Jr. was obligated to bargain in good faith with the Union and to honor the existing collective-bargaining agreement. Respondents admitted through their agent Lynn that they were bound to the collective-bargaining agreement. Thus they agreed to arbitrate grievances filed pursuant to the contract and to extend the contract 2 months.

As discussed above, I find that the 3-week period between the division of the Schmitz partnership and the takeover by Kurt Sr. and Jr. was not a hiatus. The partnership had not been formally dissolved. Kurt Jr. was still bound to the collective-bargaining agreement. At all times Kurt Jr. employed employees covered by the existing collective-bargaining agreement. The employees continued to work as they had done prior to the informal division of the partnership. The duration of the hiatus was so brief that employees noticed little, if any, change. Further, the incomplete nature of the hiatus, when viewed as from the employees' perspective, would lead to the conclusion that little, if any, change occurred. A change was not noticed until Kurt Sr. evicted the business on April 21 and then directed the employees to return to work. Further, there was no break in the continuing relation-

<sup>3</sup>During the alleged hiatus, the partnership was bound by the collective-bargaining agreement. On dissolution of the partnership, both partners were still bound by the collective-bargaining agreement to the extent they were still an employing entity.

<sup>4</sup>The partnership was heavily in debt to Kurt Sr. The partnership had never paid more than half the rent dictated by the lease. Further, the equipment and trade fixtures utilized by the partnership were owned by Kurt Sr. Kurt Sr. had supplied cattle for which he had not been paid and had not received payment on his loans.

ship between the Union and the employing entity. The division of the partnership and resumption of the business by Kurt Sr. and Kurt Jr. all took place during the term of the collective-bargaining agreement. The employees were aware of the close family relationship and at the lack of an arm's-length relationship. I find that Schmitz Meat was bound by the existing contract when the alleged new company came into existence on April 21.

As discussed earlier, even if the 3-week period in April was considered a hiatus it would not aid Respondents' case. In *El Torito-La Fiesta Restaurants*, 295 NLRB 493 (1989), the Board held that an employer that closes temporarily and reopens at the same location with substantially the same employees is bound to honor an existing collective-bargaining agreement with a union. The Board noted that otherwise employers could readily escape their collective-bargaining obligations without justification by merely instituting a temporary shutdown of operations. The Board applied its contract bar rule and required the employer to honor its existing contract after a hiatus of 14 months.

Here, the existing contract was in effect at all relevant times. Thus, the Board's contract bar rule would hold Kurt Jr. and Schmitz Meat to the contract even if the first 3 weeks of April were considered to be a hiatus. *El Torito-La Fiesta Restaurants*, supra. See also *Sterling Processing Corp.*, 291 NLRB 208, 210 (1988). Respondents violated Section 8(a)(5) of the Act by repudiating the contract midterm and by refusing to honor the existing terms and conditions of employment of the bargaining unit employees.

Most important, whether viewed as a successor or as an alter ego, Respondents reaffirmed and agreed to be bound by the bargaining agreement through Mike Lynn, their labor consultant. I find no merit in Respondents' contention that they were not bound by the agreement signed by Lynn. Lynn had been hired by Respondents to advise them in labor relations matters and to negotiate with the Union on their behalf. Lynn's testimony that Kurt Sr. and Kurt Jr. had expressly authorized him to agree to reaffirm the contract and arbitrate outstanding disputes was not contradicted. I summarily dismiss Respondents' claim that Lynn only had the authority to agree to arbitrate the grievances.

#### C. The Allegation that Kurt Jr. had no Authority to Negotiate

Respondents contend that when Kurt Jr. met with the Union in October 1992 he merely told Hamaan that any agreement was subject to approval by his father. Respondent argues that this is no different than the Union bargaining subject to ratification by its members. The duty to bargain includes the obligation to appoint a negotiator with real authority to negotiate and carry on meaningful bargaining regarding fundamental issues. *Wycoff Steel*, 303 NLRB 517 (1991); *National Amusements*, 155 NLRB 1200 (1965). However, although an employer is not required to be represented by an individual possessing final authority to enter into an agreement, this is subject to a limitation that it does not act to inhibit the progress of negotiations. *Carpenters Local 1780*, 244 NLRB 277 (1979); *Wycoff Steel*, supra. The degree of authority possessed by the negotiator is a factor which may be considered in determining good-faith bargaining. *Lloyd A. Fry Roofing Co. v. NLRB*, 216 F.2d 273 (9th Cir. 1954).

The evidence shows that Kurt Jr. indicated an inability to sign an agreement. However, it does not show clearly that Kurt Jr. stated that he could not negotiate. That point became blurred by the language of the parties. Hamaan used the authority to negotiate and the authority to sign a contract synonymously. It is not clear whether Kurt Jr. said he could not negotiate or that he could not sign the final document without his father's approval. Accordingly I find that this allegation of the complaint must be dismissed.

#### D. The Unilateral Changes

The Union filed grievances under the collective-bargaining agreement and sought to compel arbitration. On September 11, Respondents entered into an agreement to arbitrate the outstanding grievances filed by the Union. On October 20, Kurt Jr. informed the Union that Respondents could not meet with the arbitrator on the previously agreed-on date. Kurt Jr. told Hamaan that he would contact the Union to set a new date. Respondents did not contact the Union and the Union filed suit to compel arbitration. Respondents defended the suit on the ground that there had been no agreement to arbitrate. The court ordered Respondents to arbitrate the grievances. Accordingly, the General Counsel argues that Respondents fraudulently entered into the arbitration agreement. I need not decide whether Respondents had fraudulent intent. It is clear that Respondents first refused to arbitrate under their collective-bargaining agreement and later refused to arbitrate pursuant to their agreement negotiated by Lynn. Accordingly, I find that Respondents unlawfully repudiated the arbitration provisions of their collective-bargaining agreements with the Union. *United Technologies Corp.*, 310 NLRB 1126 (1993).

As discussed above, Respondents were obligated to honor the terms and conditions of employment set forth in the existing labor agreement. Respondent unlawfully discontinued payments to the union-sponsored health and welfare and pension trust plans; ceased paying the contractual wages and sick leave benefits; did not comply with the union-security clause; and unilaterally refused to comply with the union-security provision of the contract.

#### CONCLUSIONS OF LAW

1. Respondents, Kurt Schmitz Sr., Kurt Schmitz Jr., and Schmitz Food, Inc., d/b/a Schmitz Meats, are each an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By refusing to bargain with the Union by refusing to honor and abide by their collective-bargaining agreement with the Union and by making unilateral changes in the terms and conditions of employment, Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

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

4. Except as found above, Respondents have not violated the Act as alleged in the complaint.

#### THE REMEDY

Having found that Respondents engaged in unfair labor practices, I shall recommend that they be ordered to cease

and desist therefrom and that they take certain affirmative action to effectuate the policies of the Act.

Having found that Respondents violated Section 8(a)(5) and (1) of the Act by their unlawful refusal to abide by the terms and conditions of employment for unit employees contained in the wage, fringe benefit, arbitration, and union-security provisions of the 1989–1992 jobber-sausage miscellaneous labor agreement, it is recommended that Respondents rescind all unilateral changes made in the terms and conditions of employment for the unit employees as contained in the provisions; make whole the employees for losses suffered by reason of Respondents' failure to honor the collective-bargaining agreement, with interest; and make all contributions to the health and welfare and pension funds which have not been paid and which would have been paid absent the unlawful discontinuance of such payments. Back-pay for those losses incurred because of Respondents' refusal to abide by the wage provisions of the contract shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1977). See generally *Isis Plumbing Co.*, 130 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The Respondents, Kurt Schmitz Sr., Kurt Schmitz Jr., and Schmitz Foods, Inc., d/b/a Schmitz Meats, San Leandro, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to abide by the terms of their collective-bargaining agreement with Butchers Union, Local 120, United Food and Commercial Workers International Union.

(b) Refusing to bargain collectively with the above-named Union as the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time jobbing butchers, sausage makers, miscellaneous employees, drivers, and driver salesmen; excluding office clerical employees, managerial employees, guards, and supervisors as defined by the Act.

<sup>5</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Unilaterally changing any terms or conditions of employment of employees in the above unit during the life of any collective-bargaining agreement with the Union without first reaching agreement with the Union about such changes.

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

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

(a) On request by the Union, recognize and bargain with the Union concerning the employees in the appropriate unit described above.

(b) On union request, rescind all unilateral changes made in the terms of employment of the unit employees in the wage, fringe benefit, arbitration, and union-security provisions of the 1989–1992 Jobbers-Sausage-Miscellaneous Agreement, and the extension to October 1992, between Respondents and the Union.

(c) Give retroactive effect to the wage, fringe benefit, arbitration, and union-security provisions set forth in the collective-bargaining agreement, and make whole the unit employees for losses suffered by reason of their failure to comply with these provisions, in the manner set forth above in the remedy section of this decision.

(d) Make all contributions to the health and welfare and pension funds and pay the prescribed fees to administer the funds, as provided by the collective-bargaining agreement.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at their San Leandro, California facilities copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

<sup>6</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."