

**Peter O'Dovero d/b/a Associated Constructors and O'Dovero Construction, Inc. and International Union of Operating Engineers, Local 324.** Case 30-CA-13325

June 30, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On September 2, 1997, Administrative Law Judge William G. Kocol issued the attached decision. The General Counsel and the Respondents filed exceptions, supporting briefs, and answering briefs, and the Respondents filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.<sup>1</sup>

The judge found that the Respondents, Associated Constructors (Associated) and O'Dovero Construction, Inc., (O'Dovero) are a single employer and that they violated the Act in numerous ways. Specifically, he found that the Respondents made several statements that violated Section 8(a)(1). He further found that the Respondents violated Section 8(a)(3) and (5) by diverting bargaining unit work from employees of O'Dovero, who are represented by the Union, to the nonunion employees of Associated, for antiunion reasons, and without affording the Union an opportunity to bargain. The judge found that the Respondents also violated Section 8(a)(5) by refusing to bargain with the Union for a successor collective-bargaining agreement, by dealing directly with the union-represented employees of O'Dovero, and by failing to afford the Union a meaningful opportunity to bargain over the effects of the Respondents' decision to terminate the operations of O'Dovero. He found, however, that the cessation of O'Dovero's operations itself and the Respondents' failure to bargain over that decision were not unlawful. The judge also found, contrary to the General Counsel's allegations, that the direct dealing and refusal to bargain for a new contract did not violate Section 8(a)(3). Finally, he found that the identification of the employees who were prejudiced by the Respondents' unlawful conduct could properly be left to compliance. We agree with the judge on all issues except for those

arising from the alleged termination of O'Dovero's operations.

The Respondents are Marquette, Michigan construction firms owned by members of the O'Dovero family. O'Dovero is primarily engaged in the laying of underground pipe. Associated is a larger and apparently more diversified firm. It does building construction and concrete work, and at times has also done some pipe work.

O'Dovero's equipment operators have long been represented by the Union. Associated's employees are not represented by the Union. In December 1993, separate representation elections were held among the employees of each Company. The Union won the election in the O'Dovero unit and was certified as the bargaining representative of those employees. The parties entered into a collective-bargaining agreement that was effective through April 30, 1996.

The election in the Associated unit ended in a tie vote, and the Union, therefore, was not certified as the bargaining representative. In 1995, after withdrawing its representation petition for the Associated unit, the Union filed an unfair labor practice charge alleging that the Respondents were alter egos. The charge was dismissed by the Regional Director on August 22, 1995, and the Union's appeal was denied by the General Counsel on October 23, 1995.

From May through November 1995, O'Dovero employees were engaged in laying water pipe in Caspian, Michigan. Associated had bid on the project, but when it was awarded the contract, it assigned the work to O'Dovero. The O'Dovero employees were paid the wages and benefits contained in the Union's collective-bargaining agreement with O'Dovero while working on the Caspian project.

The Caspian project was not completed in 1995. When the weather permitted the resumption of work in April 1996, the work was performed by nonunion employees of Associated, rather than by O'Dovero employees. The project was completed in early 1997.

As discussed in detail in the judge's decision, the judge found that the work on the Caspian project was bargaining unit work covered by the contract between the Union and O'Dovero. He also found that the Respondents diverted that work to the nonunion employees of Associated at least in part out of anger at the Union for having attempted to organize the Associated employees, and because they wanted to escape the collective-bargaining agreement. The judge found that this conduct violated Section 8(a)(3) and (5), and we agree with those findings.

The judge found no evidence that, after the Caspian project ended, the Respondents continued to perform the work O'Dovero had previously done. He also found that the Respondents had stopped bidding on union jobs and that there was no showing that Associ-

<sup>1</sup>We shall also modify the judge's recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997).

ated was performing work that O'Dovero traditionally would have done. He therefore found that O'Dovero had ceased operations on completion of the Caspian project.

The judge further found that the cessation of O'Dovero's operations was a managerial decision concerning which the Respondents had no duty to bargain under *First National Maintenance Corp. v. NLRB*.<sup>2</sup> He rejected the General Counsel's contention that the Respondents should be ordered to resume O'Dovero's operations. The judge distinguished several decisions relied on by the General Counsel on the ground that those cases, unlike this one, involved either continued subcontracting or continuing diversions of unit work rather than genuine cessations of operations.<sup>3</sup> Accordingly, he recommended that this allegation of the complaint be dismissed. The judge did, however, find that the Respondents violated Section 8(a)(5) by not affording the Union a meaningful opportunity to bargain over the effects of the decision to cease O'Dovero's operations.

The General Counsel has excepted to the judge's failure to find that the cessation of O'Dovero's operations was unlawful and to order that those operations be restored. He argues that that action was taken for antiunion reasons, and therefore that the Respondents are not excused from bargaining over that decision by *First National Maintenance*.<sup>4</sup> The General Counsel also contends that the action was a partial closing motivated by a desire to chill unionism among employees in the Respondents' other operations, and therefore violated Section 8(a)(3).<sup>5</sup> The Respondents have excepted to the judge's finding of an effects bargaining violation. They also argue, contrary to the General Counsel, that the conduct in question was not a partial

closing, but a complete cessation of O'Dovero's operations.

We are unable to fully agree with either the judge, the General Counsel, or the Respondents. For the reasons discussed below, we find that the record does not support the conclusion that O'Dovero actually ceased operations, even after the completion of the Caspian project.

First, it is clear that O'Dovero has not gone out of existence. Peter O'Dovero, the sole owner of Associated and 40-percent owner of O'Dovero, testified that O'Dovero (a corporation) was never dissolved; it was not performing work but was still in existence and could do a project immediately.<sup>6</sup>

Next, the judge correctly found that the Respondents constitute a single employer, with common ownership, common management, centralized control of labor relations, and highly interrelated operations. In fact, the operations of O'Dovero and Associated are so interrelated as to make it difficult to tell where one firm ends and the other begins. Both companies are engaged in the construction business, and Associated has done some underground pipe work, which is the focus of O'Dovero's operations. James O'Dovero, the president of O'Dovero, has the authority to hire on behalf of Associated and to schedule equipment for jobs done by Associated. The Respondents share office facilities and office personnel. Associated has regularly loaned O'Dovero money for working capital which has not been shown to have been paid back. The two firms have leased equipment from each other; on the Caspian project itself, O'Dovero employees used equipment that carried the name "Associated." Although Associated historically bid on nonunion projects and O'Dovero on union projects, at times, as on the Caspian project, O'Dovero performed the work on projects as to which Associated had been the successful bidder. On the Caspian project, O'Dovero employees were supervised by Craig Dufresne, who is an employee of Associated but who was carried on O'Dovero's payroll for a time. Finally, when the Respondents later took the Caspian work away from the O'Dovero employees, they assigned it to Associated employees.

When the operations of two construction firms, owned and managed by members of the same family, have historically been intertwined to this extent, it is not entirely clear what it means to say that one of them, but not the other, has ceased operations. Here, in particular, O'Dovero and Associated have leased equipment from each other, and Associated has loaned working capital to O'Dovero and assigned work to the employees of O'Dovero. There is no showing, and no contention, that the Respondents could not continue

<sup>2</sup> 452 U.S. 666 (1981).

<sup>3</sup> *Ferragon Corp.*, 318 NLRB 359 (1995); "Automatic" *Sprinkler Corp of America*, 319 NLRB 401 (1995), enf. denied 120 F.3d 612 (6th Cir. 1997); *Compu-Net Communications*, 315 NLRB 216 (1994); and *A-1 Fire Protection*, 273 NLRB 964 (1984).

<sup>4</sup> The General Counsel is correct in contending that, although an employer may close a portion of its business for purely economic reasons without bargaining over the decision, it violates both Sec. 8(a)(3) and (5) if the decision is motivated by antiunion considerations. *Coronet Foods*, 305 NLRB 79, 91-92 (1991), enf. and petition for rev. denied on other grounds 981 F.2d 1284 (D.C. Cir. 1993). However, because we find below that the Respondents did not actually terminate the operations of O'Dovero, we need not reach this issue.

<sup>5</sup> See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). The General Counsel argues in the alternative that O'Dovero's cessation of operations violated Sec. 8(a)(3) because it was "inherently destructive" of the employees' Sec. 7 rights. This argument would appear to be incompatible with *Darlington's* requirement that, to violate Sec. 8(a)(3), a partial closing must be motivated by a desire to chill unionism in the employer's other operations and must foreseeably have that effect. *Id.* at 273-275. Again, however, because we find that the O'Dovero operations were not terminated, we need not address this argument.

<sup>6</sup> James O'Dovero, president of O'Dovero, testified that O'Dovero had ceased operations, evidently meaning that it was not doing construction work.

these practices in the future. Indeed, Peter O'Dovero testified that O'Dovero still existed as a corporate entity that could resume work in short order.<sup>7</sup> Thus, the owners and managers of the two firms have treated their operations as virtually interchangeable (when it suited them to do so), neither firm has gone out of existence, and there is no contention that the operations of Associated have been altered in any significant respect. Far from supporting a finding that O'Dovero has ceased operations, the record indicates only that, having unlawfully diverted unit work from O'Dovero to Associated, the Respondents have simply continued the diversion.

The factors relied on by the judge and our dissenting colleague do not persuade us otherwise. Although there is no showing that, at the time of the hearing, Associated was performing work that traditionally would have been performed by O'Dovero, there is no evidence and no contention that Associated has given up doing underground pipe work. That no such work was being performed by the Respondents at the time of the hearing could be simply because no work of that sort was available at that time. The industry, after all, is one in which work is often not continuous, but bid for and performed on a project-by-project basis; consequently, the fact that one or both firms currently may not be doing a particular kind of work does not establish that they have abandoned that kind of work. And even if the Respondents have ceased bidding on *union* work, Associated (which assertedly bid on *nonunion* jobs) nevertheless has formerly bid on projects that were then assigned to O'Dovero's union-represented employees, and there is no contention that it could not do so again. Most important, the record does not indicate that, even if the kind of work traditionally performed by O'Dovero employees were to become available, neither firm would attempt to acquire such work—unless the Respondents chose not to make such an attempt out of the same antiunion animus that motivated their unlawful diversion of the Caspian work. Thus, even though the Caspian project has been completed and there may have been no pipe work for O'Dovero employees to perform at the time of the hearing, all that the record establishes in this regard is a hiatus between projects, not a complete cessation of O'Dovero's operations.

In these circumstances, we find, contrary to the judge, that O'Dovero has not been shown to have ceased its construction operations. The most that can be said in this regard is that, after unlawfully diverting the work on the Caspian project to employees of Associated, the Respondents temporarily stopped doing the kind of work traditionally performed by O'Dovero em-

<sup>7</sup>As we find below, there also is no showing that it would be unduly burdensome for O'Dovero to resume doing the kind of work it historically performed.

ployees. There is no evidence that either or both of them could not resume such work in the future.<sup>8</sup>

We further find that as part of the remedy for the Respondent's unlawful diversion of work, the Respondents should be required to resume the operations of O'Dovero. The record establishes that O'Dovero could begin work again in short order, and there is no showing, and no contention, that it would be unduly burdensome for it to do so.<sup>9</sup> Thus, although O'Dovero had sustained operating losses for several years prior to the hearing, the judge rejected the Respondents' contention that their actions were impelled by economic considerations, and we agree with his finding. The Respondents do not contend that a resumption of work by O'Dovero would entail significant costs of, for example, moving, renovation, or acquiring plant or equipment. Accordingly, we find that the appropriate remedy for the Respondents' unlawful diversion of unit work is to order them to cease and desist and to restore the status quo ante by resuming bidding for work traditionally performed by O'Dovero employees on the same basis as they bid for such work before the unlawful diversion of the work on the Caspian project.<sup>10</sup>

In imposing this remedy, we note that our Order does not prohibit the Respondents from abandoning any operations, or from declining to bid on projects, for legitimate business reasons. Thus, we are not requiring them to engage in unprofitable operations; we are simply ordering them not to make work assignment decisions based on antiunion animus.<sup>11</sup>

#### ORDER

The National Labor Relations Board orders that the Respondents, Associated Constructors and O'Dovero Construction, Inc., Marquette, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that bargaining unit work will be done on a nonunion basis.

(b) Indicating to employees that their support for International Union of Operating Engineers, Local 324 (the Union), would be futile.

(c) Diverting work from one group of employees to another in order to discourage union activity.

(d) Diverting unit work from employees represented by the Union to nonunion employees without first giving the Union an opportunity to bargain concerning that decision.

<sup>8</sup>Since we find that O'Dovero did not in fact cease operations, we dismiss the complaint allegation that the Respondents violated the Act by terminating the operations of O'Dovero or by failing to bargain over the decision to do so or its effects.

<sup>9</sup>*Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989).

<sup>10</sup>See *A-1 Fire Protection*, supra, 273 NLRB at 967.

<sup>11</sup>*We Can, Inc.*, 315 NLRB 170, 175 (1994).

(e) Refusing to bargain with the Union for a successor contract covering unit employees.

(f) Dealing directly with unit employees concerning terms and conditions of employment.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time construction equipment operators employed by O'Dovero Construction, Inc., at or out of its facility located at Midway Industrial Park, Marquette, Michigan; excluding clerical employees, guards and supervisors as defined in the Act.

(b) Resume bidding for jobs to be performed by unit employees under bidding practices as they existed prior to the unlawful diversion of unit work.

(c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(d) Preserve and, within 14 days of a 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.

(e) Within 14 days after service by the Region, post at its facility in Marquette, Michigan, copies of the attached notice marked "Appendix."<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current

<sup>12</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."

employees and former employees employed by the Respondents at any time since April 16, 1996.

(f) Within 21 days after service by the Region, file with the Regional director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

MEMBER HURTGEN, dissenting.

The Respondent was a single employer engaged in the construction industry. It consisted of two parts—a unionized company (O'Dovero) and a nonunion company (Associated). I agree with my colleagues that, during the Caspian project, the Respondent diverted work from O'Dovero to Associated, and that it did so unilaterally and for unlawful reasons. Accordingly, such conduct was unlawful under Section 8(a)(3) and (5).

However, I part company from my colleagues with respect to events after the Caspian project. After that project, the Respondent went out of the business of bidding on construction jobs where union contracts are required.<sup>1</sup> It would remain in the business of bidding on construction jobs where union contracts are not required. The judge found, and I agree, that this was a partial going out of business.<sup>2</sup>

For the reasons set forth in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), this decision was not a mandatory subject of bargaining. It follows that there was no violation of Section 8(a)(5) with respect to this decision.<sup>3</sup> Further, since the O'Dovero unit has ceased to exist, there is no obligation to bargain for a new contract for that unit. Finally, since the Associated unit was never unionized, it follows that there is no bargaining obligation in that unit.

In addition, even if the decision to go partially out of business was discriminatorily motivated, there would be no 8(a)(3) violation, unless it is established that the purpose of the decision was to chill unionism in the remaining operation and the Employer reasonably foresaw that the partial closing would have that effect.<sup>4</sup> In the instant case, there is neither showing. The Respondent simply wanted to get out of the business of bidding on union jobs. There is no evidence

<sup>1</sup>Because of the proviso to Sec. 8(e), it is lawful for a general contractor to require that all contractors on a job have union contracts.

<sup>2</sup>My colleagues suggest that O'Dovero has not gone out of business, and that it continues to be involved in bidding on union jobs. There is no evidence to support this assertion.

<sup>3</sup>Although there may have been a Sec. 8(a)(5) obligation to bargain about the effects of this decision, there is no showing that the Union demanded such bargaining.

<sup>4</sup>*Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 275–276 (1965).

that the Respondent intended to cause Associated employees to eschew unionism. Indeed, there is no suggestion that any union was seeking to organize the Associated employees. In sum, the decision did not focus on the Associated employees at all. It was entirely directed to the dissolution of the O'Dovero unit. Accordingly, a violation is not established under the *Darlington* test.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
AN AGENCY OF THE UNITED STATES  
GOVERNMENT

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT tell you that bargaining unit work will be done on a nonunion basis.

WE WILL NOT tell you that your support for the International Union of Operating Engineers, Local 324 (the Union) will be futile.

WE WILL NOT divert work from one group of employees to another in order to discourage union activity.

WE WILL NOT refuse to bargain with the Union for a successor contract covering unit employees.

WE WILL NOT divert unit work from employees represented by the Union to nonunion employees without first giving the Union an opportunity to bargain concerning that decision.

WE WILL NOT deal directly with employees represented by the Union concerning terms and conditions of employment.

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

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time construction equipment operators employed by O'Dovero Construction, Inc., at or out of its facility located at

Midway Industrial Park, Marquette, Michigan; excluding clerical employees, guards and supervisors as defined in the Act.

WE WILL resume bidding for jobs to be performed by unit employees under bidding practices as they existed prior to the unlawful diversion of unit work.

WE WILL make the unit employees who were deprived of employment as a result of our unlawful conduct whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

PETER O'DOVERO D/B/A ASSOCIATED  
CONSTRUCTORS AND O'DOVERO CON-  
STRUCTION, INC.

*Rocky L. Coe and Percy Courseault, Esqs.*, for the General Counsel.

*R. Scott Summers and Stephen D. LePage, Esqs. (R. T. Blankenship & Associates)*, of Greenwood City, Indiana, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Ishpeming, Michigan, on May 27 and 28, 1997. The original charge was filed May 10, 1996,<sup>1</sup> by the International Union of Operating Engineers, Local 324<sup>2</sup> (the Union), the first amended charge was filed May 22, the second amended charge was filed June 26, and the third amended charge was filed August 23. The complaint was issued September 4. The complaint alleges that Associated Constructors (Respondent Associated) and O'Dovero Construction, Inc. (Respondent O'Dovero) jointly referred to as Respondents, are a single employer and/or joint employer. The substantive allegations of the complaint may best be summarized at this point as alleging that Respondents violated Section 8(a)(5), (3), and (1) of the Act by withdrawing recognition from the Union after assigning unit work to their non-union operation.

Respondent filed a timely answer which admitted the allegations in the complaint concerning the filing and service of the charge and amended charges, labor organization status, agency status of Peter O'Dovero and James O'Dovero, and appropriate unit. It denied all other allegations of the complaint. Respondents also alleged as an affirmative defense that res judicata precluded the Board from finding that Respondent Associated and Respondent O'Dovero were a single or joint employer. At the hearing Respondents admitted jurisdiction.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondents, I make the following

<sup>1</sup> All dates are in 1996 unless otherwise indicated.

<sup>2</sup> Although the complaint does not so indicate, the record shows that the Union is affiliated with the AFL-CIO.

## FINDINGS OF FACT

## I. JURISDICTION

Respondent O'Dovero, a corporation, is engaged in the construction business at its facility in Marquette, Michigan, where it annually purchases and receives goods valued in excess of \$50,000 directly from suppliers located outside the State of Michigan. Respondent Associated, a sole proprietorship,<sup>3</sup> is engaged in the construction business at its facility in Marquette, Michigan, where it annually purchases and receives goods valued in excess of \$50,000 directly from suppliers located outside the State of Michigan. Respondents admit and I find that each individually is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

## A. Background

Respondent O'Dovero had for many years recognized the Union as the collective-bargaining representative of its employees. Respondent Associated employs approximately 100 persons of whom about 60 percent are seasonal employees. The nonseasonal employees do maintenance work and snowplowing during the winter season. Respondent Associated never had a collective-bargaining relationship with the Union.

On December 3, 1993, separate elections were held for employees of Respondent Associated and Respondent O'Dovero. The Union won the election in the O'Dovero unit; it was certified by the Board as the collective-bargaining representative for a unit of construction equipment operators at or out of Respondent O'Dovero's facility located at Midway Industrial Park, Marquette, Michigan. On March 3, 1994, the Union and Respondent O'Dovero signed a "short form" agreement whereby Respondent O'Dovero adopted a master agreement the Union had with the Michigan Chapter Associated General Contractors of America. The "short form" agreement was signed by James O'Dovero on behalf of Respondent O'Dovero; the master agreement was effective May 1, 1993, through April 30, 1996.

The election in the Associated unit ultimately resulted in a tie vote and the results of the election were certified.<sup>4</sup> On February 27, 1995, the Acting Regional Director approved the Union's request to withdraw the petition it had filed in that case. The Union thereafter filed an unfair labor practice charge alleging that Respondent Associated was an alter ego to Respondent O'Dovero. That charge was dismissed by the Regional Director on August 22, 1995, and the Union's appeal was denied by the General Counsel on October 23, 1995.

<sup>3</sup> Although the complaint alleges and Respondents admit that Associated Constructors is a corporation, the evidence shows that it is a sole proprietorship owned by Peter O'Dovero. I find it appropriate to correct the record sua sponte.

<sup>4</sup> For background see *Associated Constructors*, 315 NLRB 1255 (1995).

B. *The Single-Employer Issue*

Peter O'Dovero<sup>5</sup> is the sole owner of Respondent Associated, which was formed by Peter in 1980. Peter also owns 40 percent of Respondent O'Dovero, his wife owns 50 percent, and his son, James O'Dovero, owns the remaining 10 percent. James is president, Peter is treasurer, and Peter's wife is secretary of Respondent O'Dovero. Respondent O'Dovero was originally incorporated in the 1960s by Peter, who with his wife, were 100-percent owners of the corporation. It was not until the late 1980s that James began managing the day-to-day affairs of Respondent O'Dovero when he became a part owner and its president.

Respondents both are engaged in the construction business. Both Peter and James have the authority to, and regularly have, disciplined employees of Respondent Associated. James and Peter each have the authority to sign checks on behalf of both Respondents. James has the authority to schedule equipment for jobs performed by Respondent Associated, and he had authority to move equipment from jobsite to jobsite for work performed by both Respondents. James also had the authority to hire employees for Respondent Associated, including operators. As James O'Dovero stated at the hearing, in the absence of Peter O'Dovero "I help my father out with the family business. If he asks for help I always help my father." Respondent O'Dovero leases some of its equipment from Respondent Associated. Respondent Associated leases some equipment from Respondent O'Dovero. Respondent O'Dovero has sold some of its equipment to Respondent Associated. Respondent Associated has been making loans to Respondent O'Dovero approximately every 3 months whenever Respondent O'Dovero needed money for working capital. These loans have ranged from \$5000 to \$10,000 each. At the hearing, Peter testified that he was not sure whether the loans have been paid back.

Respondents use the same individual to handle their workers' compensation and unemployment compensation matters, the same auditor to process financial statements and tax returns, and the same controller up to December 1995. Respondents are located at the same facility,<sup>6</sup> where James has a desk and office. Personnel files for employees of both Respondents are kept at the facility. Peter's wife, who works at the office as an irregularly employed part-time office worker, is paid by Respondent O'Dovero. Except for James, all other employees in the office are employed by Respondent Associated, including a payroll clerk, receptionists, accounts billing clerk, bookkeeper, and engineer. These employees, however, perform their work for both Respondents. Respondents share the same fax number and post office box. While Respondents each have different telephone numbers, the same receptionist answers the telephone.

Customarily Respondent Associated bid on nonunion projects while Respondent O'Dovero bid on union projects. In addition, Respondent O'Dovero performed large jobs involving the laying of pipe, regardless of who bid the job.

<sup>5</sup> Peter O'Dovero has a son, Peter O'Dovero Jr., who is not directly involved in these proceedings. Unless otherwise specifically indicated, all references to Peter O'Dovero will be to the father.

<sup>6</sup> Respondents rent their office facility from O'Dovero Development, which is also owned by Peter.

### C. *The Caspian Project*

From May through November 1995, employees of Respondent O'Dovero were engaged in laying water pipe in the city of Caspian. However, it was Respondent Associated that bid on and was awarded the contract to perform this work; Respondent Associated in turn assigned the work to employees of Respondent O'Dovero. Employed at the project were approximately five or six to nine<sup>7</sup> equipment operators as well as a number of other employees. The operators ran construction equipment such as a backhoe, dozer, end loader, grader, dump truck, water truck, and roller. Some of this equipment carried the name "Associated," none of the equipment carried the name of Respondent O'Dovero. Craig Dufresne was the project foreman.<sup>8</sup> Unit employees who worked on this project received the wages and benefits specified in the contract between Respondent O'Dovero and the Union, and Respondent O'Dovero recognized the Union as the employees' collective-bargaining representative.<sup>9</sup> Among the employees working on the project were Harold Beauchamp, James Harris, and Arnie Frizzell. The employees were paid with paychecks from Respondent O'Dovero. Defresne, however, was an employee of Respondent Associated who was paid for at least part of the time by Respondent O'Dovero.<sup>10</sup>

The work on the Caspian project was not completed in 1995. In late 1995, equipment was moved to the Old Caspian<sup>11</sup> area in preparation for the work that was to be done in that part of the project, and the employees were told by Defresne that they would resume work on the project in the spring when weather conditions permitted. In 1996, after the normal winter shutdown, work resumed in the Old Caspian area, where approximately 10,000 additional feet of pipe were laid. The work performed here was identical to the work performed in 1995—laying pipe. The employees used the same equipment that had been used in 1995.

On about April 9 or 10, before work actually resumed on the project, employee Beauchamp received a call from Defresne, who asked if Beauchamp was ready to go to work; Beauchamp replied that he was. Defresne said that it would be a nonunion job. Beauchamp did not reply. Approximately 1 week later, Beauchamp received another call from

<sup>7</sup>The testimony of employees was that five or six operators were employed at the project; a report sent by Respondent O'Dovero to the Union for June 1995 indicates that nine operators were employed at the project that month.

<sup>8</sup>At the hearing Respondents stipulated that Defresne was a supervisor within the meaning of Sec. 2(11) and an agent within the meaning of Sec. 2(13) of Respondent Associated.

<sup>9</sup>On two occasions during the course of the year employees complained that they were not getting contractual benefits regarding show up time. Defresne told these employees that the project was nonunion. However, when the employees persisted in their claim for the contractual benefits, Defresne relented and the employees were paid. This supports my finding that, notwithstanding Defresne's occasional protestations to the contrary, Respondent O'Dovero's conduct as a whole indicates that it applied the contract to the project and recognized the Union as the employees' representative.

<sup>10</sup>More precisely, the parties stipulated that while he was superintendent of the Caspian project, Defresne was an employee of Respondent Associated. The parties also stipulated that during some of that time at least Defresne's name appeared on the payroll of Respondent O'Dovero.

<sup>11</sup>Caspian and Old Caspian are apparently separated by a river.

Defresne. Defresne said that Beauchamp should report to the worksite since they were going to start to clean up from the 1995 work season. Beauchamp reported to the worksite; however the area was flooded from spring runoff and there had been snowfall the night before and equipment was being used for snow removal. Since work was impossible that day, Beauchamp and Defresne went to a restaurant for coffee. During conversation over coffee Defresne said that "we weren't going to have any union work this year, that our business agent, Bill Gray, had screwed us out of union jobs." Defresne said that Gray had "tried to take O'Dovero to court" and that O'Dovero was mad at him. Defresne explained that employee Harris would not be working at the project that year because there was no union contract for 1996, and that another employee, Arnie Frizzell, was working on a different job. That evening Beauchamp called Gray, who explained that the Union was still trying to negotiate a contract with Respondent O'Dovero but it was not yet successful. Later, Defresne called Beauchamp in another attempt to start work on the project. Defresne said that there was "a lot of work for 1996." This time Beauchamp told Defresne that he would not be able to go to work if there was no union contract, that he had too much time invested in the Union to give that up. Defresne offered that there would be no problem with the money, but Beauchamp explained that he did not want to jeopardize his pension with the Union.<sup>12</sup>

Harris also spoke with Defresne in April.<sup>13</sup> Harris asked what the work picture looked like, and Defresne said that they were going to start work in a week or two, weather permitting. Defresne said, "This year . . . we are going to be 100 percent nonunion." Defresne continued, stating that Peter O'Dovero "was really pissed off at Bill Gray and the union and he'd go to the Supreme Court if he had to get out of that contract." Harris said that under those circumstances he could not work there. Defresne explained that money was no object, but Harris said that money was not the only problem, there were the health benefits and pension. Defresne said that something might be done about the pension and Harris asked about the health benefits. When Defresne could give no assurance about that matter Harris again repeated that he could not work there. About 2 days later, Harris reported this conversation to Gray, who said that he would look into the matter and that he was still working on trying to get a new contract with Respondent O'Dovero. Later, Harris had another conversation with Defresne; this concerned unemployment compensation for Harris. Near the end of the conversation Harris said that if they ever became union

<sup>12</sup>These findings are based on the testimony of Beauchamp, who I found to be a credible witness. I reject Defresne's unconvincing testimony concerning these events.

<sup>13</sup>Harris had not only worked on the Caspian project in 1995; he also had worked on the Iron Mountain project as an operator for Respondent O'Dovero in 1994. This project also was a union recognized site that was covered by the contract between the Union and Respondent O'Dovero. Respondent Associated had won the bid on that project and Peter assigned it to Respondent O'Dovero for completion. A report sent by Respondent O'Dovero to the Union for the month of July 1994 indicates that Respondent O'Dovero employed 14 employees that month on the Iron Mountain project.

again, he would be happy to work for them again. Defresne replied that he did not think that would ever happen.<sup>14</sup>

The operator work on the Caspian project in 1996 was performed by nonunion employees of Respondent Associated. Work continued on the project until around November. The project was not completely finished in 1996; in 1997 3 or 4 weeks of cleanup work was performed. At the hearing when Peter O'Dovero was asked why employees of Respondent O'Dovero were not recalled to complete the project in 1996, he responded that the job was "tapering down," and that it was an "Associated project to start with." When asked to explain how the fact that the project was dwindling down would impact who completed the work, Peter answered, "It was an Associated project to start with so on Associated projects we do give preference to Associated people." Defresne, however, testified that in 1995 there had been problems on the Caspian project such as OSHA concerns, a broken telephone line, and chlorine getting into the water system; he explained that these problems led to the conclusion that changes had to be made in 1996 on the Caspian project.

#### D. The Bargaining Issues

By letter dated February 26, James O'Dovero notified the Union of Respondent O'Dovero's intent to terminate the contract set to expire on April 30. By letter dated March 26, the Union notified Respondent O'Dovero that it was prepared to meet for the purpose of negotiating a new contract; the Union requested that Respondent O'Dovero provide the dates and times that it was available to meet. Respondent O'Dovero never responded to this letter. On about April 26, Business Representative Gray visited Respondents' facility and spoke with James O'Dovero. Gray said that they needed to negotiate a contract. James responded that he did not know if that was possible since his father was "pissed" that the Union had tried to organize Respondent Associated. Gray reminded James that the Union had sent him a letter requesting bargaining. James replied that he had a written response to the letter, but when Gray requested a copy of the written response, James said that he would mail it to Gray. Gray, however, never received the written response. The Union, thereafter, filed a refusal to bargain charge against Respondent O'Dovero.

Respondent O'Dovero and the Union agreed to meet. On June 20 Gray and his attorney, Nino Green, met with James O'Dovero and his attorney, Stephen LePage. LePage advised the Union that the purpose of the meeting was to negotiate the effects of closing because Respondent O'Dovero was ceasing to do business. James said that Respondent O'Dovero was going to stop bidding on jobs. He stated that the corporation had not been dissolved and that if in future Respondent O'Dovero resumed performing work it would be with union members. This was the first time that the Union had been advised that Respondent O'Dovero had ceased operations. Green replied that the Union was not prepared to negotiate on that matter since the Union thought the parties were going to negotiate a new contract and that this was the

<sup>14</sup>These findings are based on the testimony of Harris, who I found to be a credible witness. I have considered but rejected the hesitant and generally unconvincing testimony of Defresne concerning these events.

first that the Union had heard about Respondent O'Dovero's closing. The parties agreed to hold another meeting. On June 24 LePage sent Gray a letter inviting the Union to a bargaining session on July 9; however, no further bargaining sessions were held because the Union chose to file an unfair labor practice charge instead.<sup>15</sup>

Peter O'Dovero testified that for 2 or 3 consecutive years, he had discussions with his son James concerning Respondent O'Dovero's inability to make a profit, and that James finally decided that Respondent O'Dovero should cease performing work and go out of business in 1996. Later, however, Peter O'Dovero testified that the decision to cease operations was made by the board of directors of Respondent O'Dovero, and that James "went along with it." Respondent O'Dovero, however, has continued its corporate existence and Peter O'Dovero conceded it could resume operations quickly if that was desirable. At the hearing James O'Dovero admitted that at no time during his meetings with the Union in 1996 did he ever tell the Union that the reason that Respondent O'Dovero was ceasing operations was due to financial difficulties.

Financial records show that for 1993, Respondent O'Dovero sustained an operating loss of \$20,367 but due to interest income and the sale of equipment, it realized an after tax income of \$13,686. In 1994, Respondent O'Dovero sustained an operating loss of \$4630 but, due to interest income and the sale of equipment, it realized an after tax income of \$97,340. In 1995, Respondent O'Dovero sustained an operating loss of \$32,398 but again due to interest income and the sale of equipment, it realized an after tax income of \$35,478. For 1996, which is the year Respondent O'Dovero allegedly ceased operations, it sustained an operating loss of \$97,689 and an after tax loss of \$29,343.

Finally, there is no evidence that Respondent O'Dovero bid on or was awarded any work since it was assigned the Caspian project in 1995. Nor is there any evidence that Respondent Associated is performing any work that in the past had traditionally been done by Respondent O'Dovero. From this I conclude that upon the completion of the Caspian project Respondent O'Dovero ceased operations.

### III. ANALYSIS

#### A. The Single-Employer Issue

The General Counsel asserts that Respondents are a single-integrated enterprise. The test for resolving this issue has recently been set forth as follows:

The law is well settled that the controlling criteria in determining whether two or more employing entities constitute a single employer are (1) common ownership,

<sup>15</sup>These facts are based on the credited testimony of Gray, the notes he kept of the June 20 meeting, and the June 24 letter. Respondents argue that Gray's credibility was seriously undermined when he testified that he never received Respondent O'Dovero's June 24 letter, yet the letter was discovered in the Union's files that were turned over to Respondents pursuant to subpoena. I disagree. This minor failure of recollection does not significantly detract from what was otherwise detailed and persuasive testimony that was consistent with likely probabilities based on the record as a whole. James O'Dovero's testimony, on the other hand, to the extent that it is inconsistent with Gray's, was not persuasive.

(2) interrelation of operations, (3) common management, and (4) centralized control of labor relations. *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (per curiam); *Walter N. Yoder & Sons, Inc. v. NLRB*, 754 F.2d 531, 535–36 (4th Cir. 1985). No one factor is determinative, and the Board need not find extensive evidence that all four criteria are satisfied in order to find single employer status. *I.B.E.W., Local 613 v. Fowler Indus., Inc.*, 884 F.2d 551, 553 n. #3 (11th Cir 1989), cert. denied, 494 U.S. 1066 (1990); *NLRB v. Don Burgess Constr. Corp.*, 596 F.2d 378 384 (9th Cir 1979), cert. denied, 444 U.S. 940 (1979). Ultimately, single employer status is characterized by the absence of an “arm’s length relationship found among the integrated companies.” *Local No. 627, Int’l Union of Operating Eng’rs v. NLRB*, 518 F.2d 1040, 1046 (D.C. Cir. 1975), aff’d in pertinent part sub nom, *South Prairie Constr. Co., v. Local No. 627, Int’l Union of Operating Eng’rs*, 425 U.S. 800 (1976).

*D & J Trucking v. NLRB*, 71 F.3d 486, 490, (4th Cir. 1995).

Applying this standard, the facts set forth in detail above so clearly indicate a single-integrated relationship that they need only be highlighted again here. It is apparent Respondents share common ownership. Peter O’Dovero is the sole owner of Respondent Associated, and he is a 40-percent owner of Respondent O’Dovero. Peter’s wife owns 50 percent of Respondent O’Dovero and his son James owns the remaining 10 percent. Common ownership is established where it is shared among members in a close family relationship. *H. A. Green Decorating Co.*, 299 NLRB 157 (1990), enf’d. mem. 983 F.2d 1073 (1992). It is also readily apparent that Respondents have common management and centralized control of labor relations through Peter and James O’Dovero. Respondents’ operations are highly interrelated as seen by the fact that they share equipment, have common supervision use the same office facility, etc. The absence of an arm’s-length relationship between Respondents is highlighted by the fact that Respondent Associated makes periodic “loans” to Respondent O’Dovero, yet there is no evidence that these loans have ever been repaid. The presence of a close family run integrated business is demonstrated by James O’Dovero’s commendable admission that he will always help his father with the family business.

Respondents do not directly argue that the facts fail to show a single-employer relationship. Instead, they argue at length that because the Regional Director earlier dismissed a charge filed by the Union alleging a single-employer relationship between Respondents, and that dismissal was upheld by the General Counsel, the Board is now precluded from making a contrary finding under the doctrine of *res judicata*. This argument is without merit. *Ball Corp.*, 322 NLRB 948 (1997). Respondents’ reference to *Jefferson Chemical Co.*, 200 NLRB 992 (1972), is also inapposite. That case deals with a situation where there are multiple litigations involving the same respondent. Here, there has been only a single litigation because the administrative investigation conducted by the Regional Director in the earlier charge was just that and no more. Finally, Respondents argue that the processing of the single-employer issue at this point is contrary to “the language and spirit” of Section 10(b) of the Act. In this re-

gard Respondents argue that since the Union surely knew that Respondents were a single employer long before it filed the charge in this case, the Union’s case is time barred. Assuming arguendo that the facts are as Respondents assert, this argument distorts the meaning of Section 10(b). That section precludes the issuance of a complaint alleging an unfair labor practice occurring more than 6 months prior to the filing and service of a charge covering that allegation. The mere fact that Respondents are a single-integrated enterprise does not constitute an unfair labor practice; it is only with the addition of other events that an unfair labor practice can be established. The evidence shows that the charges filed by the Union in this case were timely when compared to the unfair labor practices alleged in the complaint. Having rejected all Respondents defenses on this issue, I conclude that Respondents constitute a single-integrated enterprise.<sup>16</sup>

It follows from this conclusion that Respondents are responsible for commission of any unfair labor practices hereinafter found and are jointly and severally liable to remedy such violations of the Act. *Pathology Institute*, 320 NLRB 1050 (1996); and *Denart Coal Co.*, 315 NLRB 850 (1994), sub nom *D & J Trucking v. NLRB*, enf’d. 71 F.3d 486, (4th Cir. 1995).

#### B. *The Caspian Project*

Before resolving the specific allegations of the complaint, it is necessary to determine whether the operation of the heavy construction equipment by employees on the Caspian project was unit work covered by the contract that was in effect between the Union and Respondent O’Dovero. As more fully described above, the Caspian project was assigned to Respondent O’Dovero and its employees in 1995. These employees were covered by a collective-bargaining agreement, and the work performed on the project was within the description of unit work set forth in that contract. Moreover, the employees were paid the contractual benefits and Respondent O’Dovero filed the requisite forms with the Union indicating hours worked by unit employees. As described above, when employees complained that they had not received the contractual show up time pay, Defresne, although claiming that the project was nonunion, paid the employees in accordance with the contract. Under these circumstances I conclude that the work performed by Respondent O’Dovero’s employees on the Caspian project in 1995 was unit work covered by the contract it had with the Union.

Respondents appear to argue that because Respondent Associated originally bid on and was awarded the Caspian project, that work was therefore never unit work covered by Respondent O’Dovero’s contract with the Union. I disagree. When the work was assigned to Respondent O’Dovero’s employees and was work that fit within the unit description, it became unit work. The fact that Respondent O’Dovero thereafter paid contractual benefits and filed reports with the Union establishes that Respondent O’Dovero itself recognized that the work was covered by the contract. Respondents also point to evidence in the record that some nonunion employees of Respondent Associated performed work on the Caspian project in 1995 as demonstrating that the project was nonunion. I again disagree. First, I do not credit the summary

<sup>16</sup>In light of this finding I conclude that is unnecessary to decide whether Respondents constitute a joint employer.

testimony given in support of this contention. It was totally unsupported by documentary evidence and was at least partially inconsistent with other documentary evidence in the record showing that at least nine employees were reported to the Union as being employed on the project. In any event, there is no evidence that the Union knew or reasonably should have known that some nonunit employees were performing work on the project. To the contrary, the reports Respondent O'Dovero filed tend to show that employees working on the project were receiving the contractual benefits. Thus, the fact that nonunit employees may have performed work on the project unbeknownst to the Union is of no legal significance to this issue.

I further conclude that the work performed on the Caspian project after 1995 continued to be unit work. The evidence shows that this work was identical to the work performed earlier. It was the same type of work, involving use of the same equipment and requiring the same skills. In sum, at all relevant times the work performed on the Caspian project by the heavy equipment operators was unit work covered by the contract between Respondent O'Dovero and the Union. The fact that the work was assigned from Respondent O'Dovero to Respondent Associated did not serve to destroy the appropriateness of the unit or Respondents' bargaining obligations to the Union as the collective-bargaining representative of those employees. *Pathology Institute*, supra.

#### C. The Unlawful Statements

The General Counsel alleges in the complaint that Defresne made unlawful statements to employees during the month of April. I have found above that on about April 9 or 10, Defresne told employee Beauchamp that the Caspian project would be nonunion. About a week later Defresne repeated this statement to Beauchamp. Around that same time Defresne made a similar statement to employee Harris. I conclude below that Respondents were not privileged to operate the Caspian project on a nonunion basis. Under these circumstances the Board has held that statements such as those made by Defresne to employees Harris and Beauchamp indicating that certain work will be performed only on a nonunion basis violate Section 8(a)(1) of the Act. *American Automatic Sprinkler Systems*, 323 NLRB No. 160, slip op. p. 2 (June 11, 1997). Respondents contend in their brief that there is no evidence that the employees in fact felt coerced or threatened by this conduct. However, the test is not a subjective one; it is whether, based on objective facts, the conduct has a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Miami Systems Corp.*, 320 NLRB 71 fn. 4 (1995). I, therefore, conclude that Respondents conduct in this regard violated Section 8(a)(1) of the Act.

During the same conversation with Harris, Defresne said that Peter O'Dovero was angry with the Union and would take the matter to Supreme Court to escape the union contract. This statement indicates to employees that their support for Union would be futile in that Respondent would take extraordinary measures to frustrate the employees' efforts on behalf of the Union. *L & L Wine & Liquor Corp.*, 323 NLRB No. 151, slip op. at 2 (May 30, 1997); *Woodline, Inc.*,

233 NLRB 97, 100 (1977).<sup>17</sup> Respondents in their brief assert that *Standard Products Co.*, 281 NLRB 141 (1986), compels the conclusion that Defresne's statements did not violate the Act. I conclude that *Standard Products* is not on point. In that case the statement that the judge found not unlawful concerned the fact that the respondent in that case would engage in hard bargaining and the employees could end up with more, the same, or less as a result of the bargaining process. That was a lawful statement of the realities of the bargaining process; it is not at all like the statement that I have found unlawful in this case.

I conclude that Respondents violated Section 8(a)(1) of the Act by indicating to employees that their support for the Union would be futile.<sup>18</sup>

#### D. The Diversion of Work

The General Counsel alleges that Respondents unlawfully diverted work from the union-represented employees of Respondent O'Dovero to the nonunion employees of Respondent Associated in violation of Section 8(a)(5) and (3) of the Act. Subsumed within this allegation must be the assertion that Respondents unlawfully failed to employ employees from Respondent O'Dovero as part of the diversion of work process.

Turning first to the 8(a)(3) allegation, the general analysis set forth in *Wright Line*<sup>19</sup> governs this determination. The Board has restated that analysis as follows:

Under *Wright Line*, the General Counsel must make a prima facie showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.<sup>7</sup> An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the pro-

<sup>17</sup> As indicated above, when Harris said in this same conversation that he would be happy to work again for Respondent O'Dovero if it became union, Defresne replied that he did not think that would ever happen. In his brief the General Counsel asserts that this statement violates Sec. 8(a)(1) of the Act as an expression of futility. In light of my finding indicated above, I conclude it is unnecessary to determine whether Defresne's statement rose to the level of a violation of the Act since any such finding would not impact the remedy in this case.

<sup>18</sup> Respondents in their brief argue that employees Harris and Beauchamp, by virtue of their conduct described above, quit their employment from Respondent O'Dovero. I disagree. I find below that Respondents could not lawfully operate the Caspian project on a nonunion basis. Respondents informed Harris and Beauchamp that the project would be nonunion, and the employees decided not to work there under those circumstances. However, employees are not required to relinquish their statutory rights in order to continue to work for an employer. The Board has held that this amounts to a constructive discharge of employees. *RCR Sportswear*, 312 NLRB 513 (1993), enf. mem. 37 F.3d 1488 (3d Cir. 1994). However, because the General Counsel has neither alleged this matter in the complaint nor argues it in his brief, I conclude that it is inappropriate to make unfair labor practice findings on this issue. It is sufficient that I reject Respondents' contention that the employees quit.

<sup>19</sup> 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

tected conduct.<sup>8</sup> Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.<sup>9</sup>

<sup>7</sup>*NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).

<sup>8</sup>See *GSX Corp. v. NLRB*, 918 F.2d 1351, 1357 (8th Cir. 1990) (“By assessing a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an employer can establish an affirmative defense to the discrimination charge.”)

<sup>9</sup>See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

*T & J Trucking Co.*, 316 NLRB 771 (1995). This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

I examine the facts to assess whether the General Counsel has met his initial burden on this issue. In 1995 the work on the Caspian project was done by union-represented employees of Respondent O’Dovero. In 1996 that same work was assigned to the nonunion employees of Respondent Associated. In April Defresne told employee Beauchamp that the project had gone nonunion because the Union had “tried to take O’Dovero to court.” In that conversation Defresne directly blamed Union Representative Gray for the loss of jobs. Similarly, Defresne told employee Harris that the project was going nonunion because Peter O’Dovero was angry with Union Representative Gray and that Peter would pursue the matter to the Supreme Court in order to escape the contract that Respondent O’Dovero had with the Union. These statements were made in a context where the Union had unsuccessfully attempted to organize Respondent Associated employees by filing a petition for an election which was finally resolved February 27, 1995, and then the Union persisted in its efforts by filing a charge involving Respondent Associated which was not finally disposed of until October 23, 1995. Also in April James O’Dovero told Gray that Peter O’Dovero was angry at the Union because it had attempted to organize the employees of Respondent Associated. These facts show that a reason why Respondents refused to continue to employ union-represented employees of Respondent O’Dovero to perform work on the Caspian project in 1996 was because Respondents were angry at the Union’s attempt to organize the nonunion employees of Respondent Associated and in order to escape the contract that Respondent O’Dovero had with the Union. Thus the General Counsel has met his initial burden.

I examine the evidence to assess whether Respondents have established that they would have assigned the work to the nonunion employees for reasons unrelated to union activity. As more fully described above, at the hearing Peter O’Dovero testified that the reason Respondent O’Dovero employees were not called back to the Caspian project in 1996 was because the project was “tapering down” and that it had been a Respondent Associated project to begin with. These reasons are patently unconvincing. First, the project continued throughout the 1996 construction season and even into 1997. In any event, assuming that the project was slowing down, that does not explain a failure to recall employees who had the skill and experience of working on the project the previous year. At the hearing I asked the witness to ex-

plain his testimony in this regard. His response then shifted by asserting that preference was given to employees of Respondent Associated. In sum, Peter O’Dovero’s explanation as to why the work was shifted is entirely unconvincing and I do not credit it.

Defresne gave different reasons to explain the shift of work from employees of Respondent O’Dovero to Respondent Associated. I note that the very fact that Peter O’Dovero and Defresne gave differing reasons itself seriously, if not fatally, undermines Respondents’ case on this issue. Defresne’s testimony, more fully described above, was that there had been certain problems with the work performed on the project in 1995 that resulted in Respondents making changes in 1996. I do not credit this testimony. In addition to Defresne’s unpersuasive demeanor as a witness, his testimony is not corroborated by other witnesses and it is not supported by documentary evidence.

Respondents also assert that the diversion of work to Respondent Associated was part of the process whereby Respondent O’Dovero ceased operations, and that this was done for financial reasons. The financial records introduced in support of this contention have been described above. They show that for the years 1993, 1994, and 1995 Respondent O’Dovero had experienced operating losses of \$20,367, \$4630, and \$32,398, respectively, but that for each of those years it was to realize after income primarily due to the sale of equipment of \$13,686, \$97,340, and \$35,478, respectively. Missing from these numbers is any credible explanation as to why what had been a tolerable operation became intolerable in 1996. This is especially the case where I have concluded that Respondents operated as a single integrated enterprise and as a family owned business with intermingled operations. In the absence of more compelling evidence, I do not credit the testimony that financial reasons caused Respondent O’Dovero to cede its work to Respondent Associated. Having discredited the reasons asserted by Respondents to explain why it transferred the work from Respondent O’Dovero to Respondent Associated, it follows that Respondent has failed to meet its burden on this issue.

Respondents in their brief argue that there was no diversion of work from Respondent O’Dovero to Respondent Associated since the project always was a Respondent Associated project. However, for reasons already stated I have found that the work on the Caspian project became unit work for Respondent O’Dovero employees despite the fact that Respondent Associated had won the contract on the project. I conclude that Respondents violated Section 8(a)(3) and (1) of the Act in approximately April 1996 by failing to continue to assign employees employed by Respondent O’Dovero to perform unit work on the Caspian project in and instead assigning employees of Respondent Associated to perform that work. *Ferragon Corp.*, 318 NLRB 359 (1995).

I turn now to examine whether Respondents conduct also violated Section 8(a)(5) and (1) of the Act. It is uncontested that Respondents made and implemented the decisions not to continue to use Respondent O’Dovero employees and instead to use Respondent Associated employees without first either giving notice to or bargaining with the Union. Thus, the issue turns on whether transfer of unit work from Respondent O’Dovero to Respondent Associated and the consequent failure to continue to use Respondent O’Dovero’s employees was a mandatory subject of bargaining. General instruction

on this issue is derived from *First National Maintenance Corp., v. NLRB*, 452 U.S. 666 (1981), and *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1967). Here, since I have concluded that Respondents are a single-integrated enterprise the transfer of work involved in this case amounts to transfer from Respondents' union represented employees to its nonunion employees. *Dahl Fish Co.*, 279 NLRB 1084 (1986), enf. 813 F.2d 1254 (D.C. Cir. 1987). Extensive analysis, however, is not required on this matter, since I have already concluded that Respondents engaged in this conduct from discriminatory reasons, and the Board has consistently held that such discrimination may not serve as entrepreneurial decision immune from bargaining obligations. *Ferragon Corp.*, supra at 362. I therefore conclude that Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally diverting unit work from Respondent O'Dovero to Respondent Associated and thereby failing to continue to employ Respondent O'Dovero's employees.

#### E. *The Refusal to Bargain for a New Contract*

As indicated above, on March 26 when the contract was about to expire, the Union advised Respondent O'Dovero that it desired to commence bargaining for a successor contract. Respondent O'Dovero refused, asserting that it had ceased operations. The General Counsel contends that this conduct violated Section 8(a)(3), (5), and (1). As I have found above, Respondent O'Dovero had not lawfully ceased operations at that point. Instead, it had unlawfully diverted unit work to Respondent Associated. Had it not engaged in this unlawful conduct it would have used unit employees for at least the remainder of the construction year. Under those circumstances the Union was entitled to bargain a new contract for the unit employees. Because Respondents had no lawful basis for refusing to bargain for a new contract, I conclude that they thereby violated Section 8(a)(5) and (1) of the Act. "*Automatic*" *Sprinkler Corp.*, 319 NLRB 401, 402 (1995), enf. denied 120 F.3d 612 (6th Cir. 1997).

The General Counsel has presented no case authority to support the allegation in the complaint that the refusal to bargain for a successor contract also violates Section 8(a)(3) of the Act; I shall dismiss that allegation.

#### F. *The Direct Dealing Issue*

The General Counsel contends that Respondents violated Section 8(a)(5), (3), and (1) of the Act by engaging in direct dealing with employees. I have described above in detail the last conversations employees Beauchamp and Harris had with Defresne in April. It was during one of those conversations that Beauchamp told Defresne that he was unwilling to work on the Caspian project since it was to be run as a non-union site. Defresne then told Beauchamp that there would be no problem with "the money," but Beauchamp explained that he did not want to jeopardize his union pension. In a conversation with employee Harris, Defresne was more explicit. When Defresne told Harris that money was no object, Harris replied that he was concerned about pension and health care benefits in addition to money. Defresne replied that something might be done about the pension. Ultimately since nothing could be done about health care benefits, Harris was not persuaded to return to work at the Caspian project. I find that these conversations show that Defresne

was dealing directly with the employees concerning the wage rates and benefits that the employees would be paid if they returned to work on the Caspian project. I have already concluded above that the Union represented the employees performing unit work on the Caspian project, such as Harris and Beauchamp. Under these circumstances Respondent O'Dovero was not free to deal directly with employees about terms and conditions of employment; instead Respondent O'Dovero had to deal with the representative of the employees—the Union—concerning such matters. *L & L Wine & Liquor Corp.*, 323 NLRB No. 151, slip op. at 2 (May 30, 1997).

Respondents contend that no violation occurred because there is no evidence that Defresne had the authority to deal with employees concerning working conditions. I disagree; it is apparent that Defresne had broad authority to deal with employees concerning working conditions. Respondents rely on *Mount Hope Trucking Co.*, 313 NLRB 262 (1993), in support of their contention that Defresne's conduct did not amount to direct dealing. In that case, however, in finding no violation the Board pointed out that a representative of the union was present during the meeting concerning the alleged direct dealing. Here, it is clear that no union representative was present during the discussions between the employees and Defresne. Thus, Mount Hope is not on point. I conclude that Respondents violated Section 8(a)(5) and (1) of the Act by engaging in direct dealing with employees.

The General Counsel also alleges that by virtue of this conduct, Respondents also violated Section 8(a)(3) of the Act. I find absolutely no support for the allegation that direct dealing constitutes a violation of Section 8(a)(3). I shall therefore dismiss this allegation.<sup>20</sup>

#### G. *The Cessation of Operations Issue*

The General Counsel contends that Respondent O'Dovero unlawfully ceased operations and requests that Respondent O'Dovero be ordered to resume its operations. As indicated above, Respondent O'Dovero told the Union on June 20 that it had ceased operations. I have already concluded that this was neither accurate nor lawful since Respondents continued to perform work on the Caspian project. There is no evidence, however, that after the Caspian project ended that Respondents continued to perform the work that Respondent O'Dovero had done in the past. Respondents have ceased bidding on union jobs and there is no showing that Respondent Associated is performing work that traditionally would have been performed by Respondent O'Dovero. In the absence of such evidence I conclude that Respondent O'Dovero has ceased operations. I am aware of the fact that Respondent O'Dovero has continued its corporate existence and may,

<sup>20</sup> When questioned about this and other novel allegations in the complaint, counsel for the General Counsel represented that he had case authority to support the allegations. In his brief, counsel for the General Counsel again asserts that the direct dealing violated Sec. 8(a)(3) as well as Sec. 8(a)(5). In support of that contention, counsel for the General Counsel cites *L & L Wine*, supra. *River City Mechanical*, 289 NLRB 1503 (1988), and *Johnstown Corp.*, 313 NLRB 170 (1993). In light of these representations, I have read and reread these cases; they do not support the contention that direct dealing violates Sec. 8(a)(3). Counsel for General Counsel would be well advised to be more careful in assuring that his representations are accurate.

some time in the future, resume operations. In the event that such a development occurs in the future, it may trigger an obligation by Respondents to recognize and bargain with the Union, as well as other obligations.<sup>21</sup> However, that situation does not detract from my finding that so far as this record shows, Respondent O'Dovero ceased operations upon the completion of the Caspian project.

I further conclude that the decision to cease operations of the union portion of a double-breasted operation is a managerial decision of the type for which there is no obligation to bargain. *First National Maintenance*, supra.<sup>22</sup>

The General Counsel cites "*Automatic*" *Sprinkler Corp.*, supra; *Ferragon Corp.*, supra; and *Compu-Net Communications*, 315 NLRB 216 (1994). However, those cases involved the continued subcontracting of unit work, clearly a mandatory subject of bargaining. I have also considered *A-I Fire Protection*, 273 NLRB 964 (1984), where the Board ordered a resumption of operations remedy for an unlawful diversion of unit work. That case is distinguishable in one critical respect. There the facts showed that respondents were continuing to divert work from the union portion of their operation to the nonunion portion; thus they had not genuinely ceased operation of the union portion. That is unlike here where I have concluded that after the Caspian project Respondent O'Dovero ceased operations. Accordingly, I shall dismiss this allegation of the complaint.

#### H. The Effects Bargaining Issue

The General Counsel contends that Respondents failed to bargain over the effects of the decision of Respondent O'Dovero to cease its operations. In this regard the Supreme Court has held that even in situations where an employer need not bargain over a decision to terminate a portion of its operations, an employer is required to bargain over the effects that decision has upon unit employees. "And, under Section 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy." *First National Maintenance Corp. v. NLRB*, 452 U.S. at 681-682. As indicated above, Respondent O'Dovero made its decision to cease operations in December 1995 and January 1996. Despite this decision, Respondents continued to perform unit work since the work on the Caspian project was merely diverted to Respondent Associated. On June 20 Respondent O'Dovero advised the Union that it had ceased operations and offered to bargain over the effects of that decision. However, the Union chose not to engage in effects bargaining at that time.

The General Counsel argues that the Union was excused from bargaining with Respondent O'Dovero over the effects of its cessation of operation because the Union was presented with a fait accompli. More specifically, the General Counsel's contention is that the Union was never given a chance to bargain before Respondents ceased operations, since according to the General Counsel, the cessation of operations occurred in January and the Union was not advised of that

<sup>21</sup>As noted above, during the June 20 meeting Respondent O'Dovero promised the Union that if it should resume operations it would use union-represented employees.

<sup>22</sup>I note that there is no evidence or allegation that the decision to cease operations was designed to chill unionism elsewhere.

fact until June. This argument is not supported by the evidence the General Counsel himself has presented; he appears to be confusing the decision Respondent O'Dovero made to cease operations with the actual termination of operations. The decision to terminate operations was made in December 1995 and January 1996; the actual cessation of operations did not occur until the completion of the Caspian project in early 1997. Thus, when Respondent O'Dovero offered to engage in effects bargaining in June Respondents had not already ceased to perform work Respondent O'Dovero has traditionally performed.

Although I reject the General Counsel's fait accompli argument, I nonetheless conclude that Respondents have failed to satisfy their obligations concerning effects bargaining. As indicated above, this bargaining must occur in a meaningful manner and at a meaningful time. Respondents' conduct in this case satisfied neither aspect of this test. This is so because at the very time that Respondent O'Dovero was offering to engage in effects bargaining it was falsely claiming to the Union that it had actually ceased operations when in fact it had merely diverted the unit work to Respondent Associated. This basic deception precluded meaningful bargaining at a meaningful time and justified the Union's failure to bargain at that time until the unfair labor practice charges had been resolved. Accordingly, I conclude that Respondents violated Section 8(a)(5) and (1) by failing to provide the Union with a meaningful opportunity to bargain over the effects of the decision terminate the operations of Respondent O'Dovero.

#### I. Respondents' Motion to Dismiss

At the conclusion of the hearing Respondents moved to dismiss certain allegations in the complaint. I denied that motion in part because counsel for the General Counsel had indicated earlier that he had case authority to support the allegations. I have since read the briefs filed by the parties. Respondents again move to dismiss certain allegations. Specifically, Respondents seek the dismissal of the 8(a)(3) allegations since the General Counsel has failed to name the alleged discriminatees in the complaint. In support of this argument Respondents correctly point out that it is the policy of the General Counsel to identify by name the alleged discriminatees where they are known. In this case counsel for the General Counsel explained the failure to name the alleged discriminatees by stating that Respondent O'Dovero hired under a hiring hall arrangement and thus he was unable to identify the alleged discriminatees.<sup>23</sup> However, this representation was not supported by the General Counsel's own evidence. As described above, employees Beauchamp and Harris both testified that they were hired directly by Respondents for the Caspian project in 1995 and they were again contacted directly by Respondents for work in 1996. Thus, as Respondents again correctly point out, counsel for the General Counsel must have known the names of at least some of the alleged discriminatees, yet he failed to identify them in the complaint. Despite counsel for the General Counsel's inaccurate representation as to why the names of at least some of the discriminatees were not alleged and the consequent failure to follow normal pleading policy in this

<sup>23</sup>This explains the otherwise inexplicable references in the record to Respondents' hiring hall practices.

regard, I conclude that it is inappropriate to dismiss the 8(a)(3) allegations of the complaint thereby extinguishing the rights of the discriminatees. This is so because, as more fully described below, I shall leave for the compliance portion of this case the identification of the specific discriminatees. Respondent at that time will have the opportunity to litigate the identification of the employees harmed by its unlawful conduct. Under these circumstance I conclude that Respondents will not be prejudiced by the failure to identify the alleged discriminatees.

Respondents also seek the dismissal of paragraphs 9(d) and 10(b) of the complaint since they are "inherently inconsistent." Paragraph 9(d) alleges in pertinent part that on June 20 Respondents informed the Union that they would only meet to negotiate the effects of the decision to cease operations. Paragraph 10(b) alleges in pertinent part that Respondents made the decision to cease operations without having afforded the Union to meaningfully engage in effects bargaining. This wording is clearly confusing. From the evidence, it is apparent what the General Counsel was attempting to plead was a refusal to bargain for a successor contract as well as failure to bargain over the effects of the decision to cease operations. Nonetheless, in the absence of evidence that Respondents were prejudiced by these pleadings, I will not grant the motion to dismiss.<sup>24</sup>

#### CONCLUSIONS OF LAW

1. Respondent O'Dovero is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent Associated is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
3. Respondents constitute a single-integrated enterprise and are a single employer.

<sup>24</sup> The complaint suffered from a variety of flaws, some of which have already been described. In addition, pars. 1(a) and (c) allege that the charges were served, but fail to allege who the charges were served upon. Par. 7 contains four subparagraphs, two of which are identified as par. 7(b); the fourth subparagraph is identified as par. 7(c). Par. 6(a), the unit description, refers to a "union appropriate for purposes of collective-bargaining." The complaint was confusingly organized. Par. 7 contains the allegations of independent 8(a)(1) conduct; inexplicably, it also contains the allegation of direct dealing which, if proven, constitutes a violation of Sec. 8(a)(5). Par. 12, the conclusionary 8(a)(3) paragraph refers back not only to the 8(a)(3) allegations, but also to pars. 10(a) and (b) which are the withdrawal of recognition and failure to bargain allegations. The complaint had legally unnecessary and potentially confusing allegations. Specifically, par. 8 alleges that Respondents engaged in the independent 8(a)(1) conduct in order to discourage union and concerted activity. Of course, improper motive is unnecessary to establish the type of independent 8(a)(1) statements alleged in this case. The complaint makes allegations that are contrary to the General Counsel's own records. Par. 6(b) alleges that Respondents, as opposed to Respondent O'Dovero, recognized the Union and that later the Union was certified. The complaint fails to follow the basic rules of pleading. For example, par. 7 fails to plead the location at which the alleged unlawful statements were made. Typically, allegations concerning recognition and Section 9(a) status are plead separately; here those allegations are merged into one less than clear allegation. Missing from the complaint is the usual allegation that subjects of the alleged unilateral conduct are mandatory subjects of bargaining. Despite the fact that I have concluded that Respondent was not prejudiced by these problems, when considered together these shortcomings have caused unnecessary confusion and expenditure of time.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of Respondent O'Dovero (the unit), constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time construction equipment operators employed by the Employer at or out of its facility located at Midway Industrial Park, Marquette, Michigan; excluding clerical employees, guards and supervisors as defined in the Act.

6. At all times since December 14, 1993, the Union has been the exclusive bargaining representative of the employees in the unit under Section 9(a) of the Act.

7. By telling employees that unit work would be done on a nonunion basis, Respondents violated Section 8(a)(1) of the Act.

8. By indicating to employees that their support for the Union would be futile, Respondents violated Section 8(a)(1) of the Act.

9. By discriminatorily diverting work on the Caspian project from employees of Respondent O'Dovero to employees of Respondent Associated, Respondents violated Section 8(a)(3) and (1) of the Act.

10. By unilaterally diverting work on the Caspian project from unit employees to nonunit employees, Respondents violated Section 8(a)(5) and (1) of the Act.

11. By refusing to bargain with the Union for a successor collective-bargaining agreement for employees in the unit, Respondents violated Section 8(a)(5) and (1) of the Act.

12. By dealing directly with unit employees concerning terms and conditions of employment, Respondents violated Section 8(a)(5) and (1) of the Act.

13. By failing to engage in meaningful bargaining with the Union concerning the effects of the decision to have Respondent O'Dovero cease operations, Respondents violated Section 8(a)(5) and (1) of the Act.

14. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7).

15. Respondents have not violated the Act in any other manner alleged in the complaint.

#### REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondents unlawfully refused to bargain with the Union for a successor contract to cover employees in the unit. I shall therefore order Respondents to bargain with the Union, on request, for such a contract.

I have found that Respondents discriminatorily and unilaterally diverted unit work on the Caspian project from employees of Respondent O'Dovero to employees of Respondent Associated. As a consequence of this unlawful conduct Respondents failed to continue to employ employees of Respondent O'Dovero. I shall not order reinstatement of those employees because the project has been completed and Respondents are no longer performing unit work. However, I shall order Respondents to make them whole for any loss of

earnings and other benefits, computed on a quarterly basis from date of the failure to employ to the date they would have worked upon the completion of the project, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall further order that Respondents make whole any fringe benefit funds in the manner prescribed in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and reimburse employees for any loss of expenses they may have incurred because of Respondents failure to make payments to those funds, in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1991), with interest computed in the manner prescribed in *New Horizons for the Retarded*, supra. I shall leave the identification of the employees prejudiced by Respondents unlawful conduct, as well as the exact dates the employees would have been employed, for determination in compliance proceedings.

I have found that Respondents unlawfully failed to bargain with the Union concerning the effects on unit employees of the decision to have Respondent O'Dovero cease operations. I conclude that Transmarine<sup>25</sup> remedy is appropriate and necessary. Accordingly, Respondents shall be ordered to pay each unit employee who would have been on its payroll performing work on the Caspian project in 1996 or 1997, back-pay at the rate of their normal wages from 5 days after the

Board issues its Order on this case until the occurrence of the earliest of the following conditions: (1) the date Respondents bargain to agreement with the Union concerning the effects of the cessation of operations on unit employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the issuance of the Board's Order, or to commence negotiations within 5 days of Respondents' notice of desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to the employees exceed the amount he or she would have earned as wages from the date Respondent O'Dovero ceased operations to the time he or she secured equivalent employment elsewhere, or on the date on which Respondents offer to bargain in good faith; provided, however, that in no event shall this sum be less than what the employees would have earned for a 2-week period at the normal rate of their normal wages when last Respondent O'Dovero's employ. Interest on all such sums shall be paid in the manner prescribed in *New Horizons for the Retarded*, supra.

Because of the Respondents' widespread and serious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]

---

<sup>25</sup> *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).