

Nos. 06-1368, 06-1393

**UNITED STATES COURT of APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**ASHER CANDY, INC., AND
SHERWOOD BRANDS, INC.**

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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* Board Case No.
* 29-CA-26761
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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

(A) Parties and Amici: Asher Candy, Inc., and Sherwood Brands, Inc., (collectively “the Companies”), are petitioners in this Court and were respondents before the Board. The Board is respondent in this Court. The Board’s General Counsel was a party before the Board. Local 102, Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL-CIO, was charging party before the Board.

(B) Rulings Under Review: This case is before the Court on the Companies’ petition for review of an order issued by the Board on October 24, 2006, and reported at 348 NLRB No. 60, and on the Board’s cross-application for enforcement of that order.

(C) Related Cases: This case has not previously been before this Court or any other court. The Board is not aware of any related cases pending in or about to be presented to this Court or any other court.

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Dated at Washington, DC
this 20th day of August, 2007

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

Act	National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)
Asher	Asher Candy, Inc.
Board	National Labor Relations Board
Companies	Collective reference to Asher Candy, Inc., and Sherwood Brands, Inc.
<i>Honeywell</i>	Opinion in <i>Honeywell International, Inc. v. NLRB</i> , 253 F.3d 125 (D.C. Cir. 2001)
MOA	2002 Memorandum of Agreement between the Companies and the Union
SEC	Securities and Exchange Commission
Sherwood	Sherwood Brands, Inc.
Union	Local 102, Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL-CIO

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

No. 06-1368 is before the Court on the petition of Asher Candy, Inc., and Sherwood Brands, Inc. (referred to individually as “Asher” and “Sherwood,” respectively, and collectively as “the Companies”), for review of an Order of the National Labor Relations Board (“the Board”). No. 06-1393 is before the Court on the Board’s cross-application for enforcement of its Order.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151, 160(a) (“the Act”). This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board’s Decision and Order, issued on October 24, 2006, is reported at 348 NLRB No. 60. (A 12-13.)¹ The Order is a final order within the meaning of Section 10(f) of the Act.

The Companies filed their petition for review on November 6, 2006. The Board filed its cross-application for enforcement on November 29, 2006. Section 10(e) and (f) of the Act place no time limits on the filing of petitions for review or applications for enforcement of Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board’s finding that Asher and Sherwood constitute a single employer.
2. Whether substantial evidence supports the Board’s finding that the Companies violated Section 8(a) (5) and (1) of the Act by failing to bargain in

¹ “A” references are to the printed appendix. “SA” refers to the supplemental appendix, consisting of transcript pages designated by the Board, but omitted from the appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

good faith with the Union about the effects of their decision to close the Asher facility.

3. Whether substantial evidence supports the Board's finding that the Companies violated Section 8(a) (5) and (1) of the Act by refusing to pay severance pay to the Asher employees, thereby unilaterally changing an existing term and condition of employment.

RELEVANT STATUTORY PROVISIONS

Relevant portions of the Act are set forth between p. 4 and p. 5 of the Companies' brief.

STATEMENT OF THE CASE

On unfair labor practice charges filed by Local 102, Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL-CIO ("the Union"), the Board's General Counsel issued a complaint alleging that Asher and Sherwood were a single employer and had violated Section 8(a)(5) and (1) of the Act (A 259-68.) After a hearing, Administrative Law Judge Howard Edelman found that the Companies were a single employer and had violated the Act as alleged in the complaint. He recommended that the Companies be ordered to cease and desist from the conduct found unlawful and to take affirmative remedial action (A 13-17.) The Companies filed exceptions.

The Board (Chairman Battista and Members Liebman and Kirsanow) affirmed the administrative law judge's single-employer finding and his findings of violations, and adopted his recommended remedial order with modifications. (A 12-13.) The Companies filed a petition for review, and the Board filed a cross-application for enforcement.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Relationship Between Asher and Sherwood

Asher manufactured candy canes at its facility in New Hyde Park, New York, for many years. Its business was seasonal; it hired employees between January and April of each year and laid them off in October. Many skilled employees were recalled each year over a long period. (A 14; 66-67, SA 28, 51-52, 64.)

Sherwood manufactures, markets, and distributes a number of lines of candies, cookies, and gift baskets. It has several subsidiaries and facilities in several states and abroad. (A 14; 59, 365-70.)

Sherwood acquired Asher in April 2002. (A 14; 58.) Thereafter, Uziel Frydman (Sherwood's president, chief executive officer, and chairman of the board) was also president of Asher. (A 15; SA 3.) In addition, Chris Willi was chief financial officer for both Asher and Sherwood. (A 14; 71, SA 11.) Jim

Spampinato, former president and co-owner of Asher, became Asher's general manager and was responsible for its day-to-day operations. (A 14; 112-14, 204, SA 26-27.)

In its reports to the Securities and Exchange Commission ("SEC") and on its website, Sherwood referred to all its subsidiaries' products, including those of Asher, as its own products, and to customers of the subsidiaries as Sherwood customers. (A 365-446.) Also in a report to the SEC, Sherwood stated (A 15; 399):

As of October 8, 2004, the Company had approximately 61 full-time employees and approximately 112 part-time or seasonal employees. Of the Company's full-time workforce, 16 are located at the Company's principal office in Rockville MD. The Company has approximately 36 full and part-time employees in Virginia, approximately 75 full, part-time and seasonal employees in Rhode Island and Massachusetts and 46 full, part-time and seasonal employees in its New Hyde Park NY facility. Management believes that the Company's relationship with its employees is good. The 40 employees at the Asher Candy facility are the Company's only employees represented by labor unions under a collective-bargaining agreement.

* * * *

Sherwood handled payroll functions for all its subsidiaries, including Asher, whose employees were paid with Sherwood checks. (A 72-80, 88.) Sherwood also made pension and dues payments to the Union on Sherwood checks. (A 16; 82, SA 5.) Major decisions such as entering into collective-bargaining agreements

and paying severance pay, as well as eliminating a shift and authorizing non-emergency overtime work, required the approval of Sherwood's board of directors. (A 16; 130, 146, SA 18, 39, 79, 83.) On several occasions, Asher employees were temporarily transferred to other Sherwood facilities to train employees. (A 135, 143-45, SA 33, 38.)

Asher General Manager Spampinato could not borrow money on behalf of Asher without the approval of Sherwood's board of directors. (SA 19.) He also needed Sherwood's approval before making any significant expenditure, including the purchase of equipment or sugar, which was the main ingredient in the candy canes Asher made. (A 15; 82, 97-99, 130, SA 31, 80.)

B. Sherwood Closes the Asher Plant Without Notice to the Union and Fails To Pay Severance Pay or Vacation Pay

The Union has represented Asher's production and maintenance employees at the New Hyde Park facility since 1992. (A 14; 202-03.) The parties' most recent contract, effective from July 1, 1999 through June 30, 2002, provided for various amounts of vacation pay, depending on length of employment with Asher, for all employees who had worked for Asher for at least 6 months (1 year for employees first hired after April 30, 1997). (A 14, 15; 282-86, 306.) The contract also required payment of severance pay, in varying amounts depending on length of employment with Asher, for all employees who: (1) had worked for Asher for at least 3 years; (2) lost their jobs because Asher ceased doing business or moved the

plant beyond commuting distance; and (3) lost employment in the industry. (A 12 n. 2, 15; 301.)

When Sherwood acquired Asher, it adopted the 1999-2002 contract. (A 14; 115-16, 207-08, SA 81.) Shortly before that contract expired, Union Business Agent Ray Aquilino and the Companies' representatives—General Manager Spampinato and Chief Financial Officer Willi—negotiated a Memorandum of Agreement (“MOA”), effective until June 30, 2005. The only substantive terms in the MOA dealt with wages and rest periods. (A 14; 269.) The MOA required the approval of Sherwood's board of directors. (A 12 n.1; 87, SA 17-18.)

The Union also submitted a proposed collective-bargaining agreement, to be effective until June 30, 2005, which consisted of the terms of the 1999-2002 contract and the agreed-upon modifications set forth in the MOA. The Companies refused to sign this agreement. (A 14; 222, SA 77.) However, they continued to abide by the terms of the expired contract, as modified by the MOA, as long as the Asher plant remained open. (A 14-15; 121-24, 156, SA 41-46, 62.)

The Asher plant initially had three shifts. However, in November 2001, before Sherwood acquired the plant, the third shift was eliminated after negotiations between Asher and the Union. The permanent employees from the third shift were subsequently recalled to work on the second shift. (A 234, SA 66.) That shift was eliminated in the fall of 2003, but the laid-off employees did not

receive severance pay. The Union did not demand bargaining, because it was told that the employees would be recalled. (SA 66-68.)

On October 29, 2004, the Asher facility was closed entirely. The manufacture of candy canes which had been made there was moved to Sherwood facilities in Brazil. (A 14; 97, 184, 242, 393, 409-10, SA 20, 74.) All employees at the Asher facility were laid off, although a few continued to work until February 2005, cleaning the facility and removing machinery. (A 16 n.3; 147, SA 40.) In a document filed with the SEC a few days after the closure, Sherwood acknowledged that its contract with the Union required it to pay the employees severance pay and stated that its potential liability for severance pay could be as high as \$155,000 and that it would “provide the required State of New York timetable for severance associated with each remaining employee under the union contract at the time the facility is closed.” (A 15; 399.) However, the Companies never paid the employees severance pay. (A 15, 16; 68, SA 63.)

Sherwood’s board of directors made the decision to close Asher, and Asher General Manager Spampinato was aware of the decision before the closure occurred. (A 15; 68, 134, SA 8, 36, 78.) However, neither of them notified the Union of the decision. The Union first became aware of the closure on October 29, when Business Agent Aquilino received calls from several employees, who told him the plant was closing. (A 214.) He called Spampinato and Chief Financial

Officer Willi, each of whom told him to talk to the other. (A 134, 215, SA 32.) A few days later, Aquilino visited the plant and saw that machinery was being removed. He asked to speak with Frydman, who was present, but Frydman said he was busy and offered to meet the following week. When Aquilino did meet with Frydman and Spampinato the following week, Frydman refused to acknowledge a contractual obligation to pay severance pay. (A 15; 218-19, SA 63.)

I. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Members Liebman and Kirsanow) found, in agreement with the administrative law judge, that Asher and Sherwood were a single employer. (A 12 n. 1, 15-16.) The Board further found that the Companies had violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a) (5) and (1)) by failing to notify the Union of their decision to close the Asher plant and lay off the bargaining-unit employees, thereby precluding meaningful bargaining about the effects of that decision on the unit employees (A 15, 16), and by unilaterally changing existing terms and conditions of employment by failing to pay employees accrued vacation pay and severance pay. (A 12 n.1, 15, 16.)

The Board ordered the Companies to cease and desist from the conduct found unlawful and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights; to bargain in good

faith with the Union, upon request, about the effects of the decision to close the Asher facility and lay off the bargaining-unit employees; to make the employees whole for any loss of pay suffered as a result of the failure to bargain about the effects of the closure and the failure to pay vacation pay and severance pay²; and to mail copies of an appropriate remedial notice to the former unit employees. (A 12-13.)

² Backpay for the failure to bargain about the effects of the closure is to be calculated in accordance with *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968). Under *Transmarine*, the backpay period runs from 5 days after the issuance of the Board's Order until the earliest of the following: (1) bargaining to agreement concerning the effects of the closure on the Asher employees; (2) a bona fide impasse in such bargaining; (3) failure of the Union to request bargaining within 5 days after the issuance of the Board's Order or to commence bargaining within 5 days after the Companies notify it of their desire to bargain; or (4) failure of the Union to bargain in good faith thereafter. However, the backpay for each employee will be at least equal to the amount he would have earned for a 2-week period at his normal wage rate prior to his layoff. The Board left to compliance the relationship between the backpay order and the required payments of vacation and severance pay. (A 12 n.2.)

SUMMARY OF ARGUMENT

1. Substantial evidence supports the Board's finding that, under its four-factor test, Asher and Sherwood are a single employer. As to two of the factors, common ownership is undisputed and Sherwood's active participation in the management of Asher justifies the Board's finding of common management. All major expenditures, including the purchase of equipment and supplies essential to the operation of Asher, required the approval of Sherwood. The Sherwood board of directors, four of whose five members held no position with Asher, made the decision to close the Asher facility.

As to another factor, centralized control of labor relations existed because Sherwood also made all major decisions concerning Asher's labor relations. Its approval was required for any collective-bargaining agreement covering Asher employees, and it made the decisions to close the Asher plant and refuse to pay severance pay to the terminated employees—the actions which gave rise to the unfair labor practice charges in issue here. In addition, the Companies, in dealings with the Union and in a report filed with the SEC, held themselves out as a single employer. The Board properly took them at their word. Asher's retention of control over some, but by no means all, aspects of day-to-day labor matters is less important to a determination of centralized control of labor relations than

Sherwood's control over the specific conduct found to constitute unfair labor practices.

Sherwood's characterization of itself and its subsidiaries, including Asher, as a single integrated enterprise, both to the SEC and to the general public, indicates interrelation of operations. In any event, a finding of such interrelation is unnecessary where, as here, the other three factors for single-employer status are met.

2. The Companies failed to bargain in good faith about the effects of their decision to close the Asher facility. To be meaningful, effects bargaining must take place before the decision to close is implemented and the union has lost all bargaining power. Accordingly, except in emergencies, advance notice of the closure is required. Here, although the decision to close was made well in advance, the Union did not learn of it until the day of the closing, and then only from employees, rather than from the Companies, who were obligated to notify the Union. The belated negotiations, which occurred after the Asher plant was closed and after the employees were laid off, were no substitute for timely notice of the decision to close and good-faith bargaining prior to the closing.

The Union did not waive its right to bargain. Notice of a *fait accompli*, which is all the Union had, cannot be the basis of a finding of waiver. The Union's prior failure to request bargaining over the effects of the elimination of the second

and third shifts, which did not cause permanent job loss for any employees, was not a prospective waiver of the right to bargain about the effects of a closing of the entire plant and termination of all employees. And there is no evidence that, at the time of the prior shift eliminations, the Union clearly indicated that it would not seek bargaining about the effects of a complete closure.

3. The Companies violated Section 8(a)(5) and (1) of the Act by refusing to pay severance pay to the Asher employees. The 1999-2002 contract between Asher and the Union, which Sherwood adopted, provided for severance pay under certain conditions, which were concededly met here. Even after the expiration of that contract, and even in the absence of a new contract, the right to severance pay remained an established term and condition of employment which continued by operation of law until the parties bargained to agreement or impasse on any proposed change, or the Union clearly and unmistakably waived its right to bargain about any such change. The Company does not assert a bargaining impasse and has not shown agreement or waiver.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT ASHER AND SHERWOOD CONSTITUTE A SINGLE EMPLOYER

A. General Principles and Standard of Review

Where the Board finds two or more nominally separate entities to be a single employer for purposes of the Act, all are jointly and severally liable for remedying unfair labor practices committed by any of them. *See Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987), *enforced*, 872 F.2d 1279, 1288-87 (7th Cir. 1989). In determining whether single-employer status exists, the Board considers four factors: interrelation of operations, common management, centralized control of labor relations, and common ownership. *See IBEW Local 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *RC Aluminum Industries, Inc. v. NLRB*, 326 F.3d 235, 239 (D.C. Cir. 2003). Not all of these factors need to be present before the Board can find single-employer status, and no one factor is controlling. *See RC Aluminum Industries, Inc. v. NLRB*, 326 F.3d at 239; *Naperville Ready Mix, Inc. v. NLRB*, 242 F.3d 744, 752 (7th Cir. 2001); *NLRB v. Carson Cable TV*, 795 F.2d 879, 881-82 (9th Cir. 1986).

A Board finding of single-employer status “is essentially a factual one and not to be disturbed provided substantial evidence in the record supports the Board’s findings.” *NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1289 (7th

Cir. 1989) (citations and internal quotations omitted). The Board's finding is therefore entitled to affirmance if "it would have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998).

B. The Companies Constitute a Single Employer

The Board, affirming the administrative law judge, found that Asher and Sherwood were a single employer. As shown below, the record amply supports this finding.³

The Companies concede (Br 16) that they had common ownership. They also concede (*id.*) that Asher's president, Uziel Frydman, and chief financial officer, Chris Willi, held the same positions for Sherwood. The record also shows,

³ The Companies (Br 16-17 n.4) cite several recent cases which the Board remanded for reassignment to a different administrative law judge because the judge who heard this case copied extensively from the parties' briefs. In each of the cited cases, the Board specifically found that most or all of the judge's decision was copied substantially verbatim from the General Counsel's brief. Here, only one paragraph and part of another at A 14, and one paragraph at A 15-16, are taken from the General Counsel's brief, and the latter is explicitly attributed to the General Counsel. The Companies do not contend that the limited copying shown here requires reversal of the Board's Decision. Moreover, this Court has held that a far more extensive copying of the General Counsel's brief by a different administrative law judge was not reversible error. *See Waterbury Hotel Management, LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003).

contrary to the Companies' contention (Br 17-18), that Sherwood actively participated in the management of Asher.⁴

Expenditures essential to the operation of Asher required the approval of Sherwood officials and were processed by Sherwood. Asher General Manager Spampinato testified that he could not replace a broken machine, nor could he purchase parts in excess of a certain dollar amount (not set forth in the record), without Sherwood's approval. (A 130-31, SA 29-30.) This was true even during a period of 6 or 7 months when he and Frydman had a joint credit card. (SA 37.) Spampinato also testified that the purchase of sugar, the primary ingredient in candy canes, required approval from Sherwood, and that Sherwood's purchasing department, located in Rhode Island, placed all orders for the sugar. (A 132-33.) Similarly, Asher could not, on its own, order the boxes in which it shipped its candy canes to retailers; the same facility in Rhode Island placed the purchase orders. (A 133, SA 31.)

Spampinato's testimony was corroborated by Sherwood officers and documents. Thus, Chief Financial Officer Willi agreed that the purchase of a new

⁴ In both *American Bell, Inc. v. Federation of Telephone Workers*, 736 F.2d 879, 888-89 (3d Cir. 1984), and *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1284-87 (2001), relied on by the Companies (Br 16), common ownership was the only factor which could have supported a finding of single-employer status. Here, as shown below, three, if not all four, of the indicia of single-employer status are present.

line of machinery or other items above a certain amount required Sherwood's approval (A 82, 97, 100, SA 80) and that a Sherwood official signed the purchase order. (A 100.) Uziel Frydman also testified that, during its last year of operation, Asher had to make purchases through Sherwood. (SA 6.) In addition, in its annual report to the SEC, Sherwood said: "The Company purchases the necessary ingredients and packaging materials, which are used in its products that are manufactured at its New Hyde Park, NY and Chase City, VA production facilities." (A 397.) In this statement, "the Company" clearly refers to Sherwood; the Chase City plant was not an Asher plant, but the plant of another Sherwood subsidiary. (A 103.)

Thus, the most essential steps in conducting Asher's business – obtaining and maintaining the needed equipment, obtaining the essential raw materials, and obtaining the packages to ship the finished product to customers – all required Sherwood's approval. If Sherwood withheld its approval at any stage, it would effectively shut down Asher's operations.

When the Asher facility did shut down, Sherwood officials made the decision to do so. Uziel Frydman testified that the Sherwood board of directors made the decision (A 68, SA 8, 10, 78), Chief Financial Officer Willi testified that Asher's general manager could not make it (SA 80-81), and Asher's general manager himself testified that Uziel Frydman told him to shut down the plant. (SA

35.) In addition, in its annual report to the SEC, Sherwood stated: “The Company has decided to move all production to its overseas suppliers.” (A 401.) As just shown, in the context of the SEC report, “the Company” clearly refers to Sherwood, not Asher. The Sherwood board of directors also decided to move the equipment from the Asher facility to the non-Asher plant at Chase City, Virginia. (SA 22.)

Thus, the record shows that Sherwood made the most fundamental decisions about the operation of the Asher plant, including the decision to shut it down. This plainly shows that Sherwood, not Asher, both had and exercised the “overall control of critical matters at the policy level” (Br 18), which establishes common management.⁵

The Companies contend (Br 17) that the Board did not show that Uziel Frydman and Willi, in taking actions affecting Asher, acted as officers of

⁵ The Companies rely (Br 18) on an advice memorandum by the Board’s General Counsel in another case. There, unlike the present case, there was no evidence that the common directors were involved in the operational management of the subsidiaries, nor was there evidence that the parent exercised control over the subsidiaries’ labor relations. In any event, an advice memorandum is not binding precedent in a subsequent unrelated case. *See Chelsea Industries, Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (characterizing such a suggestion as “rather silly”).

Sherwood rather than as officers of Asher. But the record does show that approval by the Sherwood board of directors was required for the crucial decisions concerning the operation of Asher. Sherwood had five directors, as the Companies note (Br 9), and four of them held no position with Asher. The board of directors therefore necessarily acted on behalf of Sherwood in making decisions about Asher. As the Companies further note (Br 8, 22), Frydman never, and Willi rarely, visited the Asher plant prior to its closure. In addition, Spampinato testified (SA 35) that Frydman told him to close the plant, but neither he nor Frydman testified that Frydman consulted him in advance about the decision to close, rather than presenting him with a *fait accompli*. In these circumstances, it is clear “that the decision to shut down the [Asher] plant . . . was in fact no more than the implementation by a [Sherwood] officer of a policy formulated in [Sherwood’s headquarters] as a result of considerations of broader scope than [Asher’s] own operations.” *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1043 (8th Cir. 1976).

The record also supports the Board’s finding (A 12 n.1) that centralized control of labor relations existed because Sherwood, through Uziel Frydman or its board of directors, made all major decisions concerning Asher’s labor relations. Most significantly, both Frydman and Willi testified that Asher’s general manager could not enter into a collective-bargaining agreement without the approval of Sherwood’s board of directors. (SA 17-18, 79, 83.) Frydman added that, without

his agreement and without the approval by the Sherwood board of directors, the 2002 MOA would never have gone into effect. (A 256, SA 83.) Willi participated in the negotiation of the MOA. (A 87, 206-07.) The role of Sherwood in collective bargaining is strong evidence of centralized control of labor relations. *See, e.g., American Stores Packing Co.*, 277 NLRB 1656, 1657 (1986).

Sherwood also made other decisions profoundly affecting Asher employees. As shown above, pp. 17-19, Sherwood made the decision to close the Asher plant, thereby terminating the Asher employees. It had previously told Asher General Manager Spampinato to shut down the second shift and lay off the employees on that shift, a decision which only Uziel Frydman or his son Amir (an officer of Sherwood, but not of Asher) had the authority to make. (A 146, SA 39.) Uziel Frydman also testified that, upon the closing of the Asher plant, Sherwood's board of directors "decided that severance [pay] would not be paid by Sherwood Brands." (SA 77.) He also asserted that Asher's general manager would not have authority to deal with a union demand for severance pay; that decision would be made "much above his level." (SA 82.)

The role of Sherwood in the plant closure and in the refusal to pay severance pay is especially significant because these actions gave rise to the unfair labor practice charges in issue here. The Board has ordered Sherwood to remedy, not the actions of a subsidiary, but its own unlawful conduct. *See Soule Glass and*

Glazing Co., 246 NLRB 792, 795 (1979), *affirmed in pertinent part*, 652 F.2d 1055, 1075-76 (1st Cir. 1981); *Royal Typewriter Co.*, 209 NLRB 1006, 1010-12 & nn. 12, 13, 1015 n.21 (1974), *enforced*, 533 F.2d 1030, 1044 (8th Cir. 1976).

Sherwood also made pension contributions for Asher (A 82-83, 86, 117, SA 5, 15), which were paid on Sherwood checks (SA 15); Asher's general manager could not make these payments on his own. (A 82-83.) Sherwood also deducted union dues from Asher employees and forwarded the dues to the Union (SA 13, 14), and it paid health insurance for Asher employees in the same manner that it paid their wages. (A 87, SA 16.) Sherwood processed the Asher payroll (A 72-74) and funded the bank account from which Asher employees were paid. (A 75-80.) If Sherwood failed to fund this account, the Asher employees would not receive their wages. (A 77, 79.) The foregoing facts provide additional support for the finding of single-employer status. *See Wyandanch Engine Rebuilders, Inc.*, 328 NLRB 866, 873 (1999); *RC Aluminum Industries, Inc. v. NLRB*, 326 F.3d 235, 239 (D.C. Cir. 2003).

The record also shows that, on several occasions, Asher employees were temporarily transferred to facilities of other Sherwood subsidiaries, both to work at those facilities and to train employees there. (A 135, 138, 143-44, 184, 189-90, SA 32-34, 38, 54-58.) They continued to receive their regular paychecks from Sherwood. (A 186, SA 57.) The assignment of employees to work at a firm

nominally separate from their ostensible employer can support a finding that both firms are a single employer. *See, e.g., Gold Coast Produce*, 319 NLRB 202, 205-06 (1995).

It is also significant that the Companies held themselves out, both to the Union and to the SEC, as a single employer. When the Union asked Asher General Manager Spampinato when it could expect to receive pension and dues payments due under the parties' contract, Spampinato replied that the payments "were to be derived from Sherwood." (A 117.) Juanita Gillis, Asher's human resources director, similarly advised the Union, in e-mails responding to complaints about delinquent pension and dues payments, that the payments would be "forward[ed] . . . to Rockville today" and processed there (A 359). Later she noted that the relevant statements were "in Rockville" (A 360). The headquarters of Sherwood is in Rockville, Maryland (A 378, SA 4). No Asher facility was located there.

Sherwood's report to the SEC, quoted in pertinent part at p. 5 above, was even more emphatic. It stated that, as of October 8, 2004, Sherwood had approximately 173 employees, of whom 46 were at the Asher facility and the remainder at 4 other specified locations, none of them operated by Asher. It went on to state that the Asher employees were "the Company's only employees represented by labor unions." Finally, it stated that there was "potential liability to the Company for severance [pay]" as a result of the forthcoming closure of the

Asher facility. (A 399.) As shown above, p. 17, in the context of this SEC report, “the Company” was clearly Sherwood. Thus, Sherwood held itself out to the SEC as the employer of both Asher’s employees and the employees of its other subsidiaries. The Board properly took it at its word. *See NLRB v. Palmer Donavin Mfg. Co.*, 369 F.3d 954, 957 (6th Cir. 2004); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1043 (8th Cir. 1976); *Thornton Heating Service, Inc.*, 294 NLRB 304, 309 (1989).

The Companies contend (Br 7, 13, 21-24) that centralized control of labor relations did not exist because Asher retained control of day-to-day labor matters. That control was by no means complete. As shown above, Sherwood, not Asher, controlled pension payments and payroll processing. In addition, Spampinato testified (A 128-30) that, although he could assign overtime work in an emergency without consulting Sherwood, he needed Sherwood’s approval to assign “regular” overtime.⁶ Moreover, in determining whether centralized control of labor relations exists, the crucial question is not control of day-to-day matters, but control over the specific conduct found to constitute unfair labor practices. *See Package Service*

⁶ The Companies (Br 20 n.6) incorrectly characterize Spampinato’s testimony as suggesting “that he could award overtime in routine situations — for example, if it was needed on an emergency basis.” But an emergency situation is, by definition, not routine, and Spampinato’s testimony clearly indicates that his authority to assign overtime was limited to unforeseeable, and therefore non-routine, circumstances.

Co. v. NLRB, 113 F.3d 845, 848 (8th Cir. 1997); *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26 (1st Cir. 1983). We have shown above that Sherwood exercised the latter type of control.

The Companies also contend (Br 19-21) that there was no interrelation of operations between Sherwood and Asher. This contention disregards the evidence, discussed above, pp. 17, 22-23, that Sherwood, in its reports to the SEC, characterized itself and its subsidiaries, including Asher, as a single integrated enterprise. It gave the general public the same message. Its website stated “**Sherwood Brands** is a leading manufacturer and marketer of premium quality confectionary products Our product line includes such top-selling brands as . . . Asher gourmet candy canes” and nine other named brands, all manufactured by subsidiaries other than Asher. (A 365.) A separate website page described the Asher products: candy canes, sticks, and wreaths. (A 367.) Still another page told consumers “Where to buy Sherwood Brands products.” (A 369.)

Finally, a page explained why and how to “become a Sherwood Brands customer.”⁷ The “why” repeated the earlier reference to “Sherwood’s product line” as including Asher candy canes and several other named non-Asher products. The “how” included a form, entitled “SHERWOOD BRANDS, LLC NEW

⁷ The page was plainly designed for business customers. The website stated that Sherwood did not sell products directly to the general public. (A 369.)

CUSTOMER SALES APPLICATION,” and a form to apply for credit, in which the applicant: (1) authorized banks and other business “to furnish any and all information requested by **Sherwood Brands, LLC**”; (2) agreed to “Sherwood Brands, LLC’s right to obtain [the applicant’s] credit history”; and (3) “[i]n consideration of credit being extended by Sherwood Brands, LLC . . . guarantee[d] to Sherwood Brands, LLC the . . . payment when due of all accounts of the applicant.” (A 370.)

Thus, the theme that ran pervasively through the website was that customers buying any Sherwood products, including those of Asher, were not merely dealing with the particular subsidiary whose products they bought, but were dealing with a larger enterprise that encompassed all of Sherwood’s subsidiaries and all of their products and operations. The Board could reasonably find this theme to be an accurate description of the relationship in issue. *See NLRB v. Palmer Donavin Mfg. Co.*, 369 F.3d 954, 957 (6th Cir. 2004); *Thornton Heating Service, Inc.*, 294 NLRB 304, 309 (1989).

The foregoing facts would justify a finding that interrelation of operations existed. However, in view of the Board’s explicit finding (A 12 n.1) that the other three criteria for single-employer status were met, a finding which we have shown to be supported by the record, proof of interrelation of operations was not necessary to a finding of single-employer status. The Board’s finding of single-

employer status is therefore well supported and entitled to affirmance. *See Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987), *enforced*, 873 F.2d 1279, 1289 (7th Cir. 1989).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANIES VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO BARGAIN IN GOOD FAITH WITH THE UNION ABOUT THE EFFECTS OF THEIR DECISION TO CLOSE THE ASHER FACILITY

The complaint in this case did not allege, and the Board did not find, that the Companies were obligated to bargain about the decision to close the Asher facility and lay off the Asher employees.⁸ However, it is settled that an employer is obligated to bargain about the effects of such a decision on the unit employees. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677-78 n.15, 681 (1981). Moreover, such bargaining “must be conducted in a meaningful manner

⁸ The Supreme Court has held that an employer is not obligated to bargain about a decision to close part of its business. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981). Moreover, the record indicates that the decision was based on the much lower price of sugar (the main component of candy canes) in Brazil than in the United States (SA 72-73), a factor not within the Union's control. *Compare First National Maintenance Corp. v. NLRB*, 452 U.S. at 687-88, with *Food and Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24, 30-31 (D.C. Cir. 1993). *See also Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309-12 (D.C. Cir. 2003). Further, because the layoff of employees followed inevitably from the decision to close, it was not a mandatory subject of bargaining. *See NLRB v. Litton Financial Printing*, 893 F.2d 1128, 1133-34 & n.3 (9th Cir. 1990), *reversed on another issue*, 501 U.S. 190 (1991).

and at a meaningful time.” *Id.* at 682. The Board found here (A 15) that the Companies did not fulfill this obligation.

The Board has held, with court approval, that meaningful bargaining about the effects of a closing decision requires that the employer notify the union of the decision, and give it an opportunity to bargain about the effects, before the decision is implemented.⁹ See *Metropolitan Teletronics Corp.*, 279 NLRB 957, 959 & nn. 14, 15 (1986), *enforced mem.*, 819 F.2d 1130 (2d Cir. 1987); *NLRB v. Compact Video Services, Inc.*, 121 F.3d 478, 482 (9th Cir. 1997); *NLRB v. Emsing’s Supermarket, Inc.*, 872 F.2d 1279, 1286-87 (7th Cir. 1989); *Penntech Papers, Inc. v. NLRB*, 760 F.2d 18, 26-27 (1st Cir. 1983). The adequacy of the notice given is a question of fact on which the Board’s findings “are to be accepted if supported by substantial evidence.” *Penntech Papers, Inc. v. NLRB*, 706 F.2d at 27.

In this case, it is clear that the decision to close was made well in advance. Sherwood’s SEC report indicates that it entered into an agreement with a foreign

⁹ An exception to this requirement exists for situations where an unanticipated emergency requires immediate closure. See, e.g., *Raskin Packing Co.*, 246 NLRB 78, 78 (1979) (bank discontinued employer’s line of credit); *National Terminal Baking Corp.*, 190 NLRB 465, 466 (1971) (theft of two delivery trucks from small, money-losing enterprise). The Companies do not contend that such a situation existed here.

firm in the fall of 2003—a year before the Asher plant was closed—to move Asher’s production to South America by the end of 2004. (A 393.) Sherwood’s board of directors, after some discussion, made the decision to close the Asher plant. (A 68, SA 8-10, 78.) Uziel Frydman, president of both Sherwood and Asher, was a Sherwood director (SA 9) and thus necessarily aware of the decision, but he did not tell the Union about it or tell anyone else to do so. (A 68.) Asher’s plant manager, Spampinato, also knew in advance that the plant would close (SA 36), but did not claim to have notified the Union of the closing. The first notice to the Union came on the day of the closing, and did not come from the Companies, but from several employees who called the Union’s representative and told him the plant was closing. (A 214.) It is settled that notice to employees of an intended closure does not satisfy the requirement of notice to the union. *See NLRB v. Compact Video Services, Inc.*, 121 F.3d 478, 481-83 & n.5 (9th Cir. 1997); *Garment Workers v. NLRB*, 463 F.2d 907, 918 (D.C. Cir. 1972). More importantly, any notice on the day of the closure is clearly insufficient. Notice of the decision must be given “sufficiently before its actual implementation so that the union is not confronted at the bargaining table with . . . a fait accompli.” *Willamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990). *Accord Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 314 (D.C. Cir. 2003); *Garment Workers v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972). Timely notice is necessary to give the union “an

opportunity to bargain at a time when it still represent[s] employees upon whom the [employer] relie[s] for services” and thus “retain[s] at least a measure of bargaining power.” *Metropolitan Teletronics Corp.*, 279 NLRB 947, 979 (1986), *enforced mem.*, 817 F.2d 1130 (2d Cir. 1987). The Companies’ conduct here denied the Union that opportunity.

Even on the day of the closing, when the Union sought to learn what was happening, the Companies gave it the runaround. When Union Representative Aquilino asked Plant Manager Spampinato whether the plant was closing, Spampinato told him to contact Chief Financial Officer Willi. (A 134, SA 32.) Aquilino did so, only to have Willi tell him to call Spampinato. (A 215.) This is not good-faith bargaining. *See Central Mack Sales, Inc.*, 273 NLRB 1268, 1277-78 (1984).

The Companies suggest (Br 25) that the negotiations which occurred after the layoffs, which included an assertion by Frydman that he was not required to pay any severance pay and an offer by him to pay 15 percent of the amounts of severance pay specified in the 1999-2002 contract (A 227, 251-52), satisfied their bargaining obligation.¹⁰ This suggestion is without merit. In *Metropolitan*

¹⁰ The employees rejected Frydman’s offer, insisting on at least 60 percent of the contractual amounts. (A 227.)

Teletronics Corp., 279 NLRB 957, 958-59 (1986), *enforced mem.*, 819 F.2d 1130 (2d Cir. 1987), the Board held that an employer who had failed to give the union advance notice of a planned closure did not fulfill its obligation to bargain about the effects of the closure by subsequently meeting with the union and exchanging proposals. These belated actions, the Board held, were “no substitute for timely notice of [the] decision and good-faith bargaining before closing.” 279 NLRB at 959.¹¹

The Companies further contend (Br 24-25, 26-28) that the Union waived its right to bargain by not promptly seeking bargaining once it had notice of the closure. Insofar as this contention relies on the Union’s conduct in October and November 2004, following the closure of the Asher plant, it is factually and legally

¹¹ In *Creasey Co.*, 268 NLRB 1425, 1426 (1984), cited by the Companies (Br 25 n.9), the Board found that the 3 days’ advance notice to the union was reasonable in view of the employer’s perishable inventory and the reasonable fear of immediate loss of customers. The finding that meaningful effects bargaining was possible clearly rested on the conclusion that the notice to the union was timely.

In *International Offset Corp.*, 210 NLRB 854, 855 (1974), also cited by the Companies (Br 26), the union knew, long before the plant closed, about repeated removals of machinery from the plant and about the employer’s underlying financial problems. Knowledge of these facts necessarily made the union aware that the employer intended to close its plant. The Companies point to nothing in this record which would have given the Union clear notice, prior to the complete shutdown of the plant, that such a shutdown was imminent.

unsupportable. Factually, Aquilino's uncontradicted testimony shows that, as soon as he heard that the plant was closing, he called the Companies and attempted to obtain confirmation of the closure (A 214-15); that, when he did obtain confirmation, he went to the plant and talked to Plant Manager Spampinato, who told him to return a few days later, when Uziel Frydman would be at the plant (A 217); that he did return to the plant, met Frydman, and demanded bargaining about severance pay (A 218); and that, when Frydman said he was too busy to talk then but could meet the following week, Aquilino met with him and Spampinato the following week and tried to discuss severance pay (A 219.) Even if the Union had received adequate notice of the closing, it was not required to do more than this to avoid waiving its bargaining rights. Legally, however, notice of a *fait accompli*, which is all the Union had, cannot be the basis of a finding of waiver. *See Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 314 (D.C. Cir. 2003); *Garment Workers v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972).

Equally without merit is the Companies' contention (Br 24-28) that the Union, by not demanding effects bargaining when the third shift was eliminated in 2002 or when the second shift was eliminated in 2003, waived its right to engage in such bargaining when the entire plant was closed in 2004. According to the testimony of Union Representative Aquilino, the prior shift eliminations did not entail permanent job loss for any employees. When the third shift was eliminated,

the employees on that shift were transferred to the second shift. (SA 66.) When the second shift was also abolished, the Union was informed that its employees would be recalled when sales increased. (SA 67-68.) Since, in both cases, the affected employees were not terminated, they were not entitled to severance pay, which, under the 1999-2002 contract, applied only when Asher either ceased doing business, thereby causing the employees to lose employment in the industry, or moved the plant beyond commuting distance. (A 301.) Accordingly, the Union's failure to demand severance pay, or bargaining about it, on these two previous occasions could not operate as a waiver of its right to do so here, where the plant closed altogether, the employees were terminated, and the employees' entitlement to severance pay was triggered.

Moreover, even if the prior shift eliminations triggered a right to engage in effects bargaining which the Union waived by failing to request such bargaining, the waiver would extend only to those actions and not to the subsequent closing of the entire plant. “[A] union’s acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.”

Dubuque Packing Co., 303 NLRB 386, 397 (1991) (citation omitted), *enforced in pertinent part sub nom. Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993). “[E]ach time [a] bargain[able] incident occurs . . . [t]he [union] has the election of requesting negotiations or not.” *NLRB v. Roll & Hold*

Warehouse & Distribution Corp., 162 F.3d 513, 518 (7th Cir. 1998) (citation omitted). A prior failure to request bargaining “does not amount to waiver if it does not unmistakably show that the Union intended to permanently give up its right to bargain in the future.” *Id.* The Companies cite no evidence that the Union said or did anything at the time of the prior shift eliminations that would clearly indicate an intention not to seek bargaining about the effects of a possible future closure of the entire plant.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANIES VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO PAY SEVERANCE PAY TO THE ASHER EMPLOYEES, THEREBY UNILATERALLY CHANGING AN EXISTING TERM AND CONDITION OF EMPLOYMENT

It is undisputed that the Companies did not pay severance pay to any of the Asher employees terminated as a result of the closing of the Asher plant. The Board found this failure to be a unilateral change in an existing term and condition of employment and therefore a separate violation of Section 8(a)(5) and (1) of the Act. (A 12 n.1, 14-15.) As shown below, the record fully supports this finding.¹²

¹² The ensuing rationale is equally applicable to the Board’s finding (A 15) that the Companies unlawfully failed to pay accrued vacation pay to the employees after the closure of the plant. The Companies do not contest this finding on the merits, but contend (Br 3 n.1) that the question is now moot because they subsequently made the required payments. However, both the Board’s cease-and-desist order (A 12, par. 1 (b)) and the notice which the Companies are required to mail to the former Asher employees (A 13) refer specifically to vacation pay. It is

An employer violates Section 8(a)(5) and (1) (29 U.S.C. § 158 (a)(5) and (1)) by unilaterally changing any term or condition of employment that is a mandatory subject of bargaining under the Act. *See NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309 (D.C. Cir. 2003). Severance pay is clearly a mandatory subject of bargaining. *See Honeywell International, Inc. v. NLRB*, 253 F.3d 125, 127, 131 (D.C. Cir. 2001) (“*Honeywell*”).

In this case, the 1999-2002 contract between Asher and the Union provided for severance pay under certain conditions (A 301), and it is undisputed that most, if not all, of the Asher employees terminated upon the closure of the Asher plant met those conditions. Sherwood, in its fiscal 2004 report to the SEC, referred to these contractual provisions for severance pay, and acknowledged it had a

settled that compliance does not render a cease-and-desist order or a notice-posting order moot. *See NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950); *Association of Administrative Law Judges v. FLRA*, 397 F.3d 957, 960-61 n* (D.C. Cir. 2005). To the extent that it is shown in compliance proceedings that the payments have been made, no further payments will be required. But the assertion that they have been made is not a basis for refusing to enforce the Board’s order now. *See Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 107 (D.C. Cir. 2003).

“potential liability” of up to \$155,000 for severance pay resulting from the forthcoming closure. (A 399.)¹³

When Sherwood acquired Asher, it voluntarily assumed Asher’s 1999-2002 contract with the Union (SA 81), and complied with the terms of that contract thereafter. (A 115-16, 208.) Those terms, including the provision for severance pay, thus continued as established terms and conditions of employment that could not be unilaterally altered, even after expiration of the contract, absent a bargaining impasse or waiver of the Union’s right to bargain. *See Honeywell*, 253 F.3d at 128.

As the Companies point out (Br 8-9, 28-29), they never signed a comprehensive contract after the 1999-2002 contract expired. They signed only a MOA dealing with wages and rest periods, but not with severance pay. The Board declined to find that the MOA operated as an extension of the entire 1999-2002 contract. (A 12 n.1.) Such a finding was not necessary to the Board’s conclusion

¹³ The Companies (Br 31 n.11) characterize the SEC statement concerning potential liability as a “mistake.” The Companies rely on the fact that Uziel Frydman testified it was a “mistake” because “there was never any severance agreement [between] Sherwood Brands and the [U]nion.” (SA 75-76.) But, as we show below, the employees’ right to severance pay does not flow from an agreement between Sherwood and the Union. It was an established condition of employment that predated Sherwood’s acquisition of Asher, and that Sherwood was required to continue until it bargained to agreement or impasse on any proposed change. Accordingly, Frydman’s testimony that the SEC filing mistakenly acknowledged potential liability for severance pay is itself a mistake because the testimony was predicated on the false assumption that severance pay liability depended on an agreement between Sherwood and the Union.

that the Companies remained obligated to pay severance pay in accordance with the terms of the expired contract. That obligation was not contractual, but continued as a matter of law. *See Honeywell*, 253 F.3d at 128, 133.

The general rule is that the substantive terms of a collective-bargaining contract survive the expiration of the contract to the extent that they cannot be unilaterally changed absent waiver or impasse. *See Litton Financial Printing v. NLRB*, 501 U.S. 190, 198 (1991). There are exceptions to this rule. Union-security and dues-checkoff provisions do not survive the contract, because statutes permit them only as part of a contract; no-strike clauses do not survive, because they are waivers of a basic statutory right; and arbitration clauses do not survive, because no party can be required to submit a dispute to arbitration unless it has agreed to do so. *Id.* at 199-200. However, none of the rationales for the foregoing exceptions apply to severance pay provisions, and this Court squarely held in *Honeywell*, 253 F.3d at 128, that such provisions are not exempt from the general rule.

The Supreme Court noted in *Litton Financial Printing v. NLRB*, 501 U.S. at 198, that the rule against unilateral changes “has been extended . . . to cases where an existing agreement has expired and negotiations on a new one have yet to be completed.” However, contrary to the Companies’ contention (Br 30), the Court did not hold that the rule applies only as long as negotiations for a new contract

continue. It remains in effect “[a]s long as the bargaining obligation is not extinguished,” by waiver, impasse, or otherwise. *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 729 (9th Cir. 1980). In *Honeywell*, there were no ongoing negotiations about a new contract in general, or severance pay in particular, when the employer unilaterally stopped paying severance benefits, but this Court nevertheless held that the employer was not entitled to do so absent an impasse in bargaining or a new agreement. 253 F.3d at 132, 133. Significantly, the record here shows that the Companies continued to apply all the terms of the expired contract, as modified by the MOA, until they closed the Asher plant. (A 121-24, 156, SA 41-46, 62.) The Companies cite no basis for the proposition that, while every other previously existing term and condition of employment continued, the right to severance pay should not have continued.

The Companies do not contend that they bargained to impasse over the elimination of severance pay. They do, however, suggest (Br 30) that, in signing the MOA, they were agreeing to a new contract which wholly superseded the terms of the old one and which, because it dealt with only five subjects, left them free to make unilateral changes on any others. However, as to matters not covered by an existing contract, the waiver of a union’s right to bargain about such changes “must be clear and unmistakable.” *Honeywell*, 253 F.3d at 133. It is clear that the MOA, which did not mention severance pay or management rights, did not “cover”

the employees' right to severance pay or the Union's right to bargain about changes thereto. *See Id.* It contained no language which even arguably, much less clearly and unmistakably, waived the Union's right to bargain before any changes were made to severance pay.

Nor does the bargaining history of the MOA show any such waiver. One of the Union's negotiators testified that both sides understood that all terms embodied in the former contract, other than those specifically modified by the MOA, would remain in effect. (SA 47.) He further testified that severance pay was not even discussed during the negotiation of the MOA. (SA 53.) Accordingly, that negotiation cannot support a "waiver" argument.

The Companies further contend (Br 27-28, 31) that the Union's failure to demand severance pay at the time of prior layoffs waived its right to bargain about the elimination of such pay. This is essentially a repetition of their argument that the failure to demand bargaining about the effects of the 2002 and 2003 shift eliminations waived the right to bargain about the effects of the 2004 plant closure. We have shown above, pp. 32-33, that a waiver by inaction is limited to the specific incident in which the union fails to object to a unilateral change and does not clearly and unmistakably waive the right to bargain about such changes in the future. Accordingly, the Companies' contention is without merit.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for review should be denied and that the Board's Order should be enforced in full.

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August 2007

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASHER CANDY, INC., AND
SHERWOOD BRANDS, INC.

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Petitioners/Cross-Respondents * Nos. 06-1368,
* 06-1393

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v.

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NATIONAL LABOR RELATIONS BOARD

* Board Case No.
* 29-CA-26761

*

Respondent/Cross-Petitioner

*

DESIGNATION OF PORTIONS OF RECORD
TO BE INCLUDED IN THE APPENDIX

The National Labor Relations Board designates the following portions of the record to be included in the appendix in this case:

1. Chronological list of relevant docket entries;
2. The following exhibits: General Counsel's Exhibits 1(a), 1(c), 1(e), 1(g), 1(h), 7(q), 7(s), 21(a), and 21(b);
3. The following pages of the transcript of the hearing before the administrative law judge: 48, 58, 87, 88, 101, 103, 105, 106, 116, 125, 143, 145, 152, 154, 156-158, 177, 212, 217, 227, 228, 241, 253, 254, 259, 261, 263, 264, 284, 286, 306, 308, 312, 326, 336-339, 352-354, 456, 457, 542, 579-583, 620, 672, 676, 687, 735-737, 761, 762, 787, 794, 795, 806, 822, 833, 851, 852, 868, and 869.

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Dated at Washington, DC
This 20th day of August, 2007

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 9,247 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

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