Viking Industrial Security, Inc. and Additional Respondent, Viking Security Inc., a/k/a Viking Industrial Security, Inc.[1] ***and*** **Allied International Union.** Cases 29–CA–14365, 29–CA–14370, 29–CA–14489, and 29–CA–14490

November 30, 1998

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On May 13, 1996, Administrative Law Judge Raymond P. Green issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

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[2] and has decided to affirm the judge's rulings,[3] findings,[4] and conclusions and to adopt the recommended Order as modified.[5]

1. We affirm the judge's conclusion that Viking New York and Viking New Jersey constituted a single-integrated enterprise at the time the original unfair labor practices occurred and thus that Viking New Jersey is derivatively liable for the unfair labor practices previously found and for the backpay amount determined in the instant decision by the judge. In so doing, we note that the judge did not specifically discuss each of the four factors considered by the Board, and approved by the Supreme Court, in determining whether two employers constitute a single employer. These factors are: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *South Prairie Construction v. Operating Engineers Local 627*, 425 U.S. 800, 802 (1976) (per curiam); *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255, 256 (1965) (per curiam); *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987). As the Board noted in *Emsing's*, none of these factors, alone, is controlling, and not all of them need to be present. Id. at 302. Finding single-employer status ultimately depends on "all the circumstances of the case." Id., citing *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980). The fundamental inquiry is whether there exists overall control of critical matters at the policy level. Id. and cases cited therein. Thus, we now consider the application of the above factors to the instant case.

Briefly, Viking New York was formed in April 1987 by Allan Larson, and was engaged in the business of providing security guard services. Ralph Day was hired in late 1987 or early 1988, and at the time he was hired Day put several thousand dollars into Viking New York. Day was given the title of vice president, and was given supervisory authority over the security guards. Day testified that at some point in 1988, he and Larson decided to form another guard company in New Jersey where they would be partners, and to that end Viking New Jersey was incorporated on May 12, 1988.[6]

The two companies eventually separated. Although Day testified that the separation occurred in 1988, the judge found that it did not occur until some time after employee Marrero had been discharged from Viking New York on September 23, 1989, which discharge has been found to violate Section 8(a)(3) and (1) of the Act in the underlying unfair labor practice proceeding.[7]

Regarding interrelation of operations, the two companies held themselves out to the public as one company. They both used the same corporate name and the same letterhead, which displayed the name "Viking Industrial Security, Inc.," and then listed both the New York and the New Jersey addresses. There was nothing to indicate that the New York and New Jersey addresses represented two separate companies, and, in fact, testimony revealed that Larson and Day wanted the public to believe that Viking Industrial Security, Inc. was one company with two different locations. Day testified that he did not cease using this letterhead until the end of 1989. The two companies also shared at least two clients, and used the same accountant and payroll service.

Regarding common management, Day had supervisory authority over employees at both companies, including the authority to hire, fire, interview, schedule, and train employees. Day continued to be an active participant in

[1] We have modified the case caption used by the administrative law judge to more accurately conform to the name of the Respondent.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Additionally, the Respondent asserts that the judge's findings are a result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

[4] We note that the judge incorrectly stated that Ralph Day signed a collective-bargaining agreement on behalf of Viking New York on March 1, 1990. The record indicates that Day signed a collective-bargaining agreement on behalf of Viking New Jersey on March 1, 1990. This error by the judge does not affect our decision. The judge also inadvertently stated that discriminatee Israel Marrero's earnings from Marriott Corporation in the first quarter of 1991 were $114; the correct amount is $168 (the judge states the correct amount in his appendix detailing the amount of backpay).

[5] We shall modify the judge's recommended Order to provide for the payment of interest on the backpay amount.

[6] Both companies had as their official name "Viking Industrial Security, Inc."

[7] The judge's decision in the underlying proceeding issued on September 17, 1991. No exceptions were filed to his decision and, pursuant to Sec. 10(c) of the Act, the Board adopted the judge's findings and conclusions on October 25, 1991.

Viking New York even after Viking New Jersey was incorporated. For example, in the underlying unfair labor practice case, Day was found to be the individual who committed the unfair labor practices in the fall of 1989, which included interrogating employees, threatening employees with discharge, and discharging Marrero. Larson was a consultant for Day at Viking New Jersey and helped train Day's guard dogs.

Regarding centralized control of labor relations, Day signed a recognition agreement between Viking New York and Local 213, Security Union on June 5, 1989, and negotiated and signed a collective-bargaining agreement between Viking New Jersey and Local 213 on March 1, 1990. As noted above, Day interviewed, hired and fired employees at both companies, and committed the unfair labor practices in the underlying proceeding.

Regarding common ownership, on Viking New York's 1988 tax return, both Larson and Day were listed as officers and as each owning 50 percent of the corporate stock. Day contributed several thousand dollars to Viking New York and held the position of vice president. The initial Certificate of Incorporation for Viking New Jersey listed the two directors as being Larson and Day, and the 1988 Viking New Jersey tax return listed both Larson and Day as officers, with each owning 50 percent of the stock. Thereafter, the 1989 Viking New Jersey tax return listed Day as owning only 50 percent of the stock, and did not list the owner of the other 50 percent of the stock.[8] As noted by the judge, there was no documentary evidence presented indicating if and when Larson was no longer involved with Viking New Jersey. The 1989 tax return for Viking New York listed Larson as the sole owner.

Thus, we find that the General Counsel has established that the two companies had an interrelation of operations, common management and control of labor relations, and at least initial common ownership with no definitive break in that common ownership as of the time of the unfair labor practices in the underlying proceeding. Accordingly, based on the above and on the reasons cited by the judge, we agree with the judge that Viking New York and Viking New Jersey constituted a single-integrated enterprise under Board law as of the time of Marrero's unlawful discharge, and thus that Viking New Jersey is derivatively liable for the unfair labor practices previously found.

2. The Respondent argued before the judge that the backpay period should end as of December 10, 1990, the date that Viking New York went out of business, contending that even if discriminatee Marrero had not been unlawfully discharged on September 23, 1989, he would have lost his job when Viking New York ceased doing business.[9] We agree with the judge's rejection of this argument. Because Viking New York and Viking New Jersey constituted a single-integrated enterprise as of the time of Marrero's unlawful discharge, it was incumbent on Viking New York and/or Viking New Jersey to offer reinstatement to Marrero in order to terminate the backpay liability.[10] The judge also rejected the Respondent's argument that Marrero would not have commuted from his home in Brooklyn, New York, to a job in New Jersey, stating that it was not clear what Marrero would have done because he was not offered the chance of such employment. Thus, the judge ordered Viking New Jersey to make an unconditional offer of employment to Marrero and stated that until it did so, it would remain liable for additional backpay. The judge also calculated the Respondent's backpay liability up to December 31, 1994.[11]

After Viking New York went out of business on December 10, 1990, it was sold to another company, Roundstone, which hired "most or all" of Viking New York's employees. Roundstone then went out of business on February 10, 1992. Our dissenting colleague argues that backpay should be tolled as of the date that Roundstone went out of business. He bases this argument on the theory that to hold that Viking New Jersey has a continuing obligation for backpay and reinstatement to Marrero would place Marrero in a better position than the other employees of Viking New York, who lost their jobs when Roundstone lawfully shut down.

In responding to our dissenting colleague's position, we note first that the Board imposes derivative liability on parties that are found to constitute a single employer. *JMC Transport*, 283 NLRB 554, 560 (1987); *Commissary of Great Race Pizza Shoppes*, 277 NLRB 1175, 1176 (1985); *Coast Delivery Service*, 198 NLRB 1026, 1027 (1972). Thus, on a finding that a single-integrated enterprise exists, each employer within the enterprise is subject to liability. *Great Race*, above at 1176 fn. 3. Therefore, in the instant case, although Viking New York lawfully went out of business on December 10, 1990,

[8] The Respondent in its exceptions contends that Girasole, the accountant for both Viking New York and Viking New Jersey, testified that Day was the sole stockholder of Viking New Jersey in 1989, and that the 1989 corporate tax return corroborated this testimony. As noted above, however, the 1989 tax return for Viking New Jersey listed Day as owning only 50 percent of the company's stock, and did not indicate the owner of the other 50 percent. The Respondent also contends that Girasole testified that that the "50%" was a clerical error; however, his testimony regarding such a clerical error applied specifically only to Viking New Jersey's 1990 tax return. Girasole was not asked specifically about the 1989 tax return concerning its listing of Day as owning only 50 percent of Viking New Jersey's stock.

[9] There is no contention that Viking New York's cessation of operations was unlawful.

[10] In view of our agreement with the judge in this regard, we find it unnecessary to rely on his additional reasoning that it was probable that Marrero would have continued to be employed after December 10, 1990, because after Viking New York went out of business it was sold to another company, Roundstone, which hired most or all of Viking New York's employees.

[11] The General Counsel's second amended backpay specification calculated the backpay owed only to December 31, 1994.

Viking New Jersey continues to operate and accordingly is still subject to liability for the unfair labor practices committed against Marrero by virtue of its status as a single employer with Viking New York. *Great Race*, above at 1176 (although the respondent that had committed the unfair labor practices had ceased operations and was declared bankrupt, Great Race, which had been found to constitute a single employer with that respondent, continued in operation and was therefore liable for the backpay owed).[12]

Further, in disagreeing with our dissenting colleague's argument that the Respondent's reinstatement and backpay obligation should be tolled as of the date that Roundstone went out of business, we note that Roundstone had no obligation to remedy the unfair labor practices committed against Marrero.[13] To the extent that Marrero could have been employed at some point by Roundstone, Roundstone would have been acting in the capacity of an interim employer. Our colleague, however, has made Roundstone the relevant employer for the purpose of assessing Marrero's entitlement to reinstatement and backpay. But Marrero's theoretical employment and subsequent termination by Roundstone would not have ended Viking New Jersey's continuing obligation to offer reinstatement to Marrero, any more than his employment by any other employers during the backpay period would have. Further, although it may be true, as asserted by our colleague, that the other employees of Viking New York lost their jobs when Roundstone went out of business, those employees, unlike Marrero, did not have outstanding unfair labor practices committed against them that had not yet been remedied despite the continued existence of one of the liable parties.[14]

Finally, we also agree with the judge that the Respondent's argument that Marrero would not have commuted from Brooklyn, New York, to New Jersey should be rejected. The geographic distance between Viking New York and Viking New Jersey does not affect Viking New Jersey's continuing obligation to offer reinstatement to Marrero. *Cerro CATV Devices*, 237 NLRB 1153, 1157 (1978) (although the respondent no longer operated its Oxford, Alabama plant, where the unfair labor practice had occurred, the Board ordered the respondent to offer the discriminatee reinstatement to its Freehold, New Jersey plant); see also *Daka, Inc.,* 310 NLRB 201 fn. 1 (1993) (*Cerro* cited approvingly).

For the foregoing reasons, we find, contrary to our dissenting colleague, that Viking New Jersey has a continuing obligation to make an unconditional offer of employment to Marrero and that until it does so, it shall remain liable for additional backpay. Accordingly, we adopt the judge's recommended Order as modified below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Viking Industrial Security, Inc. and Viking Security Inc., a/k/a Viking Industrial Security, Inc., Brooklyn, New York and Demerast, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 4.

"3. The amount of backpay owed Israel Marrero from September 23, 1989, through December 31, 1994, is $20,388.60, plus interest computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state laws."

MEMBER BRAME, dissenting in part.

I agree with my colleagues that Viking New York and Viking New Jersey constituted a single-integrated enterprise at the time the original unfair labor practices occurred and that thus Viking New Jersey is derivatively liable for those unfair labor practices. I dissent, however, from their agreement with the judge that because Viking New York and Viking New Jersey constituted a single-integrated enterprise as of the time of discriminatee Marrero's unlawful discharge, each company had a continuing responsibility to offer reinstatement to Marrero, in the absence of the other company doing so, in order to terminate the backpay liability. Accordingly, I further dissent from the view that Viking New Jersey is still obligated to make an unconditional offer of employment to Marrero and that until it does so, it shall remain liable for additional backpay.

Contrary to my colleagues, I would find that backpay should be tolled as of February 10, 1992, the date that Roundstone lawfully went out of business after taking over Viking New York in December 1990. The record indicates that Roundstone hired most or all of Viking

[12] See also *Williams Motor Transfer*, 284 NLRB 1496, 1497 (1987), where the Board, in discussing generally the need to address unresolved derivative liability issues in that case (such as whether any other employer was liable as an alter ego or single employer with the respondent) at future compliance proceedings, stated, "if the General Counsel is unable to establish such derivative liability, [the discriminatee] will not be entitled to reinstatement except on the Respondent's resumption of the same or substantially similar operations . . . ."

[13] There was no contention that Roundstone was a successor, alter ego, or single employer with Viking New York.

[14] Throughout the time that Roundstone operated (December 1990—February 10, 1992), Viking New Jersey's obligation was to make a bona fide offer of employment to Marrero and to give him backpay. Had such an offer been made at that time, one of two events would have occurred: Marrero either would have accepted employment at Viking New Jersey or Marrero would have declined such employment. In either case, Viking New Jersey's liability would have ended. But Viking New Jersey's obligation to make such an offer existed independent of Roundstone's existence. Further, in the absence of such an offer having been made, its liability continued and it cannot escape that liability by the fortuitous circumstance that Roundstone went out of business before Viking New Jersey ever made the bona fide offer that it was obligated to make.

New York's employees when it took over Viking New York. Further, there is no evidence that any of Viking New York's employees went to work for Viking New Jersey after Viking New York closed, or after Roundstone closed. Thus, if Marrero had not been unlawfully discharged by Viking New York on September 23, 1989, it appears that he, along with all the other Viking New York employees, would have been employed by Roundstone once Roundstone took over Viking New York. Accordingly, he also would have lawfully been out of work once Roundstone closed on February 10, 1992. Thus, I would find that Viking New York's backpay liability ended as of the date that its employees lawfully would no longer have work, which is the date that Roundstone closed.

Viking New Jersey, as a single-integrated enterprise with Viking New York, only has a backpay/reinstatement liability to the extent that Viking New York does. As a general rule, the Board's traditional remedy of a make-whole order of reinstatement and backpay when an employee has been discharged in violation of the Act is undertaken in order to return the employee to the status quo that would have existed absent the unfair labor practice. See generally *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). The Board does not intend that its make-whole remedy will accord a discriminatee greater rights than those to which he would have been entitled but for the discrimination against him. *Memphis Truck & Trailer*, 284 NLRB 900 (1987); *Steelcon*, 266 NLRB 881 (1983).[15] In the absence of evidence that any of Viking New York's employees went to work for Viking New Jersey, however, my colleagues' adoption of the judge's recommended Order providing that Marrero is entitled to receive backpay and reinstatement past the date that Roundstone closed places Marrero in a better position than the other Viking New York employees, and in a better position than if he had not been discharged. This rests on speculation, which "register[s] no weight on the substantial evidence scale." *NLRB v. Peninsula General Hospital Medical Center*, 36 F.3d 1262,1269 (4th Cir. 1994), quoted in *Coronet Foods v. NLRB*, No. 97–1087, slip op. at 23 (4th Cir. 1998). Thus, I would find that Viking New Jersey's liability ended when Viking New York's liability would have ended, which is when its employees lawfully would have lost their jobs with Roundstone. Accordingly, I would toll the Respondent's backpay and reinstatement liability as of February 10, 1992, and would modify the judge's recommended Order to that effect.

[15] Further, the obligation to offer reinstatement and backpay is rebuttable. *Pacemaker Driver Service*, 290 NLRB 405 (1988).

Maggie Kappelman, Esq., for the General Counsel.
Richard E. Miller, Esq. and *Sharon Siegel, Esq*., for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on October 23 to 25, 1995, and on January 25, 1996.

This is a supplemental hearing to determine the backpay of Israel Marrero for the loss of any earnings he may have suffered as a result of his discharge on September 23, 1989.

The original backpay specification was issued on July 2, 1994, an amended specification was issued on March 24, 1995, and a second amended specification was issued on January 25, 1995. The last amendment was made at the hearing and, in part, extended the backpay calculations to the end of 1994 based on more recent information gathered after the original and first amended specification had been issued. Also, the second amendment recalculated Marrero's admitted interim earnings based on pay stubs and tax information obtained by the General Counsel after the hearing opened. Although the names of the interim employers were essentially the same as in the initial specification, there were some additional amounts of interim earnings conceded as well as some modifications which reduced interim earnings from some of Marrero's postdischarge employers.

The underlying case was heard by an administrative law judge (ALJ), on October 22 to 24, 1990, and he issued his decision on September 17, 1991. As no appeal was taken, his decision was adopted by the Board. The court of appeals enforced the Board's Order on September 15, 1992. The backpay specification, as amended at the hearing, alleges:

1. That Viking Industrial Security Inc. and Viking Security Inc. are corporations, having common ownership, officers, directors, and operations and that they constituted a single-integrated enterprise. It is therefore alleged that each is jointly and severally liable to comply with the terms of the underlying Board Order including offering reinstatement to and making whole Marrero.

2. That the backpay period began on September 23, 1989, the date of Marrero's discharge and continues indefinitely until a valid offer of reinstatement is made to him.

3. That the measure of gross backpay is Marrero's hourly rate multiplied by 40-hours week. At the time of his discharge, Marrero's rate of pay was $5 per hour.

4. That the total backpay as of the fourth quarter of 1994—$23,599.35.

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

FINDINGS AND CONCLUSIONS

I. THE SINGLE-EMPLOYER ISSUE AND DERIVATIVE LIABILITY

Although the original unfair labor practice case was against Viking Industrial Security Inc., the General Counsel has added, in the backpay phase of the case, the additional Respondent, Viking Security Inc., a/k/a Viking Industrial Security Inc. For purposes of clarity, I shall describe the original Respondent as the New York company or Viking New York and describe the added Respondent as the New Jersey company or Viking New

Jersey. In any event, the General Counsel asserts that these two companies have been a single-integrated enterprise and are therefore jointly and severally liable for remedying the unfair labor practice committed against Marrero.

I should note that the New York company, which the General Counsel agrees has been closed, did not file an answer to the backpay specification and did not appear at the hearing. Accordingly, I conclude that Viking New York is jointly and severally liable for the amount set forth in this decision.

On the other hand, the New Jersey company did appear, and among other things, contends that it is not a proper party to this proceeding. It contends that whatever relationship that once existed between the two companies, that relationship ceased to exist and that the New Jersey company cannot be held liable for any unfair labor practices committed by the New York company.[1]

The original unfair labor practice case listed the Respondent as being Viking Industrial Security Inc. It was concluded that the Respondent was a New York corporation engaged in the business of providing security guard services and that its principal place of business was in Brooklyn, New York.

The events described in that case took place during a period from late spring through September 1989. Marrero was fired on September 23, 1989, because of his activities on behalf of the Union. The judge concluded that at the time of those events, Ralph Day was a corporate officer and supervisor of the New York company. He also concluded that Day was the person who committed the unfair labor practices.

The New York company's 1987 tax returns indicates that it was formed in April 1987 by Allan Larson. Ralph Day was hired by that company in late 1987 or early 1988. At the time that he became associated with Viking New York, Day put a couple of thousand dollars into the company and within a short time he was given supervisory functions over the security guards. Day was given the title of vice president.

Day worked for the New York company during 1988. Although testifying that he never had any shares of Viking New York, its income tax return for the year ending 1988, lists Larson and Day as partners of the company, with each having a 50-percent share of the stock.

Day testified that at some point in 1988, he and Larson decided to form another guard company in New Jersey where they would be partners. To that end, the New Jersey company was incorporated on May 12, 1988. The certificate of incorporation lists the name of the company as Viking Industrial Security Inc. which is the same name as the New York company. It lists the two directors as being Allan Larson and Ralph Day. The address of the company is listed as 15 Christie Street, Demerast, New Jersey.[2]

The New Jersey company started out with a couple of customers of Viking New York that also had facilities in New Jersey. (Friedman's Trucking and Ward Trucking). Day began to split his time between the New York and the New Jersey companies.

According to Day, at some point during the spring of 1988, he and Larson decided that they would no longer be partners. Day testified that he initiated this split and that there was a verbal agreement to conduct each business as a separate enterprise. In this regard, the Respondent introduced into evidence a copy of a letter dated June 10, 1988, purporting to show that Larson was resigning as a director of Viking New Jersey, effective on June 11, 1988. Day, although testifying that he did see the signed original, could not produce and had no idea where it might be located. Later in his testimony, Day indicated, in response to my questions, that there was nothing in writing either to show an agreement between him and Larson to be partners or to break up their partnership.

The tax return for the New Jersey company filed for 1989 lists Day as owning 50 percent of the stock. It does not list who owns the other 50 percent. (I suppose this would be cited as a clerical error made by the accountant.) The 1989 tax return for Viking New York, lists Larson as the sole owner of that company.

Notwithstanding the asserted separation as having taken place in June 1988, the evidence shows that a single letterhead was used by both companies and that they were held out to the public as a single enterprise having two offices, one in New York and one in New Jersey. (See for example, G.C. Exh. 11, a letter sent to a prospective customer in January 1989.) According to Day, he did not cease using this letterhead until the end of 1989.

According to Day, he spent more and more of his time, during 1989, in New Jersey and that except for some consulting work, and dog training, Larson did not do any work for Viking New Jersey. However, as noted above, as of August and September 1989, Day was still working at the New York company and the unfair labor practices were committed by him.

Although both companies used the same accountant and the same payroll company, there has been no significant interchange between the two employers.[3]

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[1] The Respondent notes that in the underlying unfair labor practice proceeding, the Company's then attorney, Mr. Elman, stated that "in the prior representation case that the National Labor Relations Board and the petitioner at that time specifically excluded any involvement of Viking Security of New Jersey from anything having to do with that case and that was discussed in detail in the underlying arguments." Respondent asserts that in an exchange between Elman and the judge, it was understood that no issue of single employer was involved in the litigation.

Respondent asserts that the reference to the position of the parties in the representation case and the underlying unfair labor practice case, shows that the Charging Party and the General Counsel were aware that a company called Viking Industrial Security Inc., operating in New Jersey, was in existence and that as they could and should have litigated the relationship at that time they have waived all rights to litigate that issue in the present backpay proceeding. I do not agree.

Even if the Union had been aware of the existence of the New Jersey company, it sought an election amongst the New York employees and in that context the relationship of the New York company to the New Jersey company was irrelevant in the representation case. For even if the two companies could have been considered a "single employer," that would not preclude the Union from seeking an election in a separate unit of New York employees. Further, the brief exchange between Elman and the judge in the underlying unfair labor practice case, hardly shows that the General Counsel or the Charging Party "waived" any rights to assert that two employers constituted an alter ego or a single employer if and when such an issue became relevant. Obviously, at the time of the unfair labor practice proceeding, the Respondent was, from all appearances, a viable company which would have been able to meet any possible backpay award. There was, therefore, no need to litigate an issue which was extraneous to the issues of the unfair labor practice case.

[2] Although Day claims that he owns 100 percent of the New Jersey's stock, this cannot be ascertained from any of the corporate records which are essentially blank.

[3] There is some evidence that a person named Jeffrey Cohen worked at the New York and the New Jersey companies. Also, an employee

During 1990, Day continued to be involved, at least to some degree, in the affairs of the New York company. Thus, for example, Day testified that he was involved in the negotiations that resulted in a collective-bargaining agreement that he signed on behalf the New York company on March 1, 1990. (In 1990, a Charles Widman had been hired by the New York company to take over much of the payroll work and some of the other duties that Day had previously performed.)[4]

On December 10, 1990, Viking New York closed. According to Widman, Larson turned over the business to Eugene Manning, the owner of a company called Roundstone Security. Widman testified that all 5 clients of Viking New York went to Roundstone and that Roundstone hired him and all 18 of Viking New York's employees. It appears that Roundstone operated the business for about 14 months.

The evidence in this case shows that for a period of time, commencing in May 1988, there existed two corporations, one in New York and one in New Jersey; both of which had the same name and both having Ralph Day and Alan Larson as common owners. These two corporations, both of which were engaged in the same type of business and having some common customers, and using the same accountant and payroll company, were held out to the public, particularly prospective customers, as a single enterprise. It is my opinion that given this relationship, the two companies would meet the definition of a single-integrated enterprise for purposes of Board law. *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255 (1965); and *Blumenfeld Theatres Circuit*, 240 NLRB 206, 214–215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980). *Emsing's Supermarket*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989). *Il Progresso Italo Americano Publishing Co*., 299 NLRB 270, 271 (1990).

There is also no question but that at some point Ralph Day and Alan Larson parted ways and that the two companies split from each other. The key question to be asked is when did that happen? For if, as the Respondent asserts, the split came about before the unfair labor practices occurred, then Viking New Jersey would not be liable to remedy them. However, if the split did not take place until after the unfair labor practices occurred, then it is my opinion that Viking New Jersey, having been an integral part of the original Respondent, would be liable to remedy the violations, and having incurred a backpay liability would not be able to slough it off by a subsequent divestiture.

Although Day testified that the separation occurred in early 1988, the documentary evidence is unconvincing and somewhat contradictory. Thus, the purported letter from Larson indicating his resignation from Viking New Jersey's board of directors is unsigned and the original could not be located. Moreover, a resignation from the board of directors does not necessarily indicate that his ownership interest has ceased. As noted above, the tax return for Viking New York for the year ending 1988 (and presumably filed in 1989), lists the owners of that company as being Alan Larson and Ralph Day. The initial certificate of incorporation for Viking New Jersey lists Day and Larson as the co-owners, and its tax return for the year ending 1989, lists Day as owning only 50 percent of the Company's stock. There is no documentary evidence of any kind to indicate if and when Larson no longer was involved with Viking New Jersey.

Charles Widman was called as a witness by the General Counsel and he was hired by Viking New York in or about September 1989 as a security guard. In my opinion, Widman was a credible witness who had no interest in the outcome of this proceeding. Although his testimony is not dispositive, I think that it has substantial bearing on when the two companies separated from each other.

Widman testified that in late November 1989, he was promoted by Larson to a supervisory position and he was given the responsibility, in part, of taking over some of the functions of Ralph Day, who was starting to spend more and more of his time in New Jersey. Widman testified that in October 1989 (this being after the discharge of Marrero), Larson kept asking him to become part of management, indicating that he did not like Day and wanted the man away from him. He states that at around Thanksgiving, Larson said that he was dissatisfied with Day and wanted to replace Day with Widman. According to Widman, when he asked why he wanted to get rid of Day inasmuch as they were partners, Larson said that he wanted Day to stay in New Jersey while Larson would stay in New York. He testified that at around Christmastime (1989), Larson told him that he was having union problems, that he felt that the Union was not good for the men and that he was fighting with the Union in court. Widman states that Larson told him that he and Day did not see eye to eye and that they had separated. From this conversation, Widman got the impression that Larson fired Day. He testified that by January 1990, Day was not longer doing any work at the New York company.

Although there remains a degree of uncertainty (in large measure the result of poor recordkeeping by these companies), the testimony as a whole including the testimony of Widman, indicates to me that the two corporations, at the time of Marrero's discharge (September 23, 1989), were commonly controlled, probably commonly owned, and were held out to the public as a single enterprise. The testimony of Widman convinces me that although there was a separation, the earliest time that this separation took place was probably at some point after October 1, 1989, and before Christmas of that same year.

Having concluded that the two corporations constituted a single enterprise as of the time of Marrero's unlawful discharge, I conclude that the New Jersey company had incurred a liability for his backpay, which continued notwithstanding the subsequent separation of the two companies. Further, as it is concluded that Viking New Jersey was an integral part of the Respondent in the original unfair labor practice case, the fact that Viking New Jersey was not made a party in the original case does not preclude the General Counsel from seeking backpay from it at the compliance stage of the proceeding. *Associated General Contractors v. NLRB*, 929 F.2d 910, 913–915 (2d Cir. 1991); and *Coast Delivery Service*, 198 NLRB 1026, 1027 (1972). See also *Total Property Services*, 317 NLRB 975 (1995); and *Southeastern Envelope*, 246 NLRB 423 (1979).

named Charles Widman testified that while employed at the New York company, another employee, Pete Rodriguez told him that he had worked at some unknown time, at the New Jersey company.

[4] Widman testified that in April 1990, he was present at the meeting with Larson and Elman. (Day was not present.) He testified that at this meeting, Elman told Larson that he was going to lose (presumably the ULP case), and that "the next best thing is to start another company without your name in it." He states that Larson thereafter started a company called Eastern Security which folded on December 10, 1990.

II. THE AMOUNT OF BACKPAY

The general principles governing backpay proceedings are well settled. The finding of an unfair labor practice is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics Corp*., 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). Once the General Counsel has shown the gross backpay due in the specification, the employer has the burden of establishing affirmative defenses which would mitigate his liability, including willful loss of earnings and interim earnings to be deducted from the backpay award. *NLRB v. Brown & Root, Inc*., 311 F.2d 447, 454 (8th Cir. 1963); see also *Sioux Falls Stock Yards Co*., 236 NLRB 543 (1978).

At the time of his discharge on September 23, 1989, Marrero earned $5 per hour and worked a 40-hour week. Based on this, the General Counsel set her gross backpay claim at $2600 per quarter, a figure which I conclude is reasonable.

After his discharge, the evidence shows that Marrero worked at a number of jobs. What is in dispute is whether he quit some of these jobs without reasonable justification or whether he was discharged under such circumstances as would limit his backpay award. In this respect, the Board in *Newport News Shipbuilding*, 278 NLRB 1030 fn. 1 (1986), held that a discharge from interim employment will only toll backpay when the Respondent has established that the discharge was for willful or gross misconduct. It also held that although quitting an interim job may constitute a willful loss of earnings warranting a reduction of backpay, the job being quit should be equivalent to the job that the discriminatee had at the Respondent at the time of his or her unlawful discrimination. In *Ryder Systems*, 302 NLRB 608, 610 (1991), enfd. 983 F.2d 705 (6th Cir. 1993), the Board noted:

> The Board has consistently held that discharge from interim employment, without more, is not enough to constitute willful loss of employment. . . . A respondent must show deliberate or gross misconduct on the part of the discharged employee in order to establish a willful loss of employment . . . Elmore may have missed several scheduled deliveries, but he committed no offense involving moral turpitude and his conduct was not otherwise so outrageous as to suggest deliberate courting of discharge. Without such proof, Elmore's discharge from ATS will not serve as a basis for tolling his backpay. [Citations omitted.]

After his discharge from Viking, for the remainder of the third quarter of 1989, Marrero was unemployed. His first employment was at Prompt Temps at which he earned a total of $600 during the fourth quarter of 1989.

The original backpay specification and the first amended specification had no interim earnings for the first quarter of 1990 whereas the second amended specification lists Marrero as being employed for part of the time by Lloyd's Fashions[5] and 3J's Home Video, the latter being a small video store owned by his parents.[6] Although the Respondent makes much of this discrepancy, it is my opinion, that the difference merely represents an honest mistake in reporting when he worked.[7]

The next job that Marrero obtained was at Elmont Cemetery as a groundskeeper at $5 per hour. He began this job on June 6, and "quit" on July 7, 1990. This job was a seasonal position and would have ended, in any event, no later than October 31, 1990.

The Respondent contends that having quit this job, Marrero incurred a willful loss of earnings. In this regard, Marrero testified that he quit this job because he was accused by his supervisor of stealing and damaging equipment and that he was subjected to continuous harassment. He testified that these accusations were not correct and that he left this job rather than get into trouble by responding angrily to them.

The Respondent put into evidence some records from Elmont which indicate only that Marrero left his employment there. There were no records showing why he left and there were no records indicating that he was ever accused of any kind of impropriety, much less stealing or damaging equipment. Victor Delacruz who is employed by Elmont as the office manager was asked to testify by the Respondent and all he could do was verify Marrero's employment records. Delacruz could not testify as to Marrero's actual work on the job or if there were any complaints about his work by his supervisors.

Having acknowledged that he quit his employment at Elmont Cemetery, the burden shifts from the Respondent to show that the discriminatee failed to mitigate backpay damages to the General Counsel to show that the decision to quit was reasonable. *Big Three Industrial Gas*, 263 NLRB 1189, 1199 (1982). See also *Florence Printing Co*., 158 NLRB 775, 791–792 (1968).

Marrero's testimony regarding his reason for quitting Elmont Cemetery does not seem all that probable to me. He was a new employee who was not covered by a union contract having a grievance/arbitration clause and it seems to me that if he was in fact accused by his supervisor of stealing and/or damaging equipment, he would have been summarily fired. Moreover, if this had been the case, it would seem plausible, if not necessary, that the company would have kept some sort of personnel record to document the accusation.

In sum, I think that the Respondent has carried its burden of proof regarding Marrero's Elmont Cemetery employment. However, as the evidence shows that Marrero was hired on a seasonal basis and would have been laid off by the end of October 1990, his backpay shall resume after that time. Accordingly, it is my conclusion that Marrero's net loss for the third quarter of 1990 was $0 and that his net loss for the fourth quarter of 1990 was $2600–$867=$1533.

Marrero next worked at a supermarket called Royal Farms, Inc. The Respondent contends that Marrero quit this job and offered into evidence a document from Royal Farms which showed that his personnel record was marked with a "J" which, according to Angelina Samuelsen was a code for "walk off." Samuelsen, an employee of Royal Farms, did not have any personnel knowledge of the circumstances that Marrero left and he testified, without contradiction that he was laid off for lack of work. Marrero worked at this job for about a month and the

[5] The General Counsel added Lloyd's Fashions as an interim employer during the hearing and before issuing the second amended backpay specification.

[6] Marrero worked on several separate occasions at his parent's store and these periods are reflected in the second amended specification. He did not work there on a permanent basis because the store was not always able to support his parents and him at the same time.

[7] Mistakes made by a discriminatee in reporting interim earnings through "poor record keeping, uncertainty as to memory, and perhaps exaggeration" are not grounds for disqualifying an employee from receiving backpay. *Kansas Refined Helium Co*., 252 NLRB 1156 (1980).

backpay specification, as amended, concedes that he had interim earnings from this job of $512. In this respect, I conclude that the Respondent has not met its burden of showing that Marrero quit his job at Royal Farms, Inc.

According to the personnel records of Marriott Corp., Marrero was hired by this company on March 28, 1991, and left on April 26, 1991. (This is 5 weeks of employment beginning in the first quarter of 1991 and ending in the second quarter of 1992.) The records show that he was hired on a 40-hour per-week basis and that his wage rate was $5.25 per hour.

Marrero testified that he was hired by Marriott as a porter to replace a worker who had a great deal more experience than him. Marrero testified that his supervisor told him that although he was a good worker he was not as fast as the man he replaced. According to Marrero, he was let go when the man he replaced came back to work.

The Respondent called William Duggan, an employee of Marriott, to testify about some records obtained from that company. Testifying from the records, Duggan stated that during the time that Marrero worked for Marriott, he was absent 1 or more days, during 4 of the 5 weeks that he worked. He also testified that the records show that Marrero had a termination code 90 which means that no hours of work were submitted to the payroll department for him over a 7-week period. In this respect, Duggan said that he could not conjecture that Marrero had either quit or been fired because he had failed to show up for 7 weeks. Although indicating that this was a possible inference, the code 90 did not necessarily mean that either was the case.

As Duggan did not have any personnel knowledge of the circumstances that Marrero left Marriott and as the Company's records do not unambiguously demonstrate either that he quit or was fired for cause, I shall credit Marrero's version. During the first quarter of 1991, Marrero's earnings from Marriott were $114. During the second quarter of 1991, his earnings from Marriott were $729.75.

Marrero's next employment was at Curran Security where he worked from the second quarter of 1991 until sometime in the first quarter of 1992. His interim earnings from this job were respectively $114, $2545.50, $1950, and $1587 for each of the quarters that he worked. The Respondent did not dispute any matters in relation to Marrero's job at Curran Security.

The second amended backpay specification concedes that Marrero worked at his parents store (3J's Video), from the second quarter of 1992 through some portion of the second quarter of 1993. As it is conceded that his earnings during most of this time exceeded what he would have earned had he stayed at Viking, the only quarter for which net backpay is sought is the second quarter of 1992 when his earnings at 3J's was $1450.

During the fourth quarter of 1993, Marrero got a job at a company called Multi Plan and earned $480 before being laid off by that company. Although Respondent points to testimony of Marrero indicating that he might not have been laid off if he had worked harder, the Respondent has not shown any evidence which would demonstrate a willful loss of work as defined in *Ryder Systems*, supra.

The next job obtained by Marrero was at Wells Fargo Guard Services. He obtained this job during the first quarter of 1994 and worked continuously through the remainder of the year. Although there was some question as to why he left Wells Fargo, this need not be resolved in this decision inasmuch as the second amended backpay specification only calculates backpay up to December 31, 1994; leaving open any claimed backpay amounts after that date. In the second quarter of 1994, Marrero earned $1049.20 whereas in the third, and fourth quarters of 1994, his earnings from Wells Fargo exceeded the amounts that he would have earned had he not been discharged from Viking. Accordingly, the net backpay for the third and fourth quarters of 1994 equals zero.

The Respondent argues that under any circumstances, the backpay period should be cut off as of December 10, 1990, that being the date that Viking New York went out of business. He contends that had Marrero not been discharged in the first place, he nevertheless would have lost his job when Viking New York ceased doing business.

There are two reasons why I disagree with the Respondent on this issue. In the first place, the testimony of Widman was that after Viking New York went out of business, it was sold to another company who hired most or all of Viking's employees. Thus, it is probable that Marrero would have continued to be employed after December 10, 1990. Second, since I have concluded that Viking New Jersey and Viking New York constituted a single-integrated enterprise in September 1989 when Marrero was illegally discharged, it then became incumbent on Viking New York and/or Viking New Jersey to offer reinstatement to Marrero in order to terminate its backpay liability. While Respondent asserts that it is clear that Marrero would not have commuted from Brooklyn to New Jersey, this is not so clear to me. We do not know what Marrero would have done because he was not offered such employment.[8]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Viking Industrial Security, Inc. and Viking Security Inc., a/k/a Viking Industrial Security, Inc., Brooklyn, New York, and Demerast, New Jersey, its officers, agents, successors, and assigns, shall

1. Viking New York, and Viking New Jersey, constituted a single-integrated enterprise at the time the original unfair labor practices occurred, and Viking of New Jersey is derivatively liable for the unfair labor practices previously found.

2. Viking New York and Viking New Jersey are jointly and severally liable for the backpay amount determined in this decision.

3. Viking New Jersey is obligated to make an unconditional offer of employment to Israel Marrero and until it does so, it shall remain liable for additional backpay.[10]

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[8] Respondent's reliance on *Coast Delivery Service*, 198 NLRB 1026 (1972), seems to be a bit misplaced. In that case, which was a backpay proceeding, three additional companies were alleged to be derivatively liable for the unfair labor practices committed by the original defendant, Coast Delivery Service Inc. The three other corporations were not named in the original complaint and were only added in the backpay specification. The administrative law judge, with Board approval, found that two of the additional companies were not sufficiently related to the original respondent to be derivitively liable whereas one, Western Transfer, was sufficiently related so as to be liable for the backpay. Nevertheless, the backpay period was cut off as Coast Delivery *and* Western Transfer both ceased operations at the end of December 1968.

[9] 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.

4. The amount of backpay from September 23, 1989, through December 31, 1994, without counting interest is $20,388.60.

APPENDIX

Backpay owed by Respondents from September 23, 1989, to December 31, 1994. Gross backpay is based on the fact that Marrero earned $5 per hour and worked a 40-hour week at Viking New York. Thus for the third quarter of 1989, his gross backpay would be $200 and his gross backpay for every succeeding quarter would be $2600.

	Employer	*Earnings*	*Net Backpay*
1989			
Q3	None	0	$200
Q4	Prompt Temps	$600	2000
1990			
Q1	Lloyd's Fashions	677.50 1950.00	
	3J's Video	2627.50	0
Q2	3J's Video	600.00 558.75	
	Elmont Cemetery	1158.75	1441.25
Q3	Elmont Cemetery	656.25 & quit	0
Q4	None	Quit Elmont	1533.00
		But job would have ended in October	
1991			
Q1	Royal Farms	512.00 168.00	
	Marriott	680.00	1920.00
Q2	Marriott	729.75 114.00	
	Curran Security	843.75	1556.25
Q3	Curran Security	2545.50	54.50
Q4	Curran Security	1950.00	650.00
1992			
Q1	Curran Security	1587.20	1012.80
Q2	3J's Video	3000.00	0
Q3	3J's Video	3250.00	0
Q4	3J's Video	3000.00	0
1993			
Q1	3J's Video	3000.00	0
Q2	3J's Video	1450.00	1150.00
Q3	None	0	2600.00
Q4	Multiplan	480	2120.00
1994			
Q1	None	0	2600.00
Q2	Wells Fargo	1049.20	1550.80
Q3	Wells Fargo	4560.13	0
Q4	Wells Fargo	3743.63	0

Grand total exclusive of interest: $20,388.60

[10] Despite a contention that Elman who represented Viking New York in the underlying case, may have communicated a reinstatement offer to Marrero, no definitive evidence of such an offer was made and Marrero credibly denied that he received such an offer.