

**A-1 Fire Protection, Inc., and Corcoran Automatic Sprinklers, Inc. and Road Sprinkler Fitters Local 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. Case 7-CA-12659**

June 27, 1980

**SUPPLEMENTAL DECISION AND ORDER**

**BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO**

On October 18, 1977, the National Labor Relations Board issued its Decision and Order<sup>1</sup> in this proceeding in which it dismissed the allegations of the complaint that Respondents Corcoran Automatic Sprinklers, Inc. (CAS), and A-1 Fire Protection, Inc. (A-1), violated Section 8(a)(5) of the National Labor Relations Act, as amended, by transferring work from CAS to A-1 and by refusing to treat employees of CAS and A-1 as a single bargaining unit and to extend the contract between CAS and the Union to A-1 employees. The Board adopted Administrative Law Judge Phil W. Saunders' findings that Respondents violated Section 8(a)(3) and (4) of the Act by discharging and/or refusing to hire employee Michael Nunn. Thereafter, the Charging Party and Respondents petitioned the United States Court of Appeals for the District of Columbia for review of the Board's Order, and the Board cross-petitioned for enforcement of its Order. On April 11, 1979, a panel of the court affirmed and enforced the Board's Order with respect to the 8(a)(3) and (4) findings but remanded the 8(a)(5) portion of the case to the Board for further explication of its rationale in light of the court's opinion.<sup>2</sup>

On June 15, 1979, the Board accepted the court's remand and notified the parties that they could file statements of position concerning the issues raised by the remand. Subsequently, the General Counsel, the Charging Party, and Respondents filed statements of position.<sup>3</sup>

<sup>1</sup> 233 NLRB 38.

<sup>2</sup> *Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO v. N.L.R.B.*, 600 F.2d 918.

<sup>3</sup> The Charging Party also filed a "Motion To Reopen the Record and a Motion for Special Leave To File a Reply Brief." The motion to reopen the record is hereby denied as untimely. The motion was filed on July 17, 1979, almost 3 years after the close of the hearing in this case on August 3, 1976. Some of the evidence which the Charging Party seeks to introduce through this motion involves facts which allegedly occurred within the appropriate time period for filing such a motion, and there is no indication that these facts were not available to the Charging Party during that time period. The other evidence which the Charging Party seeks to introduce through this motion involves facts which allegedly occurred long after the close of the hearing. See Sec. 102.48(d) of the National Labor Relations Board Rules and Regulations, Series 8, as amend

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board had reviewed the entire case in light of the court's decision and the statements of position on remand and now makes the following findings:

As fully set forth in the Board's original Decision, Respondents CAS and A-1 constitute a single employer. Both companies are engaged in fire sprinkler installation. Their owner, George Corcoran, formed the two companies in 1973 with the intention of maintaining a "double breasted" operation whereby CAS could bid on jobs that required union contractors and A-1 could bid on jobs which permitted nonunion wages and working conditions. In 1973, before hiring any employees, Corcoran sought out the Union and entered into a contract with the Union covering CAS's employees who install and maintain fire protection systems. The Union was not aware of the existence of A-1 when it signed the CAS contract, but learned of A-1's existence later in 1973. When Corcoran informed the Union of A-1's existence, the Union advised Corcoran that A-1 could not bid on nonunion work because such work belonged to the Union. Pantell, the union business agent, also told Corcoran that A-1 would have "to join" the Union. Corcoran refused.

A-1 began hiring employees to install and maintain fire protection systems in 1975. In January 1975, Corcoran told Pantell that he was forced to lay off CAS employees, but that he could hire them to work on A-1 jobs. Pantell grudgingly assented, and Corcoran employed several CAS employees to work for A-1, paying them union wages, but not union benefits.

In May 1975, Corcoran entered into a second collective-bargaining agreement with the Union covering CAS employees. The Union did not request that the contract cover A-1 or its employees, nor was the subject of extending coverage to A-1 employees discussed during negotiations. In November 1975, the Union demanded that CAS and A-1 employees be treated as a single bargaining unit and that the 1975 contract be applied to A-1. Corcoran refused. The Union then filed unfair labor practice charges, alleging that CAS and A-1 violated Section 8(a)(5) by withdrawing work from

ed. Moreover, the Charging Party's motion appears to be a belated attempt to assert additional unfair labor practice charges. The Charging Party's motion for special leave to file a reply brief is, however, granted and its contents, as well as the contents of Respondent's brief in opposition to the motion, have been considered by the Board.

CAS and by refusing to recognize that A-1 employees were covered by the 1975 agreement.

Prior to learning of the Union's charges, Corcoran suggested to the then union business agent, Johnson, that they could resolve their differences if an A-1 job were subcontracted to CAS and if Michael Nunn, a union member, were employed on the job. After learning of the Union's unfair labor practice charges, Corcoran decided not to subcontract the job to CAS and not to employ Nunn. The Union then filed additional unfair labor practice charges, alleging violations of Section 8(a)(3) and (4).

In its Decision, the Board did not adopt the Administrative Law Judge's conclusion that Respondents violated Section 8(a)(5) of the Act by refusing to extend the terms of the 1975 collective-bargaining agreement between Respondent CAS and the Union to the employees of Respondent A-1 and by transferring work from CAS to A-1. The Board agreed with the Administrative Law Judge's findings that, in August 1973, CAS and the Union executed a prehire agreement covering a unit of journeymen and apprentice sprinkler fitters and that CAS, which Corcoran operates as a union company, and A-1, which he operates nonunion, constitute a single employer. Contrary to the Administrative Law Judge, however, the Board found that the Union knowingly acquiesced in Respondents' employment of CAS employees to work for A-1 on nonunion jobs and that it subsequently failed to request that A-1 employees be covered by the second collective-bargaining agreement with CAS executed on May 1, 1975. On these facts, the Board found that the Union voluntarily agreed to the appropriateness of a bargaining unit limited to CAS employees.<sup>4</sup> The Board found, therefore, that Respondents did not violate Section 8(a)(5) in November 1975, when they refused the Union's request to treat CAS and A-1 employees as a single bargaining unit and to extend the CAS contract to A-1 employees. The Board further found, contrary to the Administrative Law Judge, that Respondents did not violate Section 8(a)(5) of the Act by transferring work from CAS to A-1. This conclusion was based on the Union's knowing acceptance of Respondents' "double breasted" operation, which permitted Respondents to compete for both union and nonunion jobs; on the absence of evidence that work was in fact "transferred" from CAS to A-1; on the absence of evidence that the CAS bargain-

<sup>4</sup> In finding that the clear intent of the parties to the 1975 collective-bargaining agreement was to cover only CAS employees and that there was no intent to cover A-1 employees, the Board noted that it could not impose upon the parties a contract to which they had not agreed and suggested that the proper course of action for the Union was to petition for an election among the employees of A-1.

ing unit had ceased to exist as a bargaining unit; and on A-1's inability, as a nonunion company, to qualify to perform CAS' union jobs.

The court of appeals, in framing the issue, stated: "The central point in dispute in this case is the proper legal standard for determining whether the union relinquished its right to claim that the 1975 agreement applied to A-1 employees when it signed a collective bargaining agreement with CAS in May 1975."<sup>5</sup> In remanding this case to the Board, the court directed that the Board explain its failure to discuss and/or apply the "clear and unmistakable waiver" standard, which the Board and the courts have applied in other circumstances to determine whether parties to collective-bargaining relationships have relinquished statutory rights.

In its statement of position on remand, the General Counsel asserts that this case is controlled by *Don Burgess Construction Corporation d/b/a Burgess Construction and Donald Burgess and Verlon Hendrix d/b/a V & B Builders*,<sup>6</sup> in which the Board adopted the Administrative Law Judge's findings that the respondent companies constituted a single employer and violated Section 8(a)(5) and (1) of the Act, *inter alia*, by failing to apply a collective-bargaining agreement between V & B Builders and the union to carpenters employed by Burgess Construction. In its statement of position, the Charging Party Union argues that the collective-bargaining agreement between CAS and the Union at all times covered the employees of both CAS and A-1, and that Respondents abrogated the agreement by withdrawing recognition from the Union and transferring work from CAS to A-1. Citing, *inter alia*, *Appalachian Construction, Inc. and SE-OZ Construction Company, Inc.*,<sup>7</sup> the Union contends that Respondents' double-breasted operation violated Section 8(a)(5) and (1) of the Act. The Union further asserts that the Board's clear and unmistakable waiver of statutory rights standard is applicable to this case, and that, under this standard, there has been no waiver of statutory rights or of Respondents' unfair labor practices. Like the General Counsel, the Union asserts that this case is controlled by *Burgess Construction*.

We shall address the contentions of the General Counsel and the Union with respect to the above-cited Board precedent before moving on to the issue remanded by the court of appeals, *viz*, the applicability here of the "clear and unmistakable waiver of statutory rights" standard.

*Burgess Construction*, and similar cases, involved situations in which employers, through deception

<sup>5</sup> 600 F.2d at 921.

<sup>6</sup> 227 NLRB 765 (1977), *enfd.* 596 F.2d 378 (9th Cir. 1979).

<sup>7</sup> 235 NLRB 685 (1978).

and misrepresentation, used related companies<sup>8</sup> to evade their obligations under collective-bargaining agreements, to deprive bargaining unit employees of the fruits of collective bargaining, and to destroy bargaining units. In those cases, the employers surreptitiously and unilaterally transferred and shifted work away from bargaining unit employees to employees of related companies. To determine whether the unions in those cases knowingly agreed to the respondents' use of related companies in this manner, the Board has applied an "acquiescence" standard. Upon findings that the unions did not acquiesce and the respondent companies acted surreptitiously and used deception and misrepresentation, the Board extended coverage of the relevant collective-bargaining agreements to include employees of the related, nonunionized companies. This, not because of a finding that the unions had clearly and unmistakably waived a right to represent the employees of the nonunionized companies, but rather to preserve the recognized bargaining unit and the previously established right of the employees therein to be represented.

Those circumstances, however, are not present in this case. The Union was aware of A-1's existence and the fact that A-1 was engaged in sprinkler installation work. In January 1975, well before the execution of the second collective-bargaining agreement, the Union assented to Corcoran's request that CAS employees be hired to work for A-1. While the record shows that both CAS and A-1 bid on sprinkler installation jobs, there is no evidence that jobs bid for and performed by CAS were transferred to A-1. As indicated in the Board's original Decision, there is evidence that since 1975 the work of CAS decreased and that of A-1 increased. However, we will not assume from that alone, particularly in light of the Union's knowledge of Respondent's double-breasted operation, that Respondents transferred jobs from CAS employees represented by the Union to A-1 employees. Accordingly, since we find no probative evidence that Respondents engaged in deception or that they transferred work away from their union-represented employees to their nonunion employees, we conclude that the General Counsel's and the Union's reliance on *Burgess Construction* and similar cases is misplaced and that those cases are not controlling here.

As indicated previously, the court of appeals remanded the 8(a)(5) portion of this case so that the Board could explain its failure to discuss and/or

<sup>8</sup> Cf. *P. A. Hayes, Inc. and P. H. Mechanical Corp.*, 226 NLRB 230 (1976), which involved neither a double-breasted operation as in *Burgess Construction* nor a subsidiary company as in *Appalachian Construction*, but instead involved an *alter ego* situation.

apply the "clear and unmistakable waiver of statutory rights" standard to the facts of this case. As the court noted, this standard<sup>9</sup> had been applied by the Board and various courts to determine whether parties to collective-bargaining relationships have relinquished statutory rights. Under this standard, there is a presumption that employees and labor organizations, in their collective-bargaining agreements, have not abandoned rights guaranteed them in the Act. The presumption is rebutted only by evidence establishing that a statutory right has been clearly and unmistakably relinquished. Most commonly, the issue of waiver of a statutory right arises in cases involving the obligations of employers and collective-bargaining representatives under Sections 8(a)(5), 8(b)(3), 8(d), and 9(a) of the Act to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." Under these sections of the Act, the parties are required to bargain collectively about mandatory subjects of bargaining, i.e., those subjects which are covered by the phrase "wages, hours, and other terms and conditions of employment." When an employer defends itself against an allegation that it had violated its duty to bargain about a particular subject by claiming that the representative of its employees waived its right to bargain, and had thereby relieved the employer of its corresponding duty, the Board examines the collective-bargaining agreement and the circumstances surrounding the making of the agreement to determine whether there has been a clear and unmistakable waiver. Thus, the Board has applied the clear and unmistakable waiver standard in determining whether unions have waived their statutory rights to bargain about such subjects as discontinuation of year-end bonuses;<sup>10</sup> institution and modification of rentals charged for occupancy of employer-provided trailer space;<sup>11</sup> discontinuation of payroll deductions for group health insurance;<sup>12</sup> expiration of an employee retirement plan;<sup>13</sup> and termination of an employee appliance purchase plan.<sup>14</sup> In each of these cases,<sup>15</sup> the Board examined the language of

<sup>9</sup> The clear and unmistakable waiver standard has also been referred to as the clear and unequivocal waiver standard.

<sup>10</sup> *Pepsi-Cola Distributing Company of Knoxville, Tennessee, Inc.*, 241 NLRB 869 (1979).

<sup>11</sup> *Granite-Ball-Groves, A Joint Venture*, 240 NLRB 1173 (1979).

<sup>12</sup> *Rose Arbor Manor, A Division of Geriatrics, Inc.*, 242 NLRB 795 (1979).

<sup>13</sup> *Elizabethtown Water Company*, 234 NLRB 318 (1978).

<sup>14</sup> *Western Massachusetts Electric Company*, 228 NLRB 607 (1977).

<sup>15</sup> See also *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) [General Motors Corporation] v. N.L.R.B.*, 381 F.2d 265 (D.C. Cir. 1967), and *Office and Professional Employees International Union, Local 425 AFL-CIO [Brotherhood of Locomotive Firemen & Engineers] v. N.L.R.B.*, 419 F.2d 314 (D.C. Cir. 1969), cited by the court of appeals in the instant proceeding, in which

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the collective-bargaining agreements and the facts and circumstances surrounding the making of the agreements to determine whether there was a clear and unmistakable waiver of the right to bargain about mandatory subjects of bargaining.

This standard has also been applied in cases involving statutory rights other than the right to bargain about mandatory subjects of bargaining, e.g., to determine whether a union waived its right to receive wage and employment information pertaining to bargaining unit employees,<sup>16</sup> whether a collective-bargaining agreement precluded union-sponsored employee demonstrations,<sup>17</sup> whether an employer waived its right to petition the Board for an election,<sup>18</sup> and whether a union waived its right to represent employees in a bargaining unit covered by a Board certification.<sup>19</sup>

In remanding this case to the Board for an explanation of its failure to apply the clear and unmistakable waiver standard to the instant facts, the court of appeals expressed "difficulty understanding how [this factual situation] . . . differs from the traditional waiver situation." The crucial distinction, however, is that, in the circumstances of this case, the Union did not have a statutory right to represent the employees of A-1, and thus had no right which could have been waived, clearly and unmistakably, or otherwise. The dispute between Respondents and the Union in this case involved the scope of the bargaining unit covered by Respondent CAS' voluntary recognition and its collective-bargaining agreements with the Union. The dispute did not involve a mandatory subject of bargaining.<sup>20</sup> Nor did the Union's desire to represent the employees of A-1 rise to a statutory right under sections of the Act other than Sections

the court applied the clear and unmistakable waiver standard in determining whether the unions had waived their rights to bargaining about "contracting out" unit work and changes in employee classifications, respectively.

<sup>16</sup> *Globe-Union, Inc.*, 233 NLRB 1458 (1977).

<sup>17</sup> *Insurance Workers International Union, AFL-CIO, Local 60 (John Hancock Mutual Life Insurance Company)*, 236 NLRB 440 (1978).

<sup>18</sup> *Retail Clerks International Association Local No. 453 [Kroger Company] v. N.L.R.B.*, 510 F.2d 802 (D.C. Cir.1975), Supplemental Decision on remand 219 NLRB 388 (1975).

<sup>19</sup> *Hunt Brothers Construction, Inc.*, 219 NLRB 177 (1975).

<sup>20</sup> The scope of a bargaining unit, unlike "wages, hours, and other terms and conditions of employment," is not a mandatory subject of bargaining. See, e.g., *Prierm, Inc.*, 240 NLRB 654 (1979); *Canterbury Gardens and Manchester Gardens, Inc.*, 238 NLRB 864 (1978). While parties to collective-bargaining relationships may voluntarily agree to change the scope of an established bargaining unit, neither party has a statutory right to force upon the other party an enlargement or alteration of an existing unit. *International Brotherhood of Electrical Workers, AFL-CIO-CLC (Steinmetz Electrical Contractors Association, Inc.)*, 234 NLRB 633 (1978); *Shell Oil Company, and its Divisions Shell Chemical Company and Shell Development Company*, 194 NLRB 988 (1972). See also *Hunt Brothers Construction, Inc.*, *supra*. Established bargaining units, of course, may be altered by Board determinations of appropriateness under Sec. 9 of the Act, for example, where the Board finds employees are an accretion to an established unit.

8(a)(5) and 8(d). In its statement of position, the Union refers to "the employees' Section 7 right to be represented by the Union"; to the "statutory protection of the bargaining unit"; and to its own "right to protect its recognitional status." However, nothing in the Act grants the Union a *right* to alter or enlarge the CAS bargaining unit, which had been agreed to at the time of the initial recognition in 1973 and had been maintained, with the Union's knowledge of A-1's existence and without comment from the Union, through negotiation and execution of the 1975 collective-bargaining agreement.

In resolving disputes over the scope of a bargaining unit, the Board's starting point consistently had been its policy of accepting voluntary agreements between parties on unit scope, whether made as part of a voluntary recognition agreement or entered into in a Stipulation for Certification Upon Consent Election. In light of this policy, the Board's analysis of such a dispute includes an examination of the agreed-upon unit and an examination of the circumstances surrounding the alleged agreement on unit scope to determine whether it in fact reflects the intent of the parties and constitutes a voluntary agreement.

In examining the agreed-upon bargaining unit of CAS employees, we recognize that the fact that CAS and A-1 constitute a single employer does not alone dictate that separate units are inappropriate.<sup>21</sup> The Board and courts have acknowledged that in the construction industry a single employer may have one company to perform contracts under union conditions and another company to operate under nonunion conditions, and the Board has refused in the past to include nonunion company employees in the same unit with employees of the union company.<sup>22</sup> Thus, if in fact there is a voluntary agreement on unit scope here, we will not disturb that agreement in this unfair labor practice proceeding, and we will not allow the Union to avoid the terms of that agreement by asserting an unfair labor practice in Respondents' refusal to enlarge the unit to include A-1 employees.

With respect to the circumstances surrounding an agreement on unit scope, a party's knowing acquiescence in existing conditions is an expression of the voluntariness of its agreement to those conditions. The circumstances here clearly indicate a

<sup>21</sup> *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers, AFL-CIO*, 425 U.S. 800 (1976), citing, *inter alia*, *Central New Mexico Chapter, National Electrical Contractors Association, Inc.*, 152 NLRB 1604 (1965).

<sup>22</sup> *Temple-Eastex, Incorporated, Inc., etc.*, 228 NLRB 203 (1977); *B & B Industries, Inc., and Fred Beachner, an Individual d/b/a Fred Beachner Construction Co.*, 162 NLRB 832 (1967). See also *Central New Mexico Chapter, supra*.

voluntary agreement on unit scope and reflect that the parties did not intend to include the employees of A-1 in the bargaining unit. Although the Union grudgingly assented to Corcoran's double-breasted operations and his manner of conducting his business, it did assent to a unit limited to CAS employees through its knowing acquiescence to existing conditions during negotiations and execution of the May 1975 collective-bargaining agreement.<sup>23</sup> The remedy for the Union's dissatisfaction with the unit scope in November 1975 cannot be found in a claim that Respondents violated Section 8(a)(5) of the Act.

In conclusion, we find, with all due respect to the court of appeals, that application of the clear and unmistakable waiver standard is not warranted here.<sup>24</sup> In light of our finding that the parties knowingly and voluntarily entered into an agreement on the scope of the unit represented by the Union, we further find that Respondents have not violated Section 8(a)(5) and (1) of the Act by refusing to extend the collective-bargaining agreement between CAS and the Union to employees of A-1. Accordingly, we shall reaffirm the prior Order in this case and dismiss the 8(a)(5) allegations of the complaint.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby reaffirms its Order of October 18, 1977 (at 233 NLRB 38), and orders that the 8(a)(5) allegations of the complaint be, and they hereby are, dismissed.

CHAIRMAN FANNING, dissenting:

I agree with Members Jenkins and Penello, for the reasons given by them, that application of the "clear and unmistakable waiver" test would be inappropriate in this case. However, I do not join

<sup>23</sup> In this regard, the circumstances of this case are analogous to a unit clarification proceeding. It is well established that the Board will not clarify an established bargaining unit by including employees who might otherwise be appropriately included in the unit if their job classifications were in existence at the time of certification, recognition, or execution of a collective-bargaining agreement and if their duties have not undergone recent, substantial changes which create real doubt as to their unit replacement. See *Union Electric Company*, 217 NLRB 666 (1975). We consider it even less proper to find that an employer violated the Act by refusing to enlarge an agreed-upon bargaining unit to include employees who were not intended to be covered by the bargaining agreement.

<sup>24</sup> Citing *Radioear Corporation*, 199 NLRB 1161 (1972), Supplemental Decision 214 NLRB 362 (1974), the court of appeals suggested that the Board is moving away from the "clear and unmistakable waiver" to a "contract interpretation" standard in determining whether a party has waived a statutory right. Because of our finding, as set forth above, that the Union has not acquired a statutory right to represent the employees of Respondents' nonunionized company, we find it unnecessary to discuss contract interpretation standard as a means to resolve issues concerning waiver of statutory rights.

their opinion because, in my judgment, a violation of Section 8(a)(5) was established here.

As I see it—and apparently I am in further agreement with my colleagues on this point—the issue here is an evidentiary one. But the evidentiary question is not simply whether the Charging Party acquiesced in the creation of a double-breasted operation. Rather, it is whether Corcoran concealed the manner in which the double-breasted operation was to be employed and whether that manner was unlawful under the Act. If he did and it was, the Charging Party's acquiescence was only literal and not a knowing one.<sup>25</sup>

In his Decision, the Administrative Law Judge states:

It is alleged . . . that Respondents changed work arrangements so as to reduce the amount of work for the employees of Respondent [CAS]. The record in this case amply supports this allegation . . . . [S]ince early 1975 George Corcoran operated A-1 with the apparent purpose of ultimately dissolving Respondent [CAS]. Thus, in November 1975, George Corcoran, in reply to a question by Gary Sears . . . stated that he [Corcoran] generally only laid off union members but that nonunion employees of A-1 were never laid off. [He] . . . also advised Sears that he would shortly phase out Respondent[CAS] and that A-1 would take over the sprinkler work. Similarly . . . Corcoran told Business Agent Johnson and others present that in a 6-month period there would be less people working for Respondent [CAS] . . . . Corcoran likewise conceded that much of the work now being done by A-1 is being done for customers like Kroeger stores and K-Mart, which were previously customers of Respondent [CAS].

The above factual findings—as opposed to the conclusions to be drawn from them—are not reversed by the majority. And based upon those facts, I believe the Administrative Law Judge's conclusion that Respondents violated Section 8(a)(5) was fully justified. Work may not have been "transferred" from CAS to A-1, as the majority notes, but the Administrative Law Judge was not so literal. He found that Corcoran "changed work

<sup>25</sup> It is quite possible that this distinction between acquiescence in the creation of a double-breasted operation and the quality of the acquiescence is the source of whatever confusion there is about the governing legal standard to be applied. From the Charging Party's standpoint, and perhaps the court's, the notion that any labor organization would "consent to" a working arrangement intended to phase its representative status out of existence is sufficiently far fetched to call for a requirement that such "consent" be demonstrated clearly, unmistakably, irrefutably, etc.

arrangements so as to reduce the amount of work for the employees of [CAS].” Like the majority, I too would not “assume” that Corcoran “transferred” work on the sole basis that CAS’s work decreased and A-1’s increased. But, given the Administrative Law Judge’s apparently credited factual findings, there is much more to the General Counsel’s case than that. Corcoran initially concealed from the Charging Party A-1’s very existence. That the Charging Party subsequently may have ratified that *fait accompli* does not detract from the bearing its original concealment has on Corcoran’s purposes and by no means suggests that the Charging Party ratified what followed. Somehow, in advance, Corcoran knew only CAS employees would get laid off, never A-1 employees, that CAS would be phased out, and that, in 6 months, fewer people would be working for CAS; and, in point of fact, customers like Kroeger stores and K-Mart, former contractors of CAS, subsequently became contractors of A-1. Under these circumstances—circumstances I do not read the

majority opinion to dispute—the Charging Party may have consented to a double-breasted operation, but it certainly did not consent to the one it got.

Although the course of conduct found in *Burgess Construction*<sup>26</sup> may have been more glaring, its basic point, as my colleagues observe, is that an employer unilaterally may not so employ related companies or enterprises as to undermine the preservation of a recognized bargaining unit. As I view the evidence, that precisely is what happened here. Had I been on the original panel decision, I would have found *Burgess*, as urged by the General Counsel, to be controlling and, on the basis of it, extended coverage of the CAS agreement to include the employees of A-1, inasmuch as both constitute a single employer. I consequently cannot join my colleagues in their otherwise thoughtful response to the court’s remand.

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<sup>26</sup> 227 NLRB 765 (1977), *enfd.* 596 F.2d 378 (9th Cir. 1979).