

Avne Systems, Inc. and Local 445, Laborers' International Union of North America, AFL-CIO

Local 445, League of International Federated Employees (Avne Systems, Inc.) and Local 445, Laborers' International Union of North America, AFL-CIO. Cases 2-CA-30949 and 2-CB-16899

August 25, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
HURTGEN AND BRAME

On December 28, 1998, Administrative Law Judge Raymond P. Green issued the attached decision. Respondents Avne Systems, Inc. and Local 445, League of International Federated Employees (LIFE), each filed exceptions and a supporting brief. The Charging Party, Local 445, Laborers' International Union of North America, AFL-CIO, filed an answering brief, cross-exceptions, and a supporting brief. The General Counsel filed an answering brief and a cross-exception.

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 judges rulings, findings,¹ and conclusions as modified below and to adopt the recommended Order.

As an initial matter, we note that there are no exceptions to the judges finding that, but for the statute of limitations defense asserted by the Respondents, the evidence showed that the Respondents unlawfully entered into a collective-bargaining agreement at a time when the Charging Party was the Section 9 representative and Respondent Avne's collective-bargaining agreement with the Charging Party had not yet expired. Nor are there any exceptions to the judges finding that, but for the statute of limitations defense, Respondent Avne unlawfully withdrew recognition from the Charging Party during the term of an existing collective-bargaining agreement. In the absence of exceptions, we adopt these findings and proceed to consider the statute of limitations issue.

It is undisputed that the conduct alleged as unlawful in the instant case occurred more than 6 months before the charges were filed. Notwithstanding this fact, the judge found that the statute of limitations should be tolled because the Respondents fraudulently concealed from Avne's employees a scheme to substitute a new union, Local 445, League of International Federated Employees (LIFE), for Local 445, Laborers' International Union of North America (Local 445, LIUNA), their bargaining

representative. The judge found that, by misleading the employees as to the nature of the transactions involved, Respondent LIFE, with the acquiescence of Respondent Avne, fraudulently concealed the true facts from the affected employees and that, as a consequence, the 10(b) statute of limitations should be tolled. We find merit in the Respondents' exceptions to this finding.

First, we find that the Avne employees knew that officers of Local 445, LIUNA were proposing that they separate from the International Union and form a new local. Indeed, it appears that at least some of the impetus for this plan came from Respondent Avne's employees own dissatisfaction with an increase in the amount of per capita tax charged by the Laborers International Union. And, in furtherance of this plan, the Avne employees signed cards authorizing LIFE to represent them and directed Avne to deduct fees and dues from their wages as a condition of acquiring or maintaining membership in LIFE. Under these circumstances, it cannot be said that the employees were unaware of the facts giving rise to the instant unfair labor practices.

Despite their knowledge and involvement, however, the judge concluded that the employees were materially misled as to the true *nature* of the transaction. Even though they knew that LIFE would be a new union distinct from Local 445, LIUNA, the judge found Avne employees agreed to the change based on the representation that they would continue to have the same representation by the same people and that the change would only be temporary until the new union could affiliate with the International. The judge found that the employees were not informed that there might be an impediment to re-affiliation. Instead, the judge determined that, to the extent that employees were told there would be a change, they were told that it would not be a substantive one.

Contrary to the judge, we do not find that the foregoing representations to employees rise to the level of affirmative misstatements about *material* facts, a required element in the test for fraudulent concealment. Thus, apart from the affiliation aspect, it is apparent—as accurately represented by the Local 445 officials—that very little of substance did change for Respondent Avne's employees following their switch to LIFE; certainly not enough to premise a conclusion of fraudulent concealment. Thus, the employees continued to have the same shop steward, the same representatives in their dealings with Respondent Avne, and—substantively—their same contract. And, as to the representation that LIFE would eventually re-affiliate with the International, the employees could not reasonably have been surprised when the International (whose per capita tax receipts the scheme was designed to reduce) did not cooperate, and the planned re-affiliation of LIFE with the International did not occur. Accordingly, on these facts, we do not find that the statute of limitations should be tolled based on

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

fraudulent concealment vis-à-vis Respondent Avne's employees.

We do, however, agree with the judge's ultimate conclusion that the statute should be tolled. We do so, because, in our view, the *International* was the victim of fraudulent concealment. As an initial point, we find that the Respondent LIFE affirmatively concealed material facts from the International about the status of Local 445. Thus, we note that John Mongello Jr., the Local 445 official who was instrumental in the establishment of LIFE, admitted that LIFE was created specifically to avoid the Internationals per capita tax. Mongello further conceded that he and other Local 445 officials made a conscious effort to conceal their plan from the International. Indeed, the judge found that, after LIFE was created, Mongello, despite his purported resignation, continued to hold himself out, with the consent of the Unions other officers, as being in charge of Local 445, LIUNA. Further, Mongello and the other officers of Local 445, LIUNA, and LIFE concealed the existence of LIFE from the International as well as the fact that they had, in effect, transferred many contracts and members from Local 445 to LIFE.

Next, there is no record evidence that, had it exercised due diligence, the International would have learned, within the 10(b) period, of the scheme by Mongello and others to remove Avne employees from Local 445, LIUNA. As found by the judge, the deception was successful based on Mongellos misrepresentations as well as by the fact that the International was not a party to any of the contracts that Local 445, LIUNA had maintained with employers, and had neither a list of employers contracting with Local 445 LIUNA nor a list of the names and addresses of its members. Significantly, once the deception was uncovered, the International quickly placed Local 445, LIUNA in trusteeship and filed a Federal lawsuit. Moreover, the trustee designated to operate Local 445, LIUNA promptly filed the instant unfair labor practice charges.

Although the judge found that the International had been deceived, he found that the statute of limitations should not toll based on this deception because the International lacked standing. Specifically, the judge noted that the International was not the Charging Party and had no contractual or other standing vis-a-vis Avne or the employees represented by the Charging party, Local 445, LIUNA. For this reason, although the judge acknowledged the authority of the International, in certain circumstances, to impose a trusteeship on Local 445, LIUNA, he concluded that the International was not an "affected party" for 10(b) purposes. We disagree.

First, we emphasize that, in a very practical sense, the International was the obvious victim of the scheme by Mongello and others to supplant Local 445, LIUNA with LIFE as the representative of Avne employees. As a result of the deception, membership declined in the In-

ternationals local and its per capita tax base declined. Further, in order to protect its interests and those of its affiliate locals, the International placed Local 445, LIUNA into trusteeship. Significantly, it was the trustee appointed to operate Local 445, LIUNA for the International who filed the instant charges. In these circumstances, we find a sufficient nexus between the Charging Party trustee and International Union to treat the latter as an affected party for 10(b) purposes.

In sum, we find that the International was the victim of deliberate concealment of material facts, and was ignorant of these facts without any fault or want of due diligence on its part. Accordingly, we find that the tolling of the 10(b) period was warranted.²

Finally, although the judge did not make a separate finding on the point, we also agree with his tolling of the statute as to both Respondents. In doing so, we need not endorse the judges finding that Respondent Avne acquiesced in the deception practiced by Mongello and his associates. Even assuming arguendo that there was no such acquiescence, we find it appropriate to toll the statute as to both Respondents.

Briefly, had the International/trustee known the true situation in time, it presumably would have filed unfair labor practice charges during the 6-month window. In that case, even had Avne played no role in concealing the underlying actions at issue, it still would have been liable, if charged, on the underlying actions themselves. Indeed, as noted above, the judge found (and no one disputes) that, but for the 10(b) defense, Respondent Avne acted unlawfully in withdrawing recognition from Local 445, LIUNA, signing a contract with LIFE, and checking off and remitting dues and fees to it.

A party filing unfair labor practice charges may name more than one respondent. If a potential charging party, because of fraudulent concealment practiced solely by potential respondent A, fails to discover in time the unfair labor practices committed by potential respondents A and B, we see no reason, if the statute of limitations is to be tolled, why potential respondent B must remain beyond the laws grasp. As between the parties violating the Act and the victim of their unlawful conduct (from whom material facts have been concealed) we find that equities favor the latter.³

Our dissenting colleague argues that Respondent Avne has a valid 10(b) defense. The misconduct in this case occurred in March 1997, when Respondent Avne and Respondent LIFE entered into a collective-bargaining agreement. The charge was not filed until November 14, 1997, more than 6 months after the misconduct. However, the dissent concedes that the International Union

² Although the International was not the Sec. 9 representative, Sec. 10(b) provides that "any person" can file a charge.

³ As noted above, Respondent Employer does not except on the merits, i.e., it does not argue that its actions were lawful. It argues only the 10(b) point.

was the victim of fraudulent concealment. Thus, Section 10(b) was tolled, and the charge was timely. The dissent contends that the charge was timely as to Respondent LIFE, but not as to Respondent Avne. The reasoning for this proposition is that LIFE was the fraudulent party, not Avne.

The reasoning of the dissent is flawed. The doctrine of fraudulent concealment is not intended to punish a respondent for its fraud; it is intended to protect the injured party from the fraud, i.e., it is intended to excuse the injured party from what would otherwise be a 10(b) bar against it. And, once protected against Section 10(b), the injured party can proceed against the unfair labor practice. (Although Avne did not commit a fraud, it did commit an unfair labor practice). Thus, Local 445 as the Charging Party can proceed against Avne and secure an order to take away recognition from LIFE and restore recognition to Local 445.⁴

Moreover, the dissent's argument on behalf of Avne is not one that is made by Avne itself. Avne argues that LIFE did not mislead employees. Our colleague rejects this Avne argument, but then makes a very different one for Avne, i.e., that Avne was not guilty of any fraud. Thus, in addition to the nonmerit of this argument, (see above) we note that the argument is not procedurally before us.⁵

In sum, although we disagree with the judges finding that the employees of Respondent Avne were victims of fraudulent concealment for 10(b) purposes, we agree with his ultimate conclusion that the statute of limitations should be tolled.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Avne Systems, Inc., Bronx, New York, its officers, agents, successors, and assigns, and Local 445, League of International Federated Employees (Avne Systems, Inc.), its officers, agents, and representatives, shall take the action set forth in the Order.

⁴ We note that the 10(b) period does not begin to run until the party adversely affected had actual or constructive knowledge of the misconduct. *Adair Standish Corp.*, 295 NLRB 985, 986 (1989); *Carpenters Wisconsin River Valley Council*, 211 NLRB 222, 227 (1974). The record indicates the trustee appointed by the International Union filed charges within 6 months of learning of the misconduct. We recognize that *Adair Standish* and *Wisconsin River* involve the principle that Sec. 10(b) is tolled for periods when the charging party had no actual or constructive knowledge of the unfair labor practice. However, we see no valid reason for applying a different principle simply because, as here, the reason for the lack of knowledge is fraudulent concealment by the other party.

⁵ We recognize that Respondent Avne raised a 10(b) defense. Our point is simply that Respondent Avne did not make the dissents argument in support of that defense.

MEMBER BRAME, dissenting in part.

I agree with my colleagues and, in the absence of exceptions, adopt the judges findings that, but for the statute of limitations defense, the Respondents unlawfully entered into a collective-bargaining agreement at a time when Local 445, Laborers' International Union (Local 445, LIUNA) was the Section 9 representative of the employees at issue and its collective-bargaining agreement with Respondent Avne was in effect, and, further, Respondent Avne unlawfully withdrew recognition from Local 445, LIUNA during the term of that agreement. I further agree that the statute of limitations should be tolled with respect to Respondent LIFE based on Respondent LIFE's fraudulent concealment of material facts about the status of Local 445, LIUNA, and note that the International Union was ignorant of these facts without any failure of due diligence on its part. Thus, as detailed below, despite the fact that the unfair labor practices alleged occurred more than 6 months before the charges were filed and thus outside the 10(b) period, I agree with my colleagues finding that Respondent LIFE violated Section 8(b)(1)(A) and (2) by accepting recognition from Avne, entering into and enforcing a collective-bargaining agreement with Avne, and accepting dues and fees pursuant to that agreement. However, contrary to my colleagues, I would not toll the statute of limitations as to Respondent Avne. Thus, I would not find that Avne violated the Act in the manner set forth in the conclusions of law and would provide no remedial order with respect to that Respondent.¹

As detailed in the judge's decision, Local 445, LIUNA had a longstanding Sec. 9 relationship with Respondent Avne. At the time the events at issue occurred, Local 445, LIUNA and Avne were parties to a contract covering various Avne employees, which was effective from October 1, 1994, to October 1, 1997. Local 445, LIUNA was affiliated with the Laborers International Union. John Mongello Jr. (Mongello) was the business manager and chief officer of Local 445, LIUNA. The president of Avne at the time of the events at issue, Jack Steinmetz, testified that he had dealt with Mongello as the union representative to the Company for approximately 16 or 17 years.

¹ My colleagues note that Respondent Avne makes a different argument in support of its exceptions involving Sec. 10(b) than the one I rely on here. The majority essentially claims that, because "the argument is not procedurally before us," I am precluded from using this analysis to find no liability on Avne's part. I disagree. The Board has consistently held that Sec. 10(b) is not jurisdictional but is an affirmative defense which must be timely raised by a respondent in its answer to the complaint or at hearing or is considered waived. See, e.g., *Leisure Knoll Assn.*, 327 NLRB 470 fn. 3 (1999), and *Prestige Ford*, 320 NLRB 1172 fn. 3 (1996). Respondent Avne has raised the 10(b) statute of limitations defense at hearing. Thus, Sec. 10(b) is timely raised and must be considered. In my view, this is sufficient to put before us procedurally the issue of the application of Sec. 10(b) to the facts in this case, and we should not, after the fact, place a higher burden on a party raising a 10(b) defense.

In late 1996, a dispute arose between Local 445, LIUNA and the International concerning the amount of per capita tax the local affiliate was obligated to pay the International. When no resolution was reached, Mongello devised a plan whereby the local would disaffiliate from the International, form a new and independent labor organization, and reaffiliate at a later time in a manner which Mongello believed would result in a lower tax payment. In early 1997,² Mongello and the other officers of Local 445, LIUNA created a new local, Local 445, League of International Federated Employees (LIFE). At the same time, these individuals held a series of meetings with Avne employees and presented their plan. At these meetings, the employees signed LIFE authorization cards. The record is unclear regarding what the employees were told before they signed these cards.

In January or February, Mongello came to Steinmetz' office and presented him with a group of cards signed by Avne employees. According to Steinmetz, Mongello told him that "we are now representing a new union. The employees decided to vote us. Here is [sic] the . . . signature cards." After some discussion, Steinmetz and Mongello agreed to and executed a new contract which was virtually identical to the former contract between Avne and Local 445, LIUNA, which, as noted above, was not to expire until October 1. The new agreement was unsigned but was effective from March 1, 1997, to February 28, 2000.

Local 445, LIUNA was not disbanded at the time LIFE came into being. Instead, it continued to maintain a separate existence through new officers appointed by Mongello and continued to represent employees of some other employers. Both Unions apparently occupied the same offices. During the time both Unions operated, the International became concerned with the drop in membership (and resulting reduction in per capita taxes) in Local 445, LIUNA and sought to investigate the matter. In May, an investigator from the International visited the Local 445, LIUNA offices and in June an International representative accompanied by an auditor visited the offices. During these visits, Mongello met and discussed the matter with these individuals without disclosing either that he had resigned from Local 445, LIUNA or that a new union had been created. As found by the judge, Mongello, with the consent of the other officers of both Unions, continued to hold himself out as being in charge of Local 445, LIUNA and explicitly engaged in efforts to conceal the truth from the International.

Finally, in an August meeting with the Internationals investigator, Mongello admitted that he had chartered a new union and had transferred members of Local 445, LIUNA to Respondent LIFE, and that he was no longer associated with Local 445, LIUNA. In October, the International placed Local 445, LIUNA into trusteeship

and filed a Federal lawsuit. Thereafter, the Local 445, LIUNA trustee filed the charges that resulted in the complaint here.

Section 10(b) of the Act states, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." As the Board stated in *Koppers Co.*, 163 NLRB 517 (1967), the "[p]ractical effect of the proviso of Section 10(b) is that, absent the existence of a properly served charge on file, a party is assured that on any given day his liability under the act is extinguished for any activities occurring more than 6 months prior thereto."³

It is well established that there are some exceptions to this statute of limitations. Pertinently, where a wrongdoer fraudulently conceals evidence of his unlawful conduct, the concealment tolls the running of the 10(b) period, and the wrongdoer is effectively estopped from raising a 10(b) defense. Thus, under this equitable doctrine, the party engaging in the fraud, i.e., the wrongdoer, is not entitled to benefit from his actions by operation of the statute of limitations.⁴

The Board has articulated a three-pronged test established by the D.C. Circuit in describing the equitable fraudulent concealment doctrine. Under that test, fraudulent concealment tolls the 10(b) statute of limitations when, (1) there has been deliberate concealment of, (2) material facts relating to the alleged wrongdoing, and (3) the wronged party does not know of these facts and could not have discovered them through reasonable diligence.⁵ The Board has stressed that "the three critical elements" all must be present to warrant the tolling of the 10(b) period.⁶

There is no doubt here that Respondent LIFE's actions were sufficient to warrant tolling of the 10(b) period. My colleagues so find and, as stated above, I agree. However, without passing on whether Respondent Avne has itself engaged in fraudulent concealment, and assuming for purposes of the decision that Avne played no role in Respondent LIFE's deception, the majority concludes that the statute of limitations must be tolled with respect to Avne as well. The majority's theory is that the equities favor tolling with respect to both Respondents when the

³ See also *Machinists District Lodge 64 v. NLRB*, 949 F.2d 441, 445 (D.C. Cir. 1991), and cases cited therein.

⁴ *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 382-383 (9th Cir. 1979), enfg. 227 NLRB 765, 766 (1977), cert. denied 444 U.S. 940 (1979), quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), in which it was noted that the equitable doctrine of tolling for fraudulent concealment is read into every statute of limitation, including Sec. 10(b).

⁵ *Brown & Sharpe Mfg. Co.*, 321 NLRB 924 (1996), enfd. sub nom. *Machinists District Lodge 64 v. NLRB*, 130 F.3d 1083, 1087 (1997), relying on *Fitzgerald v. Seaman*, 553 F.2d 220, 228 (1977).

⁶ *Id.*

² All dates are in 1997 unless otherwise indicated.

acts of one foreclose the victim of the wrongful conduct from timely filing a charge. I disagree.⁷

It is clear that, absent the tolling of the statute of limitations, Respondent Avne would be assured that its liability under the Act would be extinguished after the passing of the 6-month period for the filing of the charge. It is equally clear that under Board and related court precedent, there must be deliberate and affirmative concealment of the wrongful acts for the tolling of the statutory time period for the filing of the charge. Thus, a potential respondent who has committed unfair labor practices, although a wrongdoer to that extent, is able to avail itself of the operation of the statutory time limits despite having committed the unfair labor practices, absent any further wrongful acts.

The majority's analysis fails to recognize this. The majority concludes that the equities favor tolling the statutory time limits against Avne, which did not except on the merits to the unfair labor practices found, rather than having the victim of the unfair labor practices without recourse against it. Thus, the majority in effect finds that Respondent Avne is not entitled to avail itself of the statutory time limits even in the absence of any fraudulent concealment of its acts. In my view, this is a misreading of the equitable doctrine of tolling statutory time limits. The majority's analysis incorrectly shifts the inquiry from the wrongdoers fraudulent concealment to an application of general equitable principles focusing on the plight of the charging party.⁸

Even accepting the improper shift, I would find that the equities lie differently. I would find that there is no showing of complicity by Respondent Avne, i.e., *it has not engaged in or condoned any fraudulent concealment of facts* associated with Respondent LIFE's scheme to conceal its unlawful conduct from the International. Thus, an essential one of the three elements of the equitable doctrine warranting the tolling of Section 10(b) is

⁷ The majority has not cited any precedent directly on point. I note that in *Demars v. General Dynamics*, 779 F.2d 95, 97 (1st Cir. 1985), involving a combined Sec. 301 and duty of fair representation lawsuit, the circuit court indicated that, in the absence of a finding that Sec. 10(b) should be tolled based on the fraudulent concealment of the respondent union, it did not reach the issue of whether the fraudulent acts of the respondent union could toll the statute as to the respondent employer. I further note that in *Newton v. Chicago & North Western Transportation Co.*, 119 LRRM 3399 (1985), the District Court found, in the context of the Railway Labor Act, that even if Sec. 10(b) could be tolled as to a plaintiff's claims against the respondent union, the plaintiffs failed to demonstrate concealment warranting tolling as to the claims against the respondent employer.

⁸ See, e.g., *Winer Motors, Inc.*, 265 NLRB 1457 (1982), where the Board majority reversed precedent, finding that the Board had previously exceeded its authority and circumvented Sec. 10(b) when it allowed the General Counsel to ignore the statutory limitations and reinstate a withdrawn charge for equitable reasons outside the 10(b) limitation period absent fraudulent concealment by a respondent. (*Winer* was extended in *Ducane Heating Corp.*, 273 NLRB 1389, 1391(1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986), to include dismissed charges as well.)

missing. Absent proof of such conduct, Respondent Avne is entitled to rely on the 10(b) statutory limitation on its liability.⁹

Geoffrey E. Dunham, Esq., for the General Counsel.
Joel E. Cohen, Esq., for the Respondent, and *Stephen Goldblatt Esq.*, for Local 445, LIFE
Barbara S. Mehlsack, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on July 28 and 29 and November 4, 1998. The charges in Cases 2-CA-30949 and 2-CB-16899 were filed on November 14, 1997. The consolidated complaint was issued on April 2, 1998, and alleges:

1. That both Unions, are labor organizations within the meaning of Section 2(5) of the Act.

2. That Avne has been party to successive collective-bargaining agreements with Local 445, Laborers' International Union of North America, AFL-CIO (Laborers' Local 445), covering its full-time and regular part-time production employees, the most recent of which was effective from October 1, 1994, to October 1, 1997. (At times, the parties also referred to Laborers' Local 445 as Local 445, LIUNA.)

3. That on or about March 1, 1997 (and during the life of the aforesaid agreement), Avne withdrew recognition from Laborers' Local and granted recognition to Local 445, League of International Federated Employees Union (Local 445 LIFE).

4. That on March 1, 1997, Avne and Local 445 LIFE executed a collective-bargaining agreement covering the aforesaid employees and did so (a) notwithstanding that no question concerning representation could be raised during the mid-term of the collective-bargaining agreement between the employer and Laborers' Local 445 and (b) notwithstanding that Local 445 LIFE did not, at the time of recognition, represent an uncoerced majority of the bargaining unit employees.

5. That the collective-bargaining agreement between Local 445 LIFE and Avne contains provisions requiring employees to become and remain members of Local 445 LIFE and permitting the employer to remit dues on behalf of those employees who sign dues-checkoff authorizations. It is alleged that pursuant to such provisions, the employer has deducted moneys from the pay of employees and has remitted them to Local 445 LIFE.

Both the Employer and Local 445 LIFE contend, among other things, that the charges were filed more than 6 months after the occurrence of the transactions alleged to be violations of the Act and therefore that the complaint is barred by Section 10(b) of the Act.

⁹ My colleagues cite *Adair Standish Corp.*, 295 NLRB 985 (1989), and *Carpenters Wisconsin River Valley Council*, 211 NLRB 222 (1974), to support a finding that Sec. 10(b) should not be tolled as to either Respondent. Those cases do not involve the issue of fraudulent concealment. Where fraudulent concealment is at issue, applicable precedent clearly requires the three elements discussed above in order to toll the statutory limitations period. See *Demars v. General Dynamics Corp.*, supra at 97, where the court distinguishes between the earliest the charging party knew or should have known about the misconduct absent concealment and the tolling of the statute of limitations under the fraudulent concealment doctrine.

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the unions are labor organizations within the meaning of Section 2(5) of the Act.

II ALLEGED UNFAIR LABOR PRACTICES

Laborers' Local 445 has had a longstanding relationship with a number of companies in the New York area, one of which is a company called Avne Systems Inc. (The current ownership of Avne is different from what existed at the time of these events.) A contract covering about 200 plus Avne employees ran from October 1, 1994, to October 1, 1997. It should be noted that the Laborers' International Union has never been a party to any contract between Laborers' Local 445 and Avne and has no contractual standing with respect to that employer.

At the time that the above-described contract was made, John Mongello Jr. was the business manager and chief officer of Laborers' Local 445. The other officers listed on the LM-2 form filed with the Department of Labor for the period ending December 31, 1996, were Rafael Griffin, president, John Mongello Sr., secretary-treasurer, Michael Aronne, vice president, and trustees Theodore Paphzis, William Aronne, Vincent Gerardi, and Ella Dupree. In relation to Avne, it was Mongello who was the union representative who dealt with that company in terms of negotiations or any other business.

It appears from this record, which includes depositions from John Mongello Jr. and Rafael Griffin taken in another lawsuit, that in or about December 1996 a dispute arose between Laborers' Local 445 and its International Union regarding the amount of per capita tax that it was obligated to pay; the local urging that its tax be reduced. When this was not acceded to, Mongello Jr., apparently in December 1996, came up with the idea of disaffiliating from the Laborers' International Union, forming a new and separate labor organization, and then at a future time reaffiliating with the Laborers' International through a division which he believed would allow for a lower per capita tax. In his deposition Mongello stated inter alia:

Our idea was, with the membership, to create an independent, go independent, create an independent union and have the members go in the independent union from Laborers' Local 445; have the independent union, at that time, affiliate with LIFE . . . and we would go back into the Laborers' and be an affiliate member of the Laborers'; we would still be Laborers', and we would be able to pay a \$3 per capita tax and still keep our programs.

The truth is, to me, LIFE and LIUNA are the same union. We want it to be the same union. We want it to be in the same International. That's what we want. Our ultimate goal was to go this way and going that way. We told the membership there's going to be a point in time where we will have independent status. That's where we are right now. In other words, we are not in LIUNA. In order to accomplish the goal to go into LIUNA, we come up to this point and then . . .

The membership is aware that by coming into LIFE, there would be a period of time before we would get our accepted charter from the NFIU, [a division of LIUNA],

that we would be independent and we wouldn't have an affiliation. That's where it is right not. We applied for a charter at the NFIU level . . .¹

Similarly, Rafael Griffin, who was the president of Laborers' Local 445 and who thereafter became the president of Local 445 LIFE, testified in his deposition:

Q. In terms of the Laborers' Local 445 people . . . were they told the same thing you just told me, that it's a temporary thing and they would still be members of the Laborers'?

A. That's correct.

Q. Is that what they were told?

A. That's correct.

Q. Would it be fair to say they were told that in any type of written documents, or just verbally by you and other officers of Laborers' Local—

A. The petitions that are signed, they say it clear.

MR. GOLDBLATT: He is asking you if there's anything other than that petition which was written down.

A. We have a meeting, a couple of meetings, where it's explained.

Q. Who explained it?

A. Mr. Mongello Jr.

Q. Was it explained that they were simply moving from one LIUNA union to another LIUNA union?

A. That's correct.

A. LIFE is not going to be that different than Laborers'. We are going to go into LIUNA no matter—we are planning to go into LIUNA through Philadelphia. So, member, we say, listen, we are going to keep the program going, and we are going to be affiliated with AFL-CIO.

Sometime in January 1997, the officers of Local 445, LIUNA, with Mongello at the lead, created Local 445 LIFE. (It is not entirely clear exactly when Mongello said let there be LIFE.) In any event, in the LM-2 form filed with the Department of Labor for the period ending December 31, 1997, the officers of Local 445 LIFE are listed as follows: Rafael Griffin, president, John Mongello Jr., secretary-treasurer, and Vice Presidents John Mongello Sr., Herman Reich, and Michael Aronne. The address listed on the form is 325-73rd Street, Brooklyn, New York, which is the same address listed on the previously noted LM-2 filed by Local 445, LIUNA.

While creating this new labor organization, the old union was kept intact and it has, through new officers appointed by Mongello, continued to maintain its separate existence. It has also continued to administer some collective-bargaining agreements that did not, like the one with AVNE, wind up being "assigned" or turned over to Local 445 LIFE. At the time of the hearing, about 20 percent of Laborers' Local 445 former membership remained in that Union and continued to be covered by contracts between their employers and that labor organization.

Orlando Hernandez, Laborers' Local 445's shop steward, testified that in the autumn of 1996 he attended some meetings of the local union where the subject of per capita taxes was

¹ He states in his deposition that such an application was made in September or October 1997.

discussed and where he learned that the International Union was proposing to raise this tax.

According to Hernandez, sometime in January or February 1997, he along with John Mongello Jr. and a few other union officials, held a series of meetings with the employees of Avne (one per shift), where they presented the idea of separating from the Laborers' International Union and forming a new union which wouldn't have to pay the per capita tax. The employees at these meetings signed cards for LIFE, League of International Federated Employees. These cards state inter alia;

I, the undersigned hereby apply for membership in the above Union and I authorize it to represent me for the purpose of collective bargaining and I authorize and irrevocably direct my Employer to deduct from my wages initiation fees and dues uniformly required by said Union as a condition of acquiring or maintaining membership

As the cards obtained at this meeting are undated and as Hernandez could not be specific regarding the date, it is not entirely clear when this set of meetings was held. It appears, however, that these cards were signed sometime before Mongello went to Jack Steinmetz to ask for recognition on behalf of Local 445 LIFE. Whether these cards were solicited before or after Mongello resigned from Laborers' Local 445 is not clear, but this is probably not relevant, as he continued, with the approval of the other officials of Laborers' Local 445, to hold himself out as the person in charge of that union for a period of time after his resignation. (Rafael Griffin remained as the president of Laborers' Local 445 until he tendered a resignation in September 1997.)

During the trial, I suggested that it might be a good idea if someone could talk to and bring to the trial a sampling of the employees of Avne who could testify as to what, if anything, they were told, either verbally or in writing, as to the plan by Laborer Local 445's officers to leave the Laborers' International Union and to create their own labor organization. For better or worse no such witnesses were presented by any party other than Hernandez who was presented by the Respondent Union. I therefore do not know exactly what the employees of Avne were told before they signed the cards for Local 445 LIFE. However, based on the depositions of John Mongello Jr. and Rafael Griffin, it seems reasonable to conclude that these employees, like employees at other shops, were told that the intention was to temporarily disaffiliate from the Laborers' International Union, to create, for a limited duration, a separate independent union, and to then reaffiliate as soon as possible with the International in such a manner that they could pay a reduced per capita tax. Thus, based on this conclusion, it seems probable to me that the employees of Avne were led or misled into believing that the proposed change was to be temporary and completely cosmetic and that this "change" would amount to no change at all inasmuch as the new union would simply reaffiliate with the Laborers' International Union in the near future. There is no evidence, however, that the employee/members were told that the International Union might not accept or approve of this plan.

Jack Steinmetz, then the president of the Company, testified that in January or February 1997, John Mongello Jr. came to his office and after presenting to him a group of cards signed by Avne's employees, asked that the Company withdraw recognition from Laborers' Local 445 and enter into a contract with Local 445, LIUNA. When Mongello agreed that the new con-

tract with Local 445, LIUNA would contain no changes from the terms and conditions in the Laborers' Local 445 contract, Steinmetz agreed. According to Steinmetz he and Mongello executed a contract between Avne and Local 445 LIFE sometime during the last week of February 1997 which runs for a term from March 1, 1997, to February 28, 2000. The contract itself is undated and once again, no one could give me a precise date when this document was executed. (For example, was it executed before or after Mongello sent his resignation to Laborer's Local 445?)

In any event, the new contract between Avne and Local 445 LIFE is virtually identical in both its terms and language as the contract between Avne and Laborers' Local 445, which by its terms, was not set to expire until October 1, 1997. The new contract contains a union-security clause requiring membership as a condition of continued employment and also requires the employer to remit union dues on behalf of employees who authorize such payments. (It was stipulated that pursuant to the contract, Avne did in fact deduct and remit dues to Local 445 LIFE.) The only difference between the two contracts is that the second, the agreement, at schedule A, provides that effective on December 1, 1997, the Employer and the Union agree to reopen the contract with respect to wages, health plan, and pension issues. (But even this is not a real difference since the old contract would have expired on October 1, 1997, and these and other terms would have been subject to negotiation at that time.) If Avne's employees were told of the existence of this new contract (and I assume that they were), the fact that it is virtually identical to the one it replaced, reinforces my opinion that they were led into believing that the change was not substantive and, in fact, represented no change at all.

In the meantime, the International became concerned about a drop in membership in Laborers' Local 445. (Reflected in a drop in its receipt of per capita tax.) In January 1997, Thomas Vinton was hired by the International Union to make an investigation of a number of local unions including Laborers' Local 445. Vinton went to the offices of the Union in April and May 1997 where he met with John Mongello Jr. who held himself out as its business manager. Indeed, when Richard Ello, an International representative, visited the offices of Laborers' Local 445 with an auditor, in June 1997, he met with John Mongello Jr. who discussed the issues raised but neither disclosed that he resigned from the Union nor that a new union had been created. As far as Ello was concerned, he thought, with no reason to believe to the contrary, that he was dealing with the person responsible for the operations of Laborers' Local 445.

The record shows that during the period after Local 445 LIFE was created, Mongello Jr., despite his purported resignation, continued to hold himself out, with the consent of the union's other officers, as being in charge of Laborers' Local 445 and that he and the other officers of Laborers' Local 445 and Local 445 LIFE made a successful effort to conceal from the Laborers' International Union, the existence of Local 445 LIFE or that they had, in effect, transferred many of the contracts and members to the latter union. This was made possible by the fact that the International Union was not a party to any of the contracts that Laborers' Local 445 had maintained with employers and had no existing list of the employers contracting with Laborers' Local 445. (Nor did it have a list of the names and addresses of the local union's membership.) That there was an explicit effort to conceal these goings on from the Inter-

national Union is admitted by John Mongello Jr. in his deposition.

At a meeting between Mongello Jr. and Vinton, held in August 1997, Mongello finally admitted that he had chartered a new union, and had transferred members of Laborers' Local 445 into the new union. Mongello told Vinton for the first time that he had resigned as business manager of Laborers' Local 445 and that a person named Peter Hasho had taken his place.

In October 1997, the Laborers' International Union placed Laborers' Local 445 into trusteeship. They also filed a Federal lawsuit and on November 14, 1997, the trustee, on behalf of Laborers' Local 445 filed the instant charges.

III. ANALYSIS

A. *The Merits*

The evidence shows that Local 445 LIFE was formed in December 1996 or early January 1997 by the officers and trustees of Laborers' Local 445 and for better or worse it was stipulated that both were labor organizations within the meaning of the Act. The head of both Unions was John Mongello Jr. and in January and February 1997, he went around to various companies having contracts with Laborers' Local 445 and asked employers, including Avne to withdraw recognition from Laborers' Local 455 and execute contracts with Local 445 LIFE. This was done in Avne's case sometime in late February 1997 and a contract identical to the existing agreement with Laborers' Local 445 was made with Local 445 LIFE. The second contract contained a reopener provision to negotiate wages and benefits and it appears that such negotiations were undertaken in November or December 1997.

Employees of Avne signed authorization cards designating Local 445 LIFE to represent them and it appears that these cards, although undated, may have been executed at a series of meetings held before Avne executed the new contract with Local 445 LIFE.

Notwithstanding the creation of Local 445 LIFE, Laborers' Local 445 continued to exist under the presidency of Rafael Griffin and thereafter under an International trustee. Notwithstanding the creation of Local 445 LIFE, the existence of Laborers' Local 445 was maintained to administer those collective-bargaining agreements with employers that refused to agree to the substitution of Local 445 LIFE. Insofar as relevant to the present case, it is noted that Laborers' Local 445 continued to exist as a labor organization, continued to act as a representative of some employees and was subsequently put under International trusteeship when the International first became fully cognizant of what was going on in New York.

When I was listening to this case, I thought that it presented an odd and *sui generis* set of facts. Nevertheless, the General Counsel has cited a case which, apart from the 10(b) issue, is almost identical and deals with all of the issues raised by all parties. *Dominick's Finer Foods*, 308 NLRB 935 (1992). In that case, Local 703 IBT, with a membership of about 2500, had a collective-bargaining agreement with Dominick's and other employers. When that union and its leadership was put under pressure by virtue of a Federal RICO lawsuit and by internal union dissension, its officers and trustees sought to form a separate union called Local 707 NPWU. They solicited and obtained signatures on petitions from approximately 628 out of 835 employees in four bargaining units. These petitions purported to authorize joint representation between Local 703 IBT and Local 707 NPWU and individual representation if

either union should disclaim interest. Subsequently, these officers, who at the time held positions in both unions, tendered disclaimers of interest on behalf of Local 703 IBT and persuaded the employers of the four units to withdraw recognition from the incumbent union and to grant recognition to the newly formed Local 707 NPWU. After these events, a rival slate took control of Local 703 IBT which continued to be a viable labor organization and continued to represent employees of other employers under existing collective-bargaining agreements. The administrative law judge (Walter H. Maloney), in an opinion adopted by the Board found that the employer violated Section 8(a)(1), (2), (3), and (5), and that Local 707 NPWU violated Section 8(b)(1)(A) and (2) of the Act. He stated *inter alia*:

Tested by normal contract-bar standards, the Respondent Employers in this case were required, when presented by either a memorandum of agreement, a supporting petition, or a disclaimer of interest to have ignored them and to have adhered to their outstanding contracts which, in each instance, obligated them to accord exclusive, not joint or several, recognition to that Union. Had they done so, great mischief would have been avoided. If, in the face of their purported dilemma, they had wished to invoke the processes of the Board, any of these Respondent employers could have filed a representation petition in late September 1990 and would have been told quickly and inexpensively in the context of a Section 9 proceeding what their rights and responsibilities were. . . . The ease and celerity with which these employers acceded to extraordinary requests to substitute one bargaining agent for another during a contract term gives rise to an inference that these employers were not dealing with the former leadership of Local 703 IBT at arm's length.

To the General Counsel's allegation that the Respondent Employers were duty bound under the Board's contract-bar rules to continue to recognize Local 703 IBT exclusively in late September and early October under the terms of existing contracts, the Respondents have advanced several defenses. First of all, they claim that the decision of Local 703 IBT members to leave the Teamsters and to join the NPWU was an internal union matter into which their employers should not intrude. Local 703 IBT was, and remains, a chartered local of the International Brotherhood of Teamsters, an AFL-CIO affiliate. Each Respondent Employer was faced with a situation in which the members of its bargaining unit were proposing, through a two-step process, to leave Local 703 IBT and become members of another union affiliated with another independent national union. By asking each employer to cease recognizing Local 703 IBT either partially or entirely and to recognize another bargaining agent for their employees, former Local 703 IBT officials were raising a question concerning representation which necessarily brought into play the contract-bar rules discussed above.

In particular, Certified argues that what was proposed by Joseph and what actually occurred was merely a decision by a union local to disaffiliate from one parent union and affiliate with another. It cites *May Department Stores v. NLRB*, 897 F.2d 221(7th Cir. 1990) and other cases for the proposition that a decision by a union to affiliate or disaffiliate is a private union matter. . . . However, in this case, Local 703 IBT as an entity has never disaffiliated

form the Teamsters International or attempted to affiliate with any other parent organization. About 20 percent of its membership, located in many small bargaining units throughout the Chicago area, never attempted to seek joint representation status with Truck Drivers Local 707 NPWU nor to disclaim the bargaining rights of Local 703 IBT with the respective employers. Throughout this dispute they have continued to be represented by Local 703 IBT, a union which itself still maintains a charter with the Teamsters International and is, indeed, now more closely identified than ever with its International through the imposition of a trusteeship. What the Senese faction attempted to do here was to strip Local 703 IBT of most of its membership and all of its assets and deliver both, in bulk, to a rival union as the property of that union, leaving behind a collective shell with a name and a charter and a small, bankrupt membership. This action was not an affiliation or a reaffiliation but something akin to larceny and does not in any way minimize or remove the existence of a question concerning representation or the rules which such a question calls into play.

B. The 10(b) Issue

It is alleged that on or about March 1, 1997, Avne withdrew recognition from Laborers' Local 445 and that on that same date, Avne illegally recognized and entered into a contract with Local 445 LIFE. The single transaction giving rise to these allegations is the execution of the collective-bargaining agreement between Avne and the newly created union. The other allegations of the complaint stem from the fact that this contract contains a union-security clause, that dues were deducted and remitted to Local 445 LIFE and that the Employer concomitantly, abrogated the existing contract with Laborers' Local 445.

The charges in these cases were filed on November 14, 1997, by Laborers' Local 455, via a trustee appointed by the Laborers' International Union. As these charges were filed and served more than 6 months after the March 1, 1997 transaction (the contract's execution), the unfair labor practice first occurred outside the 10(b) statute of limitations period. To this extent, therefore, the Respondents have met their initial burden of proof regarding the 10(b) issue.

But for the statute of limitations defense, the evidence shows that the employer and Local 445 LIFE each violated the Act by entering into a collective-bargaining agreement at a time when the Employer's collective-bargaining agreement with Laborers' Local 445 had not yet expired. Similarly, the evidence demonstrates that the Employer unlawfully withdrew recognition from Laborers' Local 445 during the life of the existing collective-bargaining agreement. That is, in the absence of a showing, not made here, that Laborers' Local 445 was defunct, the evidence establishes the unfair labor practices alleged by the General Counsel.²

² I reject the contention that Laborers' Local 445 effectively disclaimed interest. For one thing there is no evidence that this Union proffered any disclaimer of interest. Moreover, even if one construed Mongello's requests of Avne to substitute Local 445 LIFE as being the equivalent of a disclaimer of interest, such a disclaimer to be effective, must be unequivocal and made in good faith. Thus, if the assertion by a union is that it has abandoned its claim to represent employees is shown to be inconsistent with its conduct, the disclaimer will be rejected. *Retail Associates, Inc.*, 120 NLRB 388, 391 (1958); *Hartz Mountain*

Section 10(b) is a statute of limitations which must be raised as an affirmative defense by the Respondents. As it was raised by the Respondent union in its answer and by both at the hearing, the issue is properly before the Board.

As a general matter, the 10(b) period starts to run from the date that the unfair labor practice unequivocally occurs. *Industrial Power*, 321 NLRB 816 (1996). (Although the Company said on January 11, 1994, that it would terminate contract and relationship with a Union on June 1, 1994, the 10(b) period was not triggered until the actual repudiation and withdrawal occurred, i.e., on June 1, when the "affected party" either has actual or constructive notice of the transaction. As stated by the Board in *Leach Corp.*, 312 NLRB 990 (1993);

[A] statement of intent or threat to commit an unfair labor practice does not start the statutory six months running. The running of the limitations period can begin only when the unfair labor practice occurs. *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 547 (3rd Cir 1983). It is also firmly established that the 10(b) period commences only when a party that has clear and unequivocal notice of a violation of the Act. E.g., *Desks, Inc.*, 295 NLRB 1, 11 (1989). "Further, the burden of showing such clear and unequivocal notice on the party raising the affirmative defense of Section 10(b)." *Chinese American Planning Council*, 307 NLRB 41 (1992).

The Charging Party in this case is Laborers' Local 445 and not the International Union. Indeed, the International Union, not being a party to the contract with Avne had no contractual or other standing vis-à-vis the employer or the employees represented by the local union. Therefore, although it had the right under certain circumstances to impose a trusteeship on Laborers' Local 445, which it did in September 1997, I would not construe the International as being an "affected party" as that term is used by the Board in analyzing 10(b) issues.

To illustrate the point one might look at the Supreme Court's decision in *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960). In that case a charge was filed alleging that 10 months previous, the employer had recognized and executed a collective-bargaining agreement with a union notwithstanding the union's lack of majority status at the time that the agreement was executed. The Court held that the charges, filed by an individual employee were barred. And in subsequent cases, the Board has held that where recognition has been granted to a labor union, an employer cannot subsequently challenge that recognition if no 8(a)(2) charge has been filed within 6 months of the grant of recognition. See *Gibbs & Cox, Inc.*, 280 NLRB 953, 967 fn. 21 (1986); *Laborers (Roman Stone Construction)*, 153 NLRB 659 (1965).

Under the rationale of *Bryan Mfg. Co.*, supra, who can doubt the outcome of a case where an employer entered into a sweetheart contract with union A (which did not represent a majority) and then union B came along 7 months later to organize the employees. If union B filed a petition it would be dismissed by

Corp., 260 NLRB 323 (1982). In the present case, the evidence shows that the representatives of Laborers' Local 445 told employees that the new union would be, in effect, the same as the old union and that its creation was merely a means to reaffiliate with the Laborers' International Union without having to pay the existing per capita tax. This is, in my opinion, exactly the opposite of an effective disclaimer of interest as the entire plan was to have continued representation by what was intended to be a functionally identical labor organization.

the Board under its contract bar rules and if it then filed an 8(a)(2) charge against the employer and an 8(b)(1)(A) and (2) charge against union A, those charges would be dismissed if Section 10(b) was raised as defense. The fact that union B, the affected party, may not have known or been given notice of the contract between the employer and union A, would make no difference to the outcome and to hold otherwise would mean that in such circumstances, a company and a union entering into a first contract would, in order to avoid, a 10(b) defense, have to notify every other labor organization in the United States.

Of course, even in the situation described above, the 10(b) limitations period would be tolled if the transactions were concealed in such a manner that *no one* other than the contracting parties was on notice that a potentially illegal contract was made. To take the most obvious example, if an employer and a Union entered into a contract which they thereupon put it into a drawer and only notified the affected employees of its existence 6 months and 1 day after its execution, the 10(b) period would start to run from the date of its disclosure. Such a situation would present a case of fraudulent concealment and this is a legitimate exception to a 10(b) defense. *Waymouth Farms*, 324 NLRB 960 (1997). (Bargaining order at new location is appropriate remedy for Respondent's fraudulent concealment from the Union of its plans to relocate.) See generally *Browne & Sharpe Mfg. Co.*, 321 NLRB 924 (1996), for the Board's standards in cases where the General Counsel asserts fraudulent concealment.³

In the present case, the evidence shows that the officers of Laborers' Local 445/Local 445 LIFE deliberately concealed their actions from the International Union. But as the International Union is neither the charging party in this case, nor an "affected" party as that term is used in 10(b) cases, the fact that it became aware of the events more than 6 months after they occurred does not in my opinion, make any difference.

The Charging Party, Laborers' Local 445 was on notice of the illegal events as its officers were the people who engaged in the illegal acts. Those officers were aware of the events and if one or more of them changed their minds, he or she could have filed a charge within the 10(b) period. (Highly unlikely as a practical matter.)

The only other group of affected individuals were the employees of Avne. And these people were on notice that something was going on because they were asked, in January or February 1997, to sign cards authorizing Local 445 to represent them.

But with appropriate camouflage it is possible to hide something which is in plain sight. The testimony by John Mongello Jr. and Rafael Griffin in their depositions persuades me that employee/members of Laborers' Local 445 were told that even though Local 445 LIFE was going to be created as a new and separate union from Laborers' Local 445, they were advised that they would continue to have the same representation by the same people and that this was only going to be a temporary arrangement until the new union could reaffiliate with the Laborers' International Union. In the case of Avne, Local 445

LIFE was substituted for Laborers' Local 445, but the employees continued to have the same shop steward, the same person represent them in their dealings with the Employer, and the exact same contract. If they were told that there was some sort of change, it is obvious that they were also led to believe that no real change of substance had or was occurring.

In my opinion, the facts in this case show that by misleading employees as to the nature of the transactions involved, Local 445 LIFE (with the Employers' acquiescence), fraudulently concealed the true facts from the affected employees and that as a consequence, the 10(b) statute of limitations should be tolled.

CONCLUSIONS OF LAW

1. By withdrawing recognition from and refusing to bargain with Local 445, Laborers' International Union of North America, AFL-CIO, the Respondent, Avne Systems, Inc., has violated Section 8(a)(1) and (5) of the Act.

2. By abrogating its collective bargaining agreement with Local 445, Laborers' International Union of North America, AFL-CIO, the Employer has violated Section 8(a)(1) and (5) of the Act.

3. By recognizing Local 445, League of International Federated Employees, on or about March 1, 1997, as the collective-bargaining agent of its production and maintenance employees, Avne has violated Section 8(a)(1) and (2) of the Act.

4. By entering into a collective-bargaining agreement with Local 445, League of International Federated Employees, and executing a contract requiring employees to become members of that union as a condition of employment, Avne has violated Section 8(a)(1), (2), and (3) of the Act.

5. By deducting dues and fees from the wages of its employees and remitting them to Local 445, League of International Federated Employees, Avne has violated Section 8(a)(1), (2), and (3) of the Act.

6. By accepting recognition from Avne and entering into a collective-bargaining agreement with said employer, Local 445, League of International Federated Employees has violated Section 8(b)(1)(A) of the Act.

7. By entering into a contract with Avne which inter alia, requires union membership as a condition of employment, and pursuant to which Local 445, League of International Federated Employees has received dues and fees, said Union has violated Section 8(b)(1)(A) and (2) of the Act.

8. The aforesaid violations affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the 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.

Inasmuch as Avne has illegally withdrawn recognition from Laborers' Local 445, and illegally abrogated its contract with that labor organization, I will recommend that it recognize and bargain with said union and that it restore, if requested, the terms and conditions of employment as they existed under the aforesaid collective-bargaining agreement. In this regard, I shall recommend that the employer and Local 445 LIFE be jointly and severally liable for payments required pursuant to Article 22 to the designated Health and Welfare Insurance Fund. Such payments shall be for the period encompassed by the contract between Avne and Laborers' Local 445 and for the period after that contract's expiration date until such time as

³ The Board stated that in order for the 10(b) period to be tolled based on a claim of fraudulent concealment, the General Counsel must show that "(1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part. All three elements must be present to warrant the tolling of the 10(b) period.

Avne has bargained in good faith with that labor organization and has either reached a new agreement, or a valid impasse, or is otherwise legally discharged from its obligation to bargain with Laborers' Local 445. As to such moneys, interest shall be paid and computed in accordance with the practice set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).⁴

I shall also recommend that Avne cease and desist from recognizing Local 445 LIFE and cease and desist from giving effect to any of the terms contained any contract with that labor organization. Further, it is recommended that Avne and Local 445 be jointly and severally responsible for remitting to Avne's employees any and all dues and other fees that were deducted from their pay and/or remitted to Local 445 LIFE. Interest on these moneys are to be paid in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Finally, I shall recommend that Local 445 LIFE cease and desist from accepting recognition from Avne as the bargaining agent for any of its employees or from enforcing or giving effect to any of the terms of its contract with Avne.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

A. The Respondent, Avne Systems, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively in good faith with Local 445, Laborers' International Union of North America, AFL-CIO as the exclusive collective-bargaining representative in a unit consisting of all of its full-time and regular part-time production and maintenance employees, excluding all office clericals and guards, professional employees, and supervisors as defined in the Act.

(b) Refusing to give full force and effect to the terms and conditions of the collective-bargaining agreement with Local

⁴ Although the complaint does not specifically allege that the employer unilaterally changed terms and conditions of employment, it does allege that it withdrew recognition from Laborers' Local 445 and the facts show that it abrogated the existing and unexpired contract. As such, the matter is fully litigated and I see no reason not to include this as a remedy for the violations found herein. *Katz's Deli*, 316 NLRB 318, 334-335 (1995), enf. in part and remanded in part 80 F.3d 755 (2d Cir. 1996). By the same token, as the failure to make payments to the Welfare Fund was a direct consequence of the execution of the contract with Local 445 LIFE and as I have found that such agreement violated Sec. 8(b)(1)(A) and (2) of the Act, it seems to me that Local 445 LIFE is at least as culpable as the employer in failing to make payments to Laborers' Local 445's Welfare Fund. Moreover, to the extent that a similar welfare fund operated by Local 445 LIFE has received payments from the Employer, such payments were the result of an illegal contract under Sec. 8(b)(1)(A) and (2) and Sec. 303 which, although permitting payments to pension and welfare funds, precludes such payments in the absence of a valid collective-bargaining agreement. As such, I conclude that both the employer and Local 445 LIFE should be jointly and severally liable for the failure to make payments to Laborers' Local 445 Welfare Fund, not only during the life of the agreement, but also after its expiration.

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

445, Laborers' International Union of North America, AFL-CIO.

(c) Granting recognition to any labor organization other than Local 445, Laborers' International Union of North America, AFL-CIO unless and until the other labor organization becomes certified as the exclusive collective-bargaining representative of an appropriate unit of employees as the result of a Board-conducted election.

(d) Maintaining in force and effect any collective-bargaining agreement with Local 445 League of International Federated Employees and/or to any contract provision requiring employees to become or remain members of said labor organization.

(e) Checking off from the pay of its employees and remitting to Local 445 League of International Federated Employees, any money for union dues or fees.

(f) In any like or related 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) Recognize and, on request, bargain with Local 445, Laborers' International Union of North America, AFL-CIO as the exclusive bargaining representative of its full-time and regular part-time production and maintenance employees, with respect to rates of pay, wages, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

(b) Give full force and effect to any collective-bargaining agreement between Avne and Laborers' International Union of North America, AFL-CIO.

(c) Jointly and severally with Local 445 League of International Federated Employees, make whole employees by remitting to them any moneys deducted from their wages and paid to that Union as dues and fees.

(d) Jointly and severally with Local 445 League of International Federated Employees, make whole employees by paying into the Health and Welfare Insurance fund all moneys owed in accordance with the contract between Avne and Local 445, Laborers' International Union of North America, AFL-CIO.

(e) 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 amounts due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Bronx, New York, copies of the attached notice marked "Appendix A."⁶ Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall

⁶ 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."

duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 1997.

(g) 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 Respondent has taken to comply.

B. The Respondent, Local 445 League of International Federated Employees, its officers, agents, and representatives shall

1. Cease and desist from

(a) Entering into or enforcing any collective-bargaining agreement with Avne Systems, Inc., covering its production and maintenance employees or enforcing union-security provisions in said agreements requiring membership in that union as a condition of employment.

(b) Obtaining recognition and bargaining collectively with Avne Systems, Inc., where its employees were lawfully represented by another labor organization.

(c) Receiving dues and fees from Avne's employees pursuant to the aforesaid collective-bargaining agreement or any extension or renewal thereof.

(d) In any like or related manner 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) Jointly and severally with Avne Systems Inc., make whole employees by remitting to them any moneys deducted from their wages and paid to Local 445 League of International Federated Employees as dues and fees.

(b) Jointly and severally with Avne Systems Inc., make whole employees, in the manner set forth in the remedy section of this decision, by reimbursing Laborers' Local 445's Health and Welfare Insurance fund for all moneys owed in accordance with the terms and conditions of the contract between Avne and Local 445, Laborers' International Union of North America, AFL-CIO.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all records and reports, necessary to analyze the amounts due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its office copies of the attached notice marked "Appendix B."⁷ Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Signed copies of the notice shall be returned to the Regional Director for forwarding to the Respondent employer for posting on its premises.

(e) 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 Respondent has taken to comply.

APPENDIX A
NOTICE TO EMPLOYEES

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT refuse to recognize and bargain collectively in good faith with Local 445, Laborers' International Union of North America, AFL-CIO as the exclusive collective-bargaining representative in a unit consisting of all of our full-time and regular part-time production and maintenance employees, excluding all office clericals and guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT refuse to give full force and effect to the terms and conditions of our collective-bargaining agreement with Local 445, Laborers' International Union of North America, AFL-CIO.

WE WILL NOT grant recognition to any labor organization other than Local 445, Laborers' International Union of North America, AFL-CIO unless and until said other labor organization becomes certified as the exclusive collective-bargaining representative of an appropriate unit of employees as the result of a Board-conducted election.

WE WILL NOT maintain in force and effect any collective-bargaining agreement with Local 445 League of International Federated Employees and/or any contract provision requiring our employees to become or remain members of said labor organization.

WE WILL NOT check off from the pay of our employees and remit to Local 445 League of International Federated Employees any money for union dues or fees.

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

WE WILL recognize and on request, bargain with Local 445, Laborers' International Union of North America, AFL-CIO as the exclusive bargaining representative of our full-time and regular part-time production and maintenance employees, with respect to rates of pay, wages, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

WE WILL give full force and effect to terms and conditions of any collective-bargaining agreement between Avne and Local 445, Laborers' International Union of North America, AFL-CIO.

WE WILL jointly and severally with Local 445 League of International Federated Employees, make whole our employees by remitting to them any moneys deducted from their wages and paid to that Union as dues and fees.

WE WILL jointly and severally with Local 445 League of International Federated Employees, make whole our employees by paying into the Health and Welfare Insurance Fund of Local 445, Laborers' International Union of North America, AFL-

⁷ See fn. 6, above.

CIO all moneys owed in accordance with the terms and conditions set forth in our contract with that Union.

AVNE SYSTEMS, INC.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
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 enter into or enforce any collective-bargaining agreement with Avne Systems, Inc., covering its

production and maintenance employees or enforce any union-security provisions in said agreements requiring membership in our union as a condition of employment.

WE WILL NOT obtain recognition and bargain collectively with Avne Systems, Inc., where its employees are lawfully represented by another labor organization.

WE WILL NOT receive dues or fees from Avne's employees pursuant to the aforesaid collective-bargaining agreement or any extension or renewal thereof.

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

WE WILL jointly and severally with Avne Systems Inc., make whole employees by remitting to them any moneys deducted from their wages and paid to us as dues and fees.

WE WILL jointly and severally with Avne Systems Inc., make whole employees, by reimbursing Laborers' Local 445's Health and Welfare Insurance fund for all moneys owed in accordance with the terms and conditions of the contract between Avne and that Union.

LOCAL 445, LEAGUE OF INTERNATIONAL FEDERATED
EMPLOYEES