

Air-Vac Industries, Inc., Leeward Constructors, Inc., Air-Vac Environmental Limited and Local Union No. 282, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 29-CA-7887

November 18, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND HUNTER

On June 29, 1981, Administrative Law Judge Howard Edelman issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief.

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 has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondents, Air-Vac Industries, Inc., Leeward Constructors, Inc., and Air-Vac Environmental Limited, Smithtown, New York, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Add the following at the end of the last sentence to paragraph 1(a):

"The appropriate bargaining unit is:

¹ Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² In view of the nature and extent of Respondents' violations and in order to more fully effectuate the policies of the Act, we have, *sua sponte*, determined that the Administrative Law Judge's recommended broad cease-and-desist Order is unwarranted in this case. Accordingly, we will modify the Administrative Law Judge's recommended Order and notice to include the narrow injunctive language. See, generally, *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

The Administrative Law Judge inadvertently failed to include the description of the unit in his recommended Order and notice. We have corrected them accordingly. We also delete the Administrative Law Judge's reference to *F. W. Woolworth Company*, 90 NLRB 289 (1950), in his recommended remedy. See, e.g., *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970); *Paramount Plastic Fabricators, Inc.*, 190 NLRB 170 (1971).

"All drivers of Respondents employed at their Smithtown, New York location; excluding all other employees, guards and supervisors as defined in the Act."

2. Substitute the following for paragraph 1(e):

"(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

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

WE WILL NOT refuse to bargain in good faith with Local Union No. 282, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, as the representative of the employees in the unit described herein, by refusing to sign the supplemental agreement submitted to us and agreed to on or about October 23, 1979.

WE WILL NOT refuse to implement the terms of the supplemental agreement described above and effective as of January 1, 1980.

WE WILL NOT bargain directly with employees, promising employees hospitalization benefits and other benefits or improvements in their working conditions or terms of employment.

WE WILL NOT threaten our employees with the partial closure of our operations and layoffs.

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

WE WILL recognize the Union as the exclusive bargaining representative of our drivers with respect to rates of pay, wages, hours, and other terms and conditions of employment. The appropriate bargaining unit is:

All drivers of the Employers employed at our Smithtown, New York location; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL, upon request by the Union, execute the supplemental agreement agreed upon on or about October 23, 1979, and give retro-

active effect to all the provisions in said supplemental agreement as of January 1, 1980.

WE WILL jointly and severally make whole the employees in the unit described above, with interest, for our failure to implement the supplemental agreement we agreed to.

AIR-VAC INDUSTRIES, INC., LEEWARD CONSTRUCTORS, INC., AIR-VAC ENVIRONMENTAL LIMITED

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge: This case was heard before me on December 8, 1980, in Brooklyn, New York. The complaint in this case issued on May 30, 1980, based on an unfair labor practice charge filed on March 26, 1980, by Local Union No. 282, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, which alleged that Air-Vac Industries, Inc., and Leeward Constructors Inc., a single employer, herein respectively called Respondent Air-Vac and Respondent Leeward and collectively called Respondent, violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act.

The complaint alleges, *inter alia*, that Respondents Air-Vac, Leeward, and Air-Vac Environmental Limited, herein called Respondent Environmental, violated Section 8(a)(1) and (5) of the Act by refusing to sign and execute a collective-bargaining agreement with the Union.¹ The complaint also alleges that, following refusal by Respondents to execute the collective-bargaining agreement negotiated with the Union, Respondents bargained directly and individually with its employees, offered and promised its employees hospitalization benefits, and threatened its employees with a partial closing of its business and layoffs, in order to discourage their assistance and support for the Union.

The parties to this proceeding did not file briefs. Upon consideration of the entire record, and my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Air-Vac is a New York corporation which at all times material herein has maintained its principal office and place of business in Smithtown, New York. Respondent Air-Vac is engaged in the construction, maintenance, and rehabilitation of drain and sewer systems for private corporations. During the past year which period is representative of its annual operations generally, Respondent Air-Vac in the course and con-

¹ During the course of the hearing herein, the complaint was amended to include Respondent Environmental as a single integrated business enterprise with Respondents Air-Vac and Leeward, having been affiliated businesses with common officers, ownership, directors, and operators whose directors and operators formulate and administer common labor policy.

duct of its business performed services valued in excess of \$50,000 of which services were performed in New York State for customers who during the same period purchased and caused to be transported to their places of business goods and materials valued in excess of \$50,000, which were delivered to their place of business in interstate commerce directly from States of the United States other than the State in which they are located.

Respondent Leeward is a New York corporation which at all times material herein has maintained its principal office and place of business in Smithtown, New York, operating out of the same facility as Respondent Air-Vac. Respondent Leeward is engaged in the maintenance and rehabilitation of drain and sewer systems for municipalities located in Nassau and Suffolk Counties. During the past year, which period is representative of its annual operations generally, Respondent Leeward, in the course and conduct of its business, performed services for such municipalities valued in excess of \$50,000, which services were performed within New York State for municipalities which during the same period purchased and caused to be transported to their places of business goods and materials valued in excess of \$50,000 which were delivered to their places of business in interstate commerce directly from States of the United States other than the State in which they are located.

Respondents Air-Vac and Leeward admit, and I find, that said Respondents are and have been at all times material herein employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondents Air-Vac and Leeward also admit and I find that, at all times material herein, they have been affiliated businesses, with common officers, ownership, directors, and operators, and constitute a single integrated business enterprise, the said directors and operators formulating and administering a common labor policy affecting the employees of said Respondents.

I further find that Respondent Environmental is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.²

II. THE LABOR ORGANIZATION INVOLVED

Respondents admit and I find that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Respondent Leeward commenced its operation in 1970. Respondent Air-Vac commenced its operation in 1971. At all times herein, Respondents Leeward and Air-Vac were owned by Edward Jost and his wife, who

² Respondent Environmental did not admit or deny that it was an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Nor are there any jurisdictional facts contained in the record which establish independently that Respondent Environmental is an employer engaged in commerce within the meaning of the Act. This finding is based upon my conclusion described below that Respondents Air-Vac, Leeward, and Environmental are a single employer and that Respondent Environmental is an *alter ego* of Respondent Leeward. *B.J.S. Drugs*, 243 NLRB 830 (1979).

were also the sole officers and directors of both the corporations. Additionally, Respondents Leeward and Air-Vac have had at all times since 1971 common supervisory personnel and employees and have operated out of the same facility. Prior to 1977, Respondents Air-Vac and Leeward performed maintenance and rehabilitation work on drain and sewer systems for municipalities located principally in the counties of Nassau and Suffolk.

Sometime in or around November 1977, Respondent Air-Vac commenced performing drain and sewer system construction and maintenance work for private companies in the heavy construction industry located primarily in the counties of Nassau and Suffolk. At this time, in order to be able to perform such work for private companies and to avoid labor disputes, Respondent Air-Vac signed a collective-bargaining agreement with the Union covering its drivers who perform such construction and maintenance work.³ The collective-bargaining agreement herein expired on June 30, 1978. Thereafter, Respondent Air-Vac entered into a subsequent collective-bargaining agreement with the Union which was effective from July 1, 1978, through June 30, 1982.

At the time Respondent Air-Vac initially entered into its collective-bargaining agreement with the Union, it was orally agreed by union representatives and Edward Jost that all heavy construction work would be performed through Respondent Air-Vac and that such work would be covered by the Union's contract. It was further agreed that Respondent Leeward would continue to operate as a nonunion corporation performing municipal work exclusively.

From November 1977 through July 1980, Respondents Air-Vac and Leeward have employed five to seven drivers in a single common unit. Following the execution of the union contract, a seniority list was prepared by Respondent Air-Vac. Those drivers having the highest seniority were awarded the more lucrative Air-Vac work. Since such work was covered by the Union's contract, the drivers received a higher rate of pay than those performing similar work for Respondent Leeward. Additionally, drivers performing work for Respondent Air-Vac received the contract benefits which included pension and hospitalization benefits. The lower seniority drivers performing work for Respondent Leeward were not covered by the Union's contract and received no hospitalization or pension benefits.

At times, depending on the volume of work available, all Respondents' employees might be performing work for Respondent Air-Vac. At other times the entire complement of employees might be performing work for Respondent Leeward. Generally, however, the two to three employees with the lowest seniority were assigned to work jobs for municipalities performed by Respondent Leeward.

Sometime in September 1979 the employees of Respondents Air-Vac and Leeward, including Union Shop Steward Thomas Sallie, met with Edward Jost. The employees demanded that Jost provide hospitalization and

other benefits for those employees working on Respondent Leeward's jobs. These employees were not performing sufficient work under the Union's contract with Respondent Air-Vac to qualify for the union benefits provided in such agreement. When Jost refused, the Union commenced a strike. The strike concluded when Jost agreed to meet with union representatives for the purpose of negotiating a supplemental agreement on behalf of the employees performing work for Respondent Leeward.

Sometime during the latter part of October 1979, Jost and his attorney, Leonard Kimmell, met at the Union's offices with Union Representative Andrew Boggia, Union Attorney Brian McCarthy, and Union Steward Thomas Sallie. During this meeting, Jost explained that he could not afford to pay the rates and benefits provided for in Respondent Air-Vac's agreement on municipal jobs performed by Respondent Leeward because the municipalities paid lower contract rates than the private corporations. Boggia told Jost that the Union would do everything it possibly could to influence the municipalities to raise their contract rates. During this meeting, all terms of a supplemental agreement between Respondent Leeward and the Union were agreed upon. After reaching an agreement, Boggia reassured Jost that he would contact the various town supervisors and exert union influence in order to convince the municipalities to raise the contract rate paid to Respondent Leeward. Jost replied that, if the rates were not increased, there was no way he could pay the new contract rate. Boggia responded that he could not help this.

The agreed-upon terms were incorporated into a written "supplemental agreement" drawn up and submitted to the Union for employee ratification and signature by Respondents Air-Vac and Leeward (by its attorney, Kimmell). The supplemental agreement submitted to the Union provided in part as follows:

AGREEMENT entered into between Air-Vac Industries Inc. and its subsidiary Leeward Constructors Inc., 137 Oakside Drive, Smithtown, New York (herein called the Company) and Building Material Local Union No. 282, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 1975 Linden Boulevard, Elmont, New York (herein called the Union).

WHEREAS, Air-Vac Industries Inc. and the Union entered into a collective bargaining agreement effective July 1, 1978 covering the terms and conditions of employment of its members employed by Air-Vac, and

WHEREAS, the employees of Air-Vac have from time to time been assigned to work for Leeward on contracts with various public municipalities at which time they did not receive wages and fringe benefits in accordance with the contract between Air-Vac and the Union, and

WHEREAS, such assignments of employees to Leeward to perform public work was done in good faith belief that the bargaining agreement between Air-Vac and the Union was not applicable to such

³ In November 1977, Respondent Air-Vac became a signatory to the heavy construction excavating collective-bargaining agreement between Nassau-Suffolk Constructors Association Inc., an employer association, and the Union.

employees when performing public work for Leeward, and

WHEREAS, it has been established that the contract rates paid to Leeward by public municipalities are not presently sufficient to enable the Company (Respondent Leeward) to grant employees all the wages and other benefits under the bargaining agreement with the Union, and

WHEREAS, the parties agree that the continued operation of the Company (Respondent Leeward) is in the best interests of the employees,

NOW THEREFORE, it is hereby agreed as follows:

1. The collective bargaining agreement effective July 1, 1978 between Air-Vac and the Union shall cover at all times, all of the Company's (Respondent Leeward's) employees including such times as they are employed by the Company performing work for public municipalities except as set forth below.

Thereafter, paragraphs 2, 3, and 4 of the supplemental agreement provided for wage rates which, although below that provided in Respondent Air-Vac's agreement, were more than presently in effect for work performed for Respondent Leeward, and for contributions by Respondent Leeward into the Union's pension, welfare, and annuity funds for those employees performing municipal work for Respondent Leeward. The concluding paragraph 6 of the supplemental agreement provided as follows:

6. In consideration for the undertakings by the Company (Respondent Leeward) set forth above, the Union and its members employed by the Company agreed to make no claim for unpaid wages or unpaid trust fund contributions under the bargaining agreement that may have arisen prior to the date of this agreement.

There is no language contained in the supplemental agreement as drawn up by Respondent Leeward's attorney, which would indicate directly or impliedly that the supplemental agreement was in any way conditioned upon the municipalities raising the contract rate for work performed by Respondent Leeward on behalf of such municipalities.

Upon receiving the supplemental agreement prepared by Respondent Leeward's attorney, Kimmell, Boggia turned over the agreement to Shop Steward Sallie to obtain ratification by the employees. Shortly thereafter Sallie met with all employees and described the terms of the supplemental agreement to them. The employees thereupon orally ratified the agreement. Sallie returned the agreement to Boggia informing him of the employee ratifications. Boggia thereupon signed the supplemental agreement and submitted it to his attorney, McCarthy, who forwarded the agreement to Attorney Kimmell.⁴

⁴ The record does not disclose the date ratification took place. Nor does the record disclose the date when Union Attorney McCarthy forwarded the supplemental agreement to Respondent.

Sometime in January or February 1980, Boggia telephoned Respondents and spoke to Jost's wife. He asked Mrs. Jost when the supplemental agreement would be signed and she indicated that her husband was out of town and she did not know whether the agreement had been signed. About 1 month later, on or about the end of February, when the agreement had not been submitted to the Union, Boggia telephoned Kimmell and asked him when the agreement would be signed. Kimmell stated that he had given the agreement to Jost and indicated he did not know when and if Jost had signed the agreement. Boggia informed Kimmell that he intended to file charges with the National Labor Relations Board.

Jost admits that he did not sign the supplemental agreement submitted to him by the Union, nor did he implement the terms and conditions set forth therein. Jost contends that the agreement was orally conditioned upon the Union being able to obtain a higher contract rate from the municipalities for work performed for them. In this respect, Jost testified, "My feeling was that if we had gotten the increase [from the municipalities], we certainly would have went [sic] along with the supplemental agreement."

Sometime in January 1980, Jost assembled all employees and informed them that he was not going to sign the supplemental agreement between Respondent Leeward and the Union. He explained to the employees that he would not be able to go along with the supplemental agreement because he had been unable to get an increase in his contract rate from the municipalities. He informed the employees that, if he had to pay the contract benefits and wage increases provided in the supplemental agreement, he would have to close his doors and give up the municipal work and that employees would lose their jobs. He also told the employees that he would try to provide them with hospital benefits in lieu of the benefits provided for in the supplemental agreement provided he could obtain such benefits at a lower rate than that set forth in the supplemental agreement. He asked the men to think about this and to get back to him.

Sometime later, employees informed Jost that they would rather have the union contract but would not close the door to his proposal entirely.

At all times prior to January 1980, all employees who performed work for municipalities were on Respondent Leeward's payroll and received Respondent Leeward's paychecks. After January 1980, the employees who performed work for municipalities were transferred to the payroll of Respondent Environmental.

Respondent Environmental was formed in 1979. It is owned solely by Jost and his wife who are the sole officers and directors as well. Respondent Environmental operates out of the same facility as Respondents Air-Vac and Leeward and employs the same supervisory personnel. Prior to January 1980, Respondent Environmental was primarily engaged in the cleaning of oil spills on highways, stack cleaning, and the wholesale sale of various chemical cleaners and degreasers to municipalities and private corporations used for the purpose of cleaning sewers and drains. Prior to January 1980, Respondent Environmental employed on its payroll a single outside

salesman who was engaged in the selling of the aforementioned chemical cleaners and degreasers to municipalities and private corporations.

Subsequent to January 1980, all those employees classified as drivers who were employed by Respondent Leeward, performing work for municipalities, were transferred to Respondent Environmental's payroll. Thereafter, these employees received Respondent Environmental checks. These employees working for Respondent Environmental, excluding the outside salesman, continued to perform the same work under the same supervision, using the same equipment as they had been performing when working for Respondent Leeward.⁵

IV. ANALYSIS AND CONCLUSIONS

A. *The Single Employer Issue*

A critical issue presented in this case is whether Respondents Air-Vac, Leeward, and Environmental constitute a single employer within the meaning of the Act.

The Supreme Court held in *Radio & Television Broadcast Technicians, Local Union 1264, International Brotherhood of Electrical Workers, AFL-CIO, et al. v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965), that in determining whether enterprises constitute a single employer:

The controlling criteria set out and elaborated in Board decisions are interrelation of operations, common management, centralized control of labor relations and common ownership.

The Board in *Blumenfeld Theatres Circuit, a partnership, et al.*, 240 NLRB 206, 214, 215 (1979), held that a "single employer" status, for the purposes of the National Labor Relations Act, depends upon all the circumstances of the case [and] that not all of the 'controlling criteria' specified by the Supreme Court [in *Radio & Television Broadcast Technicians, supra*] need be present."

Turning our consideration to the instant case, it is admitted by Respondents Air-Vac and Leeward that these two entities are affiliated businesses with common officers, ownership, directors, and operators and constitute a single business enterprise, the said directors and operators formulating and administering a common labor policy. However, it is denied that Respondent Environmental is a single employer along with Respondents Air-Vac and Leeward. In this connection, the evidence establishes that all three Respondent Companies are owned by Jost and his wife. Moreover, Jost and his wife are the sole directors and officers of all three corporations, formulating and administering a common labor policy. Additionally, Respondents operate out of the same facility using the same equipment. The employees of all three Companies are supervised by a single supervisor. Additionally, and most significantly, Respondents utilize a single complement of employees.

⁵ Sometime after March 2, 1980, Respondents Air-Vac, Leeward, and Environmental moved from their 137 Oak Side Drive, Smithtown, location to 45 Terry Road, Smithtown. To date, all operations operate from this facility.

In view of the admissions by Respondents Air-Vac and Leeward as to single employer status and in view of the evidence described above, and the above-cited authorities, I conclude that Respondents Air-Vac, Leeward, and Environmental constitute a single integrated enterprise, and a single employer within the meaning of the Act.

B. *The Appropriate Unit*

Although I have concluded that Respondents Air-Vac, Leeward, and Environmental constitute a single employer, such conclusion does not necessarily support a finding that a single employerwide unit is appropriate for bargaining. In this connection, the Supreme Court, following the Board's theory in a line of prior Board cases, held in *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers, AFL-CIO, et al.*, 425 U.S. 800, 805 (1976), that a determination that two affiliated firms constitute a single employer "does not necessarily establish that an employerwide unit is appropriate, as the factors which are relevant in identifying of the breadth of an employer's operation are not conclusively determinative of the scope of an appropriate unit." The Supreme Court remanded to the Board for determination of the question of whether the employees employed by Peter Kiewit Sons' Co. and South Prairie Construction Co. constituted an appropriate unit within the meaning of Section 9 of the Act.

On remand the Board in *Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 231 NLRB 76, 77 (1977), held that in determining the appropriate bargaining unit, the following factors were particularly relevant: "the bargaining history; the functional integration of operations; the differences in the types of work and skills of employees; the extent of centralization of management and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations; and the extent of interchange and contact between the groups of employees."

An examination of the facts of the instant case establish that Jost and his wife are in complete charge of all three Companies and orders are passed from them to a single supervisor utilized by all three Companies. Additionally, there is but a single complement of employees. Prior to January-February 1980, this single complement of employees performed work either for Respondent Air-Vac or Respondent Leeward. The type of work performed by the employees comprising this single complement was essentially the same work except that Respondent Air-Vac employees performed work for private companies whereas Respondent Leeward's employees performed work for municipalities. Employees were selected to perform the more desirable and higher paid Respondent Air-Vac work, based on a single seniority list. The employees having the greatest seniority received assignments for Respondent Air-Vac work while those within the same complement with lesser seniority received assignments for Respondent Leeward work. At certain times, depending upon work availability, the entire complement of employees might be performing work for Respondent Air-Vac. On other occasions,

where no Respondent Air-Vac work was available, the entire complement of employees might perform work for Respondent Leeward. Most of the time those employees with greater seniority performed work for Respondent Air-Vac while those employees on the lower end of the seniority list performed work for Respondent Leeward. A single supervisor supervised the work of all employees whether working for Respondent Air-Vac or Respondent Leeward.

Prior to the January-February 1980 period, Respondent Environmental operated essentially as a sales corporation, employing a single outside salesman. At some point in time during the January-February 1980 period, and at all times thereafter, following the negotiation of the supplemental agreement herein, all employees performing work for municipalities and on the payroll of Respondent Leeward receiving Respondent Leeward's checks were transferred to the payroll of Respondent Environmental and received Respondent Environmental checks. The effect of this transfer was that the employees performing work previously performed by Respondent Leeward were now performing the same work for Respondent Environmental. Except for the change of payroll all else remained the same. Thus, the same employees performed the same work under the same supervision. The facts establish that Respondent Leeward and Respondent Environmental had the same management, had the same business purpose and operation, utilized the same equipment, serviced the same customers, employed the same supervision, and utilized the same single complement of employees. The Board had held that, in these circumstances, an *alter ego* relationship between two such enterprises exists. See *Young's Metal Fabricators and Roofing, Inc. and Young's Sheet Metal and Roofing Inc.*, 241 NLRB 978 (1979); *Crawford Door Sales Company, Inc.*, and *Cordes Door Company, Inc.*, 226 NLRB 1144 (1976).

I therefore conclude that, in addition to Respondents Air-Vac, Leeward, and Environmental constituting a single employer, Respondent Environmental was an *alter ego* of Respondent Leeward. I further conclude that, based on all the factors recited above, including common ownership, officers, and directors, common supervision, a common facility, single complement of employees, the similar nature of the work involved, and the utilization of the same equipment, that the single unit of employees which I find to be commonly employed by Respondents Air-Vac, Leeward, and Environmental constitutes an appropriate unit for bargaining within the meaning of the Act.

C. Representative Status of the Union

The facts establish that the Union has, at all times material herein, represented the employees of Respondent Air-Vac. This is established by the existing collective-bargaining agreement between Respondent Air-Vac and the Union. In view of my conclusions, described above, that Respondents Air-Vac, Leeward, and Environmental constitute a single employer and that Respondent Environmental is an *alter ego* of Respondent Leeward, and in view of my further conclusion that Respondents herein employ the same complement of employees, I conclude

that, at all times material herein, the Union represented such complement or unit of employees which I have found to be an appropriate unit for bargaining.

Such conclusion is further established by an examination of the language of the supplemental agreement drawn up by Respondents' counsel contained in the "whereas" provisions of the agreement, where it is set forth by way of a recitation of prior bargaining history:

[T]he employees of [Respondent] Air-Vac have from time to time been assigned to work for [Respondent] Leeward on contracts with various public municipalities at which time they did not receive wages and fringe benefits in accordance with the contract between [Respondent] Air-Vac and the Union, and WHEREAS, such assignments of employees to [Respondent] Leeward to perform this public work was done in a good faith belief that the bargaining agreement between [Respondent] Air-Vac and the Union was not applicable to such employees when performing public work for [Respondent] Leeward.

Thus, as among themselves, the Union and Respondents recognized that, while the Union at all times material herein represented the single complement of employees employed by all Respondents herein, the contract benefits were applicable to only the employees when performing Respondent Air-Vac work. The effect of the supplemental agreement is not to expand the scope of employee coverage of the bargaining unit, but rather to increase the type of work covered by the agreement.

D. The Supplemental Agreement

The next issue presented is whether the Union and Respondents reached an agreement on the terms of the supplemental agreement involved in this case. Respondents take the position that the agreement reached was conditioned upon Respondents' receiving a higher contract rate from the municipalities for the work they performed. Respondents' contention is based on Jost's testimony that he understood the promise made by Boggia during the negotiation on October 23 that the Union would use its influence in obtaining from the municipalities such higher contract rate to be an implied agreement by the Union that the supplemental agreement was conditioned on Respondents' obtaining such higher rate from the municipalities. However, this contention is not supported by the evidence. There is no evidence that Boggia or any other union representative stated expressly at any time during the negotiations that the supplemental agreement negotiated was conditioned upon Respondents' obtaining a higher contract rate from the municipalities. Boggia affirmatively denies that such statement was made during the negotiations or at any other time. Moreover, an inspection of the terms of the supplemental agreement, including the preliminary language, fails to include anywhere within the four corners of the agreement any language, either directly or by implication, indicating that such agreement was conditional on Respondent Leeward's receiving a greater rate from municipalities. Clearly, had the agreement been so condi-

tioned, such condition would have been inserted within the agreement itself. That this is true is established by the inclusion in the preliminary language reciting the reason for the differences in the lower rates and benefit coverage to be applied to employees performing work for Respondent Leeward where it is set forth as follows:

WHEREAS, it has been established that the contract rates paid to [Respondent] Leeward by public municipalities are not presently sufficient to enable the company to grant employees all the wages and other benefits under the bargaining agreement with the Union.

In view of the meticulous preliminary language preceding the actual terms of the supplemental agreement, as illustrated by the above example, I conclude that, had such conditional agreement existed, it is inconceivable that such condition would not have been inserted in the agreement. In this regard, the agreement was drawn up by Respondents' counsel. I therefore conclude that the parties did not condition the supplemental agreement on Respondent Leeward's receiving higher contract rates from the municipalities.

Moreover, under the parole evidence rule, a prior contemporaneous oral agreement may not alter the terms of a written contract. The Board has consistently applied this rule in refusing to permit a party to a collective-bargaining agreement to vary the terms thereof by proving a contemporaneous or prior oral agreement or undertaking. *Gollin Block and Supply Company*, 243 NLRB 350 (1979), and cases cited therein.

Neither can it be argued by Respondents that its financial inability to implement the terms of the supplemental agreement because of the failure to obtain from the municipalities an increased contract rate excuses the unilateral repudiation of the supplemental agreement. *Nassau County Health Facilities Association, Inc. and its Members; et al.*, 227 NLRB 1680, 1684 (1977).

There is no dispute but that the parties reached agreement on all substantive terms and conditions set forth in the supplemental agreement. This is established by the testimony of Boggia and Jost and reflected by the supplemental agreement drawn up by Respondents' attorney and submitted to the Union.

In view of my conclusion that there was no understanding or condition, either oral or written, whereby the supplemental agreement herein was conditioned on Respondent Leeward's obtaining a higher rate from the municipalities, and in view of my conclusion that Respondents and the Union agreed upon all substantive terms and conditions set forth in the supplemental agreement, I find that Respondents, by failing and refusing to execute this supplemental agreement and to implement its terms, has violated Section 8(a)(1) and (5) of the Act. *H. J. Heinz Company v. N.L.R.B.*, 311 U.S. 514 (1941); *Gollin Block and Supply Company, supra*.

E. The 8(a)(1) Violations

The undisputed evidence establishes that Respondents bargained directly and individually with its employees in January 1980 when Jost assembled all employees and in-

formed them that he was not going to sign the supplemental agreement between Respondent Leeward and the Union. At this time he explained to the employees that if he had to pay the benefits provided in the supplemental agreement he would have to close his doors and give up the municipal work and that employees would lose their jobs. During this meeting he told the employees that he would try to provide them with hospital benefits in lieu of the benefits provided in the supplemental agreement provided he could obtain such benefits at a lower rate than provided in the supplemental agreement. It is also undisputed that such meeting took place without the knowledge, consultation, consent, or presence of union representatives. The Board has long held that dealing with employees directly at a time when there is a recognized collective-bargaining representative and promising or discussing terms and conditions not sanctioned by a collective-bargaining agreement and outside the presence of any union representative constitutes direct dealing with employees and interference with their Section 7 rights. Accordingly, I conclude that Jost's promise that he would try to provide employees with hospital benefits in lieu of those benefits provided in the supplemental agreement constituted direct dealing with employees and that, by engaging in such activity, Respondents thereby violated Section 8(a)(1) of the Act. *Mountaineer Excavating Co., Inc.*, 241 NLRB 414 (1979); *John M. Lastooka, trading as Ram Construction Company*, 228 NLRB 769 (1977). I also find Jost's statement to the employees at this meeting, that if he had to pay the contract benefits and wage increases provided in the supplemental agreement, he would have to close his doors, give up the municipal work, and employees would lose their jobs, to be an unlawful threat of partial closing with an implied threat of loss of jobs, violative of Section 8(a)(1) of the Act. *Henry A. Young d/b/a Columbia Engineers International*, 249 NLRB 1023 (1980).

CONCLUSIONS OF LAW

1. Respondents Air-Vac, Leeward, and Environmental are, individually, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondents Air-Vac, Leeward, and Environmental constitute a single employer within the meaning of the Act.
3. Respondent Environmental is an *alter ego* of Respondent Leeward.
4. The Union is a labor organization within the meaning of Section 2(5) of the Act.
5. The Union is the exclusive collective-bargaining representative of all drivers employed by Respondents Air-Vac, Leeward, and Environmental.
6. At all times material herein, since 1976, the Union has had a collective-bargaining agreement with Respondent Air-Vac covering the employees in the bargaining unit described above in paragraph 5 of the Conclusions of Law.
7. On or about October 23, 1979, the Union and Respondents Air-Vac, Leeward, and Environmental reached an agreement as to all terms of a supplemental

collective-bargaining agreement covering the employees in the bargaining unit described above in paragraph 5.

8. Respondents Air-Vac, Leeward, and Environmental by refusing to sign the agreement described above in paragraph 7 and by refusing to implement the terms of such agreement violated Section 8(a)(1) and (5) of the Act.

9. Respondents Air-Vac, Leeward, and Environmental by bargaining directly and individually with the employees described above in paragraph 5 and by offering and promising such employees hospitalization benefits and other benefits and improvements violated Section 8(a)(1).

10. Respondents Air-Vac, Leeward, and Environmental by threatening its employees with partial closure of its business and impliedly threatening its employees with layoff violated Section 8(a)(1) of the Act.

11. The aforesaid unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondents Air-Vac, Leeward, and Environmental have engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take the following affirmative action designed to effectuate the policies of the Act. My recommended Order will require Respondents Air-Vac, Leeward, and Environmental to execute the supplemental agreement submitted to them described hereinabove, and to apply all the provisions of said supplemental agreement retroactively to January 1, 1980, and to further make whole unit employees as appropriate for failure to do so in the manner described by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest thereon computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977),⁶ making available, if necessary, records for computation purposes and posting the attached notice.

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record in this case, I hereby issue the following recommended:

ORDER⁷

The Respondents, Air-Vac Industries, Inc., Leeward Constructors, Inc., and Air-Vac Environmental Limited, herein called Respondents Air-Vac, Leeward, and Environmental, respectively, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with Local Union No. 282, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, as the representative of its employees in the unit described herein by refusing to sign the supplemental agreement submitted to them and agreed to on or about October 23, 1979.

(b) Refusing to implement the terms of the supplemental agreement described above and effective as of January 1, 1980.

(c) Bargaining directly with employees and promising employees hospitalization benefits and other benefits or improvements in their working conditions or terms of employment.

(d) Threatening its employees with layoffs and the partial closure of its operations.

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

2. Take the following affirmative action designed and found necessary to effectuate the policies of the National Labor Relations Act, as amended:

(a) Recognize the Union as the exclusive bargaining representative of the employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment.

(b) Upon request by the Union, execute the supplemental agreement agreed upon on or about October 23, 1979, and give retroactive effect to all of the provisions in said supplemental agreement as of January 1, 1980.

(c) Jointly and severally, make whole the employees in the unit described above, in the manner and to the extent set forth and prescribed in "The Remedy" section of this Decision.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due under the terms of this Order, if any.

(e) Post at its place of business copies of the attached notice marked "Appendix."⁸ Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondents' authorized representative, shall be posted immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

⁶ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

⁷ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein, shall as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁸ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."