

**Johnstown Corporation and/or Stardyne, Inc. and  
United Steelworkers of America, AFL-CIO-  
CLC. Case 6-CA-22363**

November 23, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On January 28, 1992, Administrative Law Judge George F. McInerney issued the attached decision. Each of the Respondents filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed an answering brief, cross-exceptions, and a brief in support of their cross-exceptions. The Respondents each filed an answering brief to the General Counsel's and the Charging Party's cross-exceptions, and the Charging Party filed a reply brief to the Respondents' answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions<sup>1</sup> as modified and to adopt the recommended Order.

Respondent Johnstown manufactures and processes steel products. John E. (Jack) Sheehan is the founder of Johnstown, and is Johnstown's principal, if not majority, stockholder,<sup>2</sup> chairman of the board of directors, and, until spring 1988, was Johnstown's chief executive officer.

In February 1988, Johnstown agreed with Penn State University (acting through its applied research laboratory) to establish a facility at Johnstown's mill to use lasers in metal working. Ten bargaining unit employees were assigned to the laser operation and these employees continued to be covered by Johnstown's collective-bargaining agreement with the Union.

Around February 1989, it was decided that the laser facility would become a separate corporation, Stardyne. Johnstown's board of directors were informed of this decision on August 11, 1989. Stardyne was incorporated on September 22, 1989. By letter dated January 12, 1990, Johnstown's stockholders were informed that the "laser metal working operations" had been sold to Stardyne effective December 29, 1989.

In December 1989, employment applications for Stardyne were distributed to Johnstown's employees

who were working in the laser operation. On December 18, 1989, management held a meeting with those laser room employees who had completed employment applications. At that meeting, changes in benefits were discussed and the employees were told to meet privately with management to discuss their pay rates. All but one of the laser room employees were offered and accepted jobs with Stardyne.

The complaint alleges that the Respondents are a single employer, and are also alter egos, and, in the alternative, that Respondent Stardyne is a successor to Respondent Johnstown. The judge found that the Respondents are not a single employer, but that Stardyne is an alter ego of Johnstown, and, in the alternative, that Stardyne is a successor to Johnstown's laser operations. The judge went on to find that the Respondents had violated Section 8(a)(5) and (1) of the Act by bargaining individually with employees, by imposing new working conditions, and by repudiating its collective-bargaining agreement with the Union. Because we agree with the judge's finding that Stardyne is a disguised continuance, and therefore an alter ego, of Johnstown's laser operations, it is immaterial whether the Respondents might also constitute a single employer. The remedy requested by the General Counsel is warranted by the alter ego finding.<sup>3</sup>

In determining alter ego status, the Board has stated that:

Clearly each case must turn on its own facts, but generally we have found *alter ego* status where the two enterprises have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, as well as ownership.

*Crawford Door Sales Co.*, 226 NLRB 1144 (1976); see *Denzil S. Alkire*, 259 NLRB 1323 (1982), enf. denied 716 F.2d 1014 (4th Cir. 1983); and *Advance Electric*, 268 NLRB 1001 (1984); *Airport Bus Service*, 273 NLRB 561 (1984).

Initially, we note that Stardyne shares Johnstown's laser operations' business purpose of using laser technology in metal production for commercial purposes. Although Stardyne and Johnstown agreed that existing customers' contracts would be assigned to Stardyne, for various reasons the assignments did not come

<sup>1</sup>In adopting the judge's finding that the Respondents are alter egos we find it unnecessary to rely on the judge's citations to *Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989), and *Hendricks-Miller Typographic Co.*, 240 NLRB 1082 (1979), which are stock transfer cases.

<sup>2</sup>The record reveals that Sheehan's percentage interest apparently fluctuated somewhat from slightly under to slightly over 50 percent for the period in question. The judge found, and we agree, that Sheehan had effective ownership of Johnstown.

<sup>3</sup>We do not agree with our concurring colleague that this is an appropriate case in which to engage in extended dicta on theoretical differences between alter ego and single employer concepts. We also disagree with our colleague's contention that our decision here "is directly inconsistent with *Gartner-Harf*, 308 NLRB 531, 533 fn. 8 (1992)." The allegedly inconsistent sentence our colleague quotes from that opinion was followed by the observation that there was no evidence in that case of a "disguised continuance." It is thus apparent that the Board in *Gartner-Harf* did not purport to address situations like the one here, in which an operation ceases and then resumes under another name.

through. There is no evidence that Stardyne had new customers that it had independently obtained at the moment operations were transferred from Johnstown. Nevertheless, although it has expanded its customer base Stardyne does serve several of Johnstown's laser customers in the same specialized laser field. Additionally, most of the equipment used by Stardyne is the same as that used at Johnstown's laser facility, and Stardyne is located in the same place, bay 9 of Johnstown's mill, as was the laser operation under Johnstown.

Several managers, including Stardyne's president, Nurminen, and a Stardyne supervisor also managed the laser operations at Johnstown. Ed Sheehan Sr., Stardyne's chief executive officer and a physicist with extensive experience in the military application of lasers, was instrumental in establishing Johnstown's laser operation. He was first consulted in 1987 by his brother, Jack Sheehan, about the possibility of bringing the laser metal working technology to Johnstown. Ed Sheehan Sr. advised Jack Sheehan that this was a good idea. Although Ed Sheehan Sr. testified that he was not directly involved in the laser operations until 1989, his testimony revealed that he had an important hand in the decision-making that led to Stardyne's establishment. Thus, he testified that "we" made a mistake in bringing over the fitter/welders to the laser operations and that "we" immediately brought down a laser after Penn State decided that Johnstown Corporation was going to be the partner in the laser operation.<sup>4</sup> In early 1989, Jack Sheehan asked Edward Sheehan Sr. to determine whether continuing the laser operations was feasible. Ed Sheehan Sr. investigated the background of personnel from Penn State who were involved in the laser's operation, decided that there was a market for the laser technology, and determined the capital needed to penetrate the market. He then met with Jack Sheehan, and Johnstown's chief executive officer, Slater, and Johnstown's vice president of finance, Warner, regarding the information he had obtained. Thus, Edward Sheehan Sr., who is the chief executive officer of Stardyne, had been acting as Johnstown's principal adviser, whether or not in an official capacity, concerning the laser operation from the time Jack Sheehan began to consider bringing the laser operation to Johnstown Corporation. Based on the above, we find substantially identical management and supervision of the laser operation as it existed at Johnstown prior to December 1989 and as it existed at Stardyne immediately after Stardyne was established.

We also find that Johnstown and Stardyne have substantially identical ownership. Johnstown has a 40-percent ownership interest in Stardyne and Jack Sheehan,

<sup>4</sup>The fitter/welders were the bargaining unit employees at Johnstown Corporation who were transferred to the laser operation.

Johnstown's principal stockholder,<sup>5</sup> also personally has a 20-percent interest in Stardyne.<sup>6</sup>

We agree with the judge that there is not sufficient evidence to establish that Stardyne was created so that Johnstown could "evade responsibilities under the Act." *Advance Electric*, supra, 268 NLRB 1001, 1002, citing *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984). The Board does not require, however, that an illegal motive be established in order to find alter ego status. *Allcoast Transfer*, 271 NLRB 1374, 1378-1379 (1984), enfd. 780 F.2d 576 (6th Cir. 1986). See *Goodman Piping Products Co. v. NLRB*, 741 F.2d 10 (2d Cir. 1984), affg. sub nom. *E. G. Sprinkler Corp.*, 268 NLRB 1241 (1984). We have found that Johnstown's laser operation and Stardyne shared substantially identical management, business purposes, operation, equipment, customers, supervision, and ownership. We therefore find that Respondent Stardyne is a disguised continuance, and therefore an alter ego of Johnstown's laser operation.

#### AMENDED REMEDY

We agree with the judge that Stardyne is a successor to Johnstown Corporation as well as an alter ego. Although such a finding is unnecessary in finding the 8(a)(5) violations, we note that a finding of successorship, without a finding of alter ego status, would require a different remedy. *Spruce Up Corp.*, 209 NLRB 194 (1974).

<sup>5</sup>The Respondents contend that Jack Sheehan does not control Johnstown's 40-percent interest in Stardyne, but that Johnstown's interest is represented by its president and CEO, Charles Slater, who sits on the Stardyne board of directors. Respondent acknowledges, however, that Slater occupies his seat not as an independent board member, but by virtue of Johnstown's interest in Stardyne. As Johnstown's president and CEO, Slater perforce must be responsible to Johnstown's controlling shareholder, Jack Sheehan. Indeed, there is no evidence that Slater acts independently of Jack Sheehan. On the contrary, the judge found that when Slater became CEO, Jack Sheehan informed the shareholders that he had hired Slater and he could fire Slater.

<sup>6</sup>See *Haley & Haley, Inc.*, 289 NLRB 649, 652 (1988), enfd. 880 F.2d 1147 (9th Cir. 1989) (substantially identical ownership found where one company was the wholly owned subsidiary of the other company and the stock of the latter company was concentrated in members of the same family). We find it unnecessary to rely on the judge's statement in fn. 29 that he was "sure that Jack Sheehan could count on the support of the additional 20 percent of Stardyne stock owned by his brother, Ed Sheehan, Sr." The Board does not automatically assume common ownership because members of the same family have an ownership interest in both companies. Each case is examined in light of all the surrounding circumstances, but the Board places particular emphasis on whether the owners of one company retained financial control over the operations of the other. See *First Class Maintenance*, 289 NLRB 484, 485 (1988). We do note here, however, that Jack Sheehan has substantial ownership interest in both Respondents and, in addition, that Edward Sheehan Sr. testified that he was on the board of directors of Johnstown, in essence, to give Jack Sheehan someone he could trust, and with whom he could discuss ideas.

Having found that the Respondent alter egos, Johnstown and Stardyne, have violated Section 8(a)(1) and (5) of the Act, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent shall immediately recognize and, upon request, bargain with United Steelworkers of America, AFL-CIO-CLC concerning the terms and conditions of employment of employees currently employed in the laser operations located in bay 9 of the Respondent's mill in Johnstown, Pennsylvania. The Respondent, having on or about January 1, 1990, unilaterally implemented wage rates and other terms and conditions of employment effecting its laser operation, without bargaining with the Union, shall restore the status quo ante as it existed prior to its unilateral changes in terms and conditions of employment, and shall make whole any bargaining unit employees adversely affected by the terms and conditions of employment unilaterally implemented by the Respondent for any such loss of earnings or benefits in accordance with *Ogle Protection Services*, 183 NLRB 682 (1970), with interest as set forth in *New Horizon for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondent shall reimburse bargaining unit employees for any expenses ensuing from the Respondent's unlawful failure to make such required payments and interest or other sums as provided in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 1 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981), and *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that Respondent Johnstown Corporation and its alter ego, Stardyne, Inc., Johnstown, Pennsylvania, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER RAUDABAUGH, concurring.

I concur with my colleagues' conclusion that Stardyne is an alter ego of Johnstown's laser operations. However, in my view, the judge's decision, affirmed by my colleagues, continues the confusion between the concepts of alter ego status and single employer status. In order to eliminate that confusion, I write this separate concurrence.

As noted above, the judge and my colleagues found that Stardyne and Johnstown are alter egos. They expressly declined to find that the two entities constitute a single employer. Thus, my colleagues treat differently the "alter ego" and "single employer" contentions. However, they refuse to say what these differences are.

Further, my colleagues' decision is directly inconsistent with *Gartner-Harf*, 308 NLRB 531, 533 fn. 8

(1992). In that case, the Board said that "alter ego is in effect a subset of the single employer concept (i.e., not all single employers are alter egos, but all alter egos by definition meet the criteria for single employer status)." Under this statement, the conclusion in this case (that Johnstown and Stardyne are alter egos) would lead, by necessary logic, to the conclusion that these entities also constitute a single employer. Notwithstanding this, my colleagues, without overruling *Gartner-Harf*, find alter ego status but refuse to pass on the single employer question.<sup>1</sup>

It would be tempting to say, with my colleagues, that the difference between alter ego status and single employer status is inconsequential in this case. Concededly, a "single employer" conclusion would add nothing to the remedy here. However, I believe that the Board has an obligation to clarify the law. The obligation is particularly strong where, as here, the Board's decision continues the confusion in the law and is inconsistent with at least one Board declaration on the subject.

The differences between "alter ego" and "single employer" are of more than academic interest. If two entities are found to be alter egos, the contract covering the one entity will be deemed to cover the other one. By contrast, if two entities are deemed to constitute a single employer, the contract covering the one will not necessarily be deemed to cover the other one. The proponent of contract coverage must go on to show that the employees of the one entity and the employees of the other constitute a single appropriate unit.<sup>2</sup>

Based on all the above, I would clarify the law. I would draw a clear distinction between those facts which will result in an alter ego finding and those which will result in a single employer finding.

In my view, the single employer analysis should be used when two companies *concurrently perform* the same function, and one of them recognizes the union although the other does not. That is, the term applies "to situations in which *ongoing*, nominally distinct businesses" are alleged to be the same.<sup>3</sup> If the two

<sup>1</sup> My colleagues seek to explain away the Board's statement in *Gartner-Harf*. I disagree with them. The fact is that the Board clearly made the statement and then applied it in that case. That is, the Board, after making the statement and after finding no single employer status, concluded "a fortiori" that there was no alter ego status. My colleagues seize on a subsequent sentence in which the Board "note[d] also" that there was no showing of a "disguised continuance." It is clear, in context, that this thought was separate and independent from the previously stated principle and conclusion. This separate "notation" by the Board cannot, and does not, detract from the broadly stated principle and its application in that case.

<sup>2</sup> *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976).

<sup>3</sup> *Gilroy Sheet Metal*, 280 NLRB 1075 fn. 1 (1986) (emphasis added). In that case, the Board did not apply a "single employer" analysis because the first company no longer existed.

companies are a single employer,<sup>4</sup> and if the two groups of employees are a single appropriate unit, then the bargaining and contractual obligations of the one company will be deemed to also apply to the second company.

By contrast, the alter ego concept should apply to situations where the first company goes out of existence (or at least the unionized function goes out of existence), and a second company starts to perform the work on a nonunion basis.<sup>5</sup> If the new company is the alter ego of the prior one,<sup>6</sup> the bargaining and contractual obligations of the prior company will be deemed to apply to the second one.<sup>7</sup>

I would not require a finding of antiunion motive in order to establish alter ego status. For example, a company may wish to dissolve one corporation and form another for reasons of tax or corporate law. Assuming that everything remains substantially the same (under the alter ego factors), I would find alter ego status, notwithstanding the absence of antiunion motive. In sum, if the second company is in reality the same as the prior one, the corporate shell game should not operate to change labor law obligations.<sup>8</sup>

In the instant case, Johnstown performed the laser work on a unionized basis. It then ceased performing that work, and a new company (Stardyne) began performing it. Thus, the alter ego analysis applies and the single employer analysis does not apply.<sup>9</sup> I agree with the conclusion that the alter ego factors have been established. As discussed above, I would not regard as fatal the absence of antiunion motivation. Thus, I would find that Stardyne is an alter ego and that it must recognize the Union and honor the contract.

<sup>4</sup>The Board examines four factors in determining single employer status. They are: interrelation of operations, common management, common ownership or financial control, and centralized control of labor relations.

<sup>5</sup>Consistent with this analysis, after the Board declined to apply a single employer analysis in *Gilroy*, supra, it proceeded to apply an alter ego analysis as to the second company which took the place of the first one.

<sup>6</sup>The Board examines seven factors in determining alter ego status. They are ownership, management, business purposes, operations, equipment, customers, and supervision.

<sup>7</sup>Unlike the single employer situation, there is no need to ascertain whether two groups of employees constitute one unit. See *Walter N. Yoder & Son*, 270 NLRB 652 fn. 2 (1984). For, in alter ego situations, there is only one group left.

<sup>8</sup>For the sake of completeness, I note the concept of *Burns* successorship. Unlike the single employer and alter ego concepts, the successor is a new and different employer who takes over the business. If *Burns* tests are met, the new employer must recognize the union. However, because it is a different employer, it is not obligated to honor the contract of the predecessor.

<sup>9</sup>Although Johnstown remains in existence, the significant point is that the unionized laser function at Johnstown ceased and Stardyne took over the function.

However, because this is not a situation where two companies are concurrently performing the laser operation, I would not apply "single employer" concepts and I would find no "single employer" relationship.

*Leone P. Paradise, Esq.*, for the General Counsel.

*Mr. Edward R. Johnson*, of Johnstown, Pennsylvania, for Respondent Johnstown Corporation.

*Mark E. Scott, Esq.*, of Coraopolis, Pennsylvania, for Respondent Stardyne, Inc.

*David I. Goldman, Esq.*, of Pittsburgh, Pennsylvania, for the Charging Party.

## DECISION

GEORGE F. MCINERNEY, Administrative Law Judge. Based on a charge filed by the United Steelworkers of America, AFL-CIO-CLC (Union), on January 5, 1990, the Regional Director for Region 6 of the National Labor Relations Board (the Regional Director and the Board), issued a complaint on March 2, 1990, alleging that Respondent Johnstown Corporation (Johnstown) and Stardyne, Inc. (Stardyne), are alter egos and a single employer within the meaning of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act). In addition, the complaint alleges that these Respondents engaged in unilateral dealing with their employees; changed terms and conditions of employment for certain of their employees; repudiated a currently existing collective-bargaining agreement as it applied to certain employees; and withdrew recognition of the Union as the exclusive bargaining representative of certain of its employees.

After several postponements this matter came on to be heard before me at Johnstown, Pennsylvania, on December 11 and 12, 1990, at which time all parties were represented and had the opportunity to introduce testimony and documentary evidence, to examine and cross-examine witnesses, to make requests and motions, and to argue orally.<sup>1</sup> After the close of the hearing, all parties filed briefs, which have been carefully considered.

On the entire record in this case, including my observations of the witnesses and their demeanor while testifying, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

The complaint alleges, the answers of Respondents Johnstown and Stardyne admit, and I find that both Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answers of Respondents Johnstown and Stardyne admit, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup>The General Counsel has filed a motion to correct the transcript of this hearing in 13 instances. There was no objection to this motion, and the proposed corrections comport with my memory of what transpired at the hearing. The General Counsel's motion is allowed.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Johnstown Corporation was founded in 1984 in premises formerly used by another steel company, on 545 Central Avenue in Johnstown, Pennsylvania. It has been engaged since that time in the manufacture and fabrication of steel products. At the time of this hearing there were 390 production and maintenance employees on the payroll at Johnstown.

John E. (Jack) Sheehan was a founder of Johnstown and was chairman of its board of directors from 1984 at least up to the date of this hearing. Jack Sheehan also served as chief executive officer up to the spring of 1988 at a shareholders meeting when he notified the shareholders that he had appointed Charles E. Slater, Johnstown's president, to be chief executive officer.<sup>2</sup>

There were some questions as to how much of Johnstown's stock Jack Sheehan owned at various times in the 1988-1990 period. The parties were unable to agree on any amount. The figures in evidence ranged from between 49 to 54 percent in August 1988, to 52.7 percent in August 1990, to 49.54 percent in October 1990. The stock is not publicly traded, but there was an employee stock purchasing plan in existence at Johnstown, and these variations in Jack Sheehan's percentage of ownership in Johnstown's equity could vary slightly depending on sales or redemptions in the amounts in the stock purchasing plan.

In any event, the amount of stock owned by Jack Sheehan at any particular time, and the percentage of that position relative to the total outstanding shares would be a matter within the sole knowledge of Johnstown's financial officers. Jack Sheehan did not testify, nor did Johnstown produce any evidence on percentage of stock Jack Sheehan owned. An exhibit dated January 1, 1990, shows that he owned 50.31 percent of the outstanding shares at that time. I find that Jack Sheehan held an absolute majority of shares at that time, and, allowing for slight variations before and after January 1, 1990, I infer and find that he had effective ownership and control over the affairs of the Johnstown Corporation through all times material here.

At the time it was organized, Johnstown recognized the Union as the bargaining representative for its production and maintenance employees.<sup>3</sup> A collective-bargaining agreement running from June 27, 1984, to June 26, 1989, was executed by Johnstown and the Union, and covering "all manufacturing and maintenance employees engaged at work at the plant in Johnstown, PA, excluding all office clerical employees, professional employees, quality control technicians, guards and supervisors." This contract contained union-shop and dues-checkoff provisions.

Sometime in 1987 John E. Sheehan (Jack Sheehan), the board chairman and, at that time, chief executive officer of Johnstown, became interested in a type of metalworking

<sup>2</sup>This is the occasion when Jack Sheehan announced, according to the undenied and credible testimony of Local 9089 President John P. Cassidy, that he had complete faith in the ability of Chuck Slater to perform this job, that if it was not performed to his liking, he had hired Chuck Slater and he would have the ability to fire Chuck Slater.

<sup>3</sup>The International Union was the organization recognized by Johnstown, and the Union describes itself in the agreement as acting "on behalf of" its Local 9089.

technology utilizing lasers. Jack Sheehan discussed the subject with his brother Edward J. Sheehan Sr. (Ed Sheehan Sr.), a physicist whose background included over 30 years in the management of, primarily, military applications of lasers. Ed Sheehan Sr. agreed that laser metalworking technology was a good idea for Johnstown. He testified that he did not become further involved until sometime later.

The particular technology involved here is based on the use of highly complex systems of computers and high-voltage laser beams to weld metals by actually fusing the molecules of different parts, or different metals, into a single bond. The systems described in this case are also used in plating or "cladding" of manufactured products.

The techniques used were originally developed in research laboratories operated by the United States Navy.<sup>4</sup> The Navy people were also involved in grants to the Applied Research Laboratory (ARL) at the Pennsylvania State University (Penn State), and, at some point, some of the Navy researchers transferred themselves and their work, together with programming and manufacturing technology, to the ARL. In addition, contracts, probably funded by the Navy, were entered into between ARL and the Westinghouse Corporation which provided for Westinghouse to develop practical applications for industrial use of processes which had been worked out, theoretically, in the laboratories.<sup>5</sup>

For reasons not material here, Westinghouse decided to get out of this arrangement sometime in 1987. This led ARL to look for a new industrial partner,<sup>6</sup> and led also to the interest expressed by Jack Sheehan to his brother in late 1987. Jack Sheehan followed up on the matter, and, on February 5, 1988, Johnstown entered into an agreement with Penn State (acting through its ARL and under the direction of the Navy) to establish a Laser Metalworking (LM) Technology Transfer Facility on Johnstown's property. The purposes of the agreement were, "(1) to advance the state-of-art of LM technology through further research and development; (2) to accommodate the Navy technology at the Facility; and (3) to transfer the LM Technology to commercial (non federal government) markets."<sup>7</sup>

After the decision was made to bring the LM technology to Johnstown, preparations had to be made to provide a facility which would meet requirements for cleanliness and controlled temperatures required in the laser operation. Johnstown's plant was described as a typical steel mill, with machines, dirt, dust and scraps all over. So the Company chose one section of the mill's upper shop, bay 9,<sup>8</sup> a red brick extension or bay, about 45 feet by 150 feet, to house the laser operation. Bay 9 had been used as a storage area for patterns and all that material was cleaned out and stored

<sup>4</sup>This material comes from the undenied and candid testimony of Dr. John I. Nurminen, who was the president of Stardyne at the time of this hearing.

<sup>5</sup>John Nurminen had been employed at Westinghouse for some 15 years in the Metals Joining Research Department, ending up as manager of that department.

<sup>6</sup>And also led Nurminen and several of his associates at Westinghouse to leave to become associated, Nurminen as a research professor, with ARL and Penn State.

<sup>7</sup>See Agreement dated November 23, 1988, between Johnstown and Penn State, p. 2.

<sup>8</sup>Out of a total of 23 bays.

somewhere else.<sup>9</sup> Work then proceeded with an outside contractor together with Johnstown maintenance employees to transfer this dirty old section of a steel mill into “some kind of a glamorous room with a drop ceiling, insulated walls, enclosed windows, and painted walls and floor.” Unlike other parts of the mill, bay 9 was heated and air conditioned to maintain a constant temperature of 72. Some facilities, such as a shower room outside of bay 9 and a gantry crane attached to the building inside bay 9, remained under the control of Johnstown and were supplied and serviced by Johnstown throughout the period of time involved here.

The equipment and machinery installed in bay 9 included some leased, some from Penn State’s ARL, and some purchased for the facility. The facility began operations in June 1988, and a formal dedication of “The Technology Transfer Facility for Laser Metalworking” was formally dedicated in June 24. A brochure put out by Johnstown announcing the dedication described its growth from 35 employees on July 5, 1984, to 560 employees by June 1988, and stated, hopefully, that “The implementation of laser technology will enable the Johnstown Corporation to produce higher quality products and to increase employment.”

The staff employed in the laser operation was headed by John I. Nurminen and James E. Smith, who had come from the Westinghouse location.<sup>10</sup> According to Cassidy’s undisputed testimony, 10 rank-and-file employees were assigned to the laser operation by Lawrence (Larry) Lear, manager of fabrication for Johnstown. Lear assigned the employees on the basis of their expressed interest in learning the laser operation, and according to seniority, in labor class 4, filter/welder/burner (FWB), class 2, FWB utility, and class 1, laborer. The employees so assigned continued to be paid at contractual rates, but Johnstown was compensated for this expense by ARL (presumably using grants from the Navy). Union dues continued to be deducted, and the jobs held by these employees were subject to seniority and bumping requirements of the collective-bargaining agreement. This last resulted in employees in the laser room being bumped out by senior employees from other areas of the plant.<sup>11</sup>

Thus, by mid-June 1988, the “Technology Transfer Facility for Laser Metal Working” was installed in the refurbished bay 9 at the Johnstown Company; equipment with new and transferred equipment, with supervisory staff from ARL and workers from the Johnstown workforce.

<sup>9</sup>This description of the building, and of the remodeling work, was taken from the testimony of Local 9089 President John P. Cassidy, whose concluding remark on the remodeling was that you could “almost eat off the floors” in bay 9.

<sup>10</sup>The parties stipulated that Nurminen and Smith were agents of Johnstown and supervisors within the meaning of Sec. 2(11) of the Act. Nurminen and Smith, along with John T. Barnes, a salesman, were paid by Penn State until December 1989. Also stipulated was the supervisory status of Paul F. McMullen, production supervisor assigned by Johnstown to the laser operation, Barnes, and Thomas Rentchko, an engineering specialist who performed quality control and research and development for the laser operation.

<sup>11</sup>The record indicates that only two grievances were filed by the Union in June and July 1989 over displacement of two employees in the FWB category by “less senior” employees. There is no substantive evidence of frequent movement into or out of the laser room because of requirements in the union contract.

### B. *The 1989 Negotiations*

Negotiations for a new collective-bargaining agreement to succeed the agreement due to expire at midnight on June 26, 1989, commenced in January 1989. These negotiations were apparently difficult, requiring, according to Local Union President John P. Cassidy, 17 sessions, finally culminating in an agreement near to the expiration date of June 26, 1989. We are not concerned with most of the contract, affecting all of Johnstown’s 390 union employees, but only with those provisions applicable to employees in the laser operation. It was the position of the Union during the negotiations that the FWB class 4 positions should be upgraded. This was countered by the Company with the argument that the job was a welding job, and no more difficult than what an FWB would ordinarily do. The Union eventually conceded on this point, and the classifications remained as they were.

This did not, however, settle the questions of bumping or “regression” rights whereby unit employees in other parts of the plant could bump down or across, by seniority, into the laser operation. Discussions on these issues continued after the rest of the contract had been agreed to, ending with a session on July 20 when the parties finally came to an agreement. A new classification of laser tech 3 was established, together with a ladder of progression within the laser operation, whereby individuals coming into the operation as FWB utility class 2 employees could, by serving 500 hours and passing a test, advance to the new laser tech class 3 category. Employees in the laser tech 3 or caster roll processor, class 3,<sup>12</sup> could, after 750 hours and 500 hours respectively, and passing a test, advance to the FWB class 4 position. In regressions, or layoffs, the people in the FWB 4 category could bump down into the laser tech 3 positions. With the settlement of these issues the contract was complete, effective by its terms until midnight, June 26, 1994.

### C. *The Formation of Stardyne*

After its heralded and optimistic beginning in June 1988, and despite the fact that most, if not all, of its salary costs were underwritten by Penn State’s ARL, the laser operation was encountering financial problems by the end of the year.

In December, Ed Sheehan Sr. testified that his brother Jack informed him of “problems” with the laser program.<sup>13</sup> The program was losing a lot of money, and both Penn State and

<sup>12</sup>This category was used in other parts of the plant, as was the FWB 4 classification. Apparently some employees in the laser operation were in the caster roll processor category, and the progression and regression chart prepared by Johnstown, dated “7/20/89,” shows their status, as well as the lines of progression and regression in the laser operation, and in the rest of the fabrication department.

<sup>13</sup>I appreciate the facts that Jack Sheehan did not appear or testify in this proceeding, and that Ed Sheehan Sr.’s knowledge of, and testimony about these events are, at best, self-serving. I found Ed Sheehan Sr. to be a candid and forthright witness, however, and his testimony about the establishment of Stardyne is both logical and in accord with what documents there are in the record concerning that event. I therefore rely on Ed Sheehan Sr.’s testimony, as supplemented by that of John Nurminen, on the reasons for the establishment of Stardyne. I note also that there were no objections to the hearsay aspects of Sheehan’s and Nurminen’s testimony on this subject.

the Navy needed to be shown that this laser technology had profitable industrial application, as well as academic interest.

So, in the beginning of 1989, Jack Sheehan asked his brother to come up to Johnstown from Washington, D.C., where the latter had a consulting business, after years of working for the United States Army, to check into, first, the people (Nurminen, Smith, Barnes, et al.) who were in charge of the laser operation; second, to determine if there was a real market out there for this (somewhat exotic) process; and, third, how much money it would take to "attack the market place effectively."<sup>14</sup>

Ed Sheehan Sr. agreed to do this and he came up to Johnstown in January and February 1989. He first checked on Nurminen, finding him qualified, capable, and well respected in the field. Sheehan then proceeded to develop a business plan, determining that it would require \$4 million to "go after the market" effectively.

Johnstown, however, was not prepared to spend any more money on the laser operation. Indeed, according to Ed Sheehan Sr., Johnstown had borrowed up to its debt limit, and needed capital for its fabricating, casting, and normal steel production.

In February, Ed Sheehan Sr. reported the results of his study to Jack Sheehan, Charles E. (Chuck) Slater, president and chief executive officer, and Caryl Warner Jr., vice president of finance. Ed Sheehan Sr. expressed his confidence in the future of this laser technology, as well as his confidence the Penn State group (Nurminen, et al) in the process. The Johnstown group was not convinced, but after what Ed Sheehan Sr. described as "meetings" it was decided to go ahead with the "project."<sup>15</sup>

Ed Sheehan Sr. indicated that he had hoped that the new entity, to be named Stardyne, would be able to open up in April, but there were, inevitably, delays. The lender for the purchase was to be Principal Financial Group of Des Moines, Iowa, but they did not reply to the financing application until July. A person brought in to run the new company had a heart attack, was out 6 to 8 weeks, and then decided that he did not want to spend his declining years in Johnstown, Pennsylvania. So Ed Sheehan Sr. gave up his consulting business in Washington and, perforce, took the helm of the new entity.

Along with financing delays, and the replacement of a prospective chief executive, there were concerns on the part of the scientific people which needed to be considered. According to John Nurminen, he and the other people who were working on the laser operation at Johnstown were faced with a career choice by the summer of 1989. Apparently the Navy had problems with a contractor who was responsible for LM cladding of trough cover assemblies for use with sea-borne missiles. This resulted in a chain of events which, first, prompted the Navy to ask Johnstown to get into production

<sup>14</sup>There is no explanation in the record about why these basic questions were not explored before the laser operation was undertaken in 1987 and early 1988.

<sup>15</sup>The "project," the establishment of Stardyne, was apparently approved at this time, steps were taken to obtain financing, and negotiations took place between Johnstown and someone, probably Ed Sheehan Sr. for transfers, leases and purchases, but Johnstown's board of directors did not approve of the transfer until August 11, 1989, and the shareholders were not notified about it until they received a letter from Jack Sheehan dated January 12, 1990.

immediately and before it had planned to do so; and second, led officials at Penn State to express concern that its ARL people at Johnstown were getting more deeply involved in production than was permitted under Penn State's charter. The ARL Scientists at Johnstown were, therefore given a choice to return to Penn State or to leave the ARL program; and, third, as Nurminen testified, led him and his associates to demand something more than just an employment contract with Johnstown if they were to give up untenured, but still secure, positions at Penn State. What they wanted was a share in the enterprise. They went out and hired a lawyer, eventually coming to an agreement with the new Stardyne corporation for shares in the enterprise. Of the five original ARL people at Johnstown, three, Nurminen, Smith and Barnes, stayed with Stardyne, and two, Paul Denny and Dave Farston, returned to Penn State.

At a Johnstown board of directors' meeting on August 11, 1989, Chairman Jack Sheehan discussed this matter with the Board. He referred to financial losses and the involvement of Ed Sheehan Sr. in the desire to "create a more business like approach." He then went on to say, "We decided in order to retain the technology, preserve our investment, get a return on our capital and not continue the losses, we needed to form a split group and individually finance it. The split group will put cash in and borrow \$3 million from Principal Financial Group. The losses will never show up on the Company's books, they will be absorbed by the new enterprise. The new enterprise will lease the buildings and improvements from the Company and will generate a significant amount of income to the Company. Expect to close sometime around the first of November."<sup>16</sup>

Much the same justification was contained in a January 12, 1990 letter from Slater to Johnstown's shareholders informing them of the

sale of our laser metal working operation to Stardyne, effective 12/29/89, for a total of about \$2,550,000 in cash and notes. The final price will be determined as a result of profit or losses incurred by the laser operation in December, 1989. Included in this price is approximately \$550,000 of development expense incurred in 1989 but not taken as a loss by the Johnstown Corporation (JC). This sale cancels the requirement that these losses be taken by our own Company. In addition, the sale generates about \$200,000 in profit for the month of December, 1989, which come about because of recapture of interest and depreciation.

The major reasons behind the sales were to allow the laser operation to satisfy its additional cash needs for expansion that were beyond the capacity of the JC to support and to provide a vehicle such that the key technical people could have significant equity participation in order to hold their interest in the operation. The ownership of Stardyne, Inc. will be as follows:

Johnstown Corporation—40%  
Edward J. Sheehan—20%  
John E. Sheehan—20%

<sup>16</sup>The minutes of this board meeting verify the claim that Johnstown had serious financial problems aside and apart from the laser operation.

Other Stardyne officers—20%<sup>17</sup>

Stardyne's initial equity of \$1,000,000 was provided by JC's paying \$500,000 for 40 percent ownership, Edward J. Sheehan's buying 20 percent ownership for \$250,000, and John E. Sheehan's buying 20 percent ownership for \$250,000. In addition to the cash and notes mentioned above, JC will receive rent of about \$1,168,000 over the ten year lease period which includes the base rent and leasehold improvements with interest. If Stardyne is very successful, with our ownership of 40 percent, JC stockholders will benefit substantially from our equity investment while our liability is limited to that of investor, creditor and landlord.

Stardyne was incorporated on September 22, 1989. On December 28, 1989, its first shareholders' meeting was held, at which a board of directors was named, as follows:

John I. Nurminen  
 Charles E. Slater<sup>18</sup>  
 John E. Sheehan<sup>19</sup>  
 Edward J. Sheehan, Sr.  
 Harold D. Brody<sup>20</sup>

Once elected, the directors proceeded to select a slate of officers, as follows:

Edward J. Sheehan, Sr., chairman and chief executive officer  
 John I. Nurminen, president  
 J. T. Barnes, vice president  
 J. E. Smith, secretary and treasurer.<sup>21</sup>

The board also authorized the distribution of stock to Nurminen, 500 shares; Smith, 400 shares; and Barnes, 300 shares. These were in addition to the 4000 shares owned by the Johnstown Corporation, representing \$500,000 invested; and 2000 shares a piece to the Sheehan brothers, who each contributed \$250,000. The total of 9200 outstanding shares remained current through the time of this hearing on December 12, 1990.

The purchase of 4000 shares of Stardyne by Johnstown was authorized at a meeting of Johnstown's board of directors on December 18, 1989, together with further authorization for the sale of the laser operation to Stardyne for \$2.6 million; an agreement between Johnstown, Stardyne and the

<sup>17</sup>As far as I can determine, the other Stardyne offices, John Nurminen, president, James Smith, secretary-treasurer, and J. T. Barnes, vice president, were actually authorized a total of 1200 shares between them, or 13 percent of the outstanding shares of Stardyne.

<sup>18</sup>Slater was president and chief executive officer of Johnstown. The parties stipulated that Slater's position on the board of Stardyne was to represent Johnstown's position in Stardyne's equity.

<sup>19</sup>Jack Sheehan owned 20 percent of Stardyne's outstanding shares.

<sup>20</sup>Brody was a professor at the University of Pittsburgh who was elected as a director to watch out for the interests of Stardyne's scientific and technical staff.

<sup>21</sup>As of December 28, the board named Edward J. Sheehan Jr. as executive vice president, changed Smith to vice president for manufacturing and operations, and Barnes to vice president for sales and marketing.

Sheehan brothers effectuating the transfer; and the lease of bay 9 to Stardyne.

Stardyne's board, meeting on December 1, 1989, authorized its officers to agree with Johnstown to buy lasers, supplies, and other equipment for a total price of \$2,405,962,<sup>22</sup> and to enter into a \$3 million loan from Principal Mutual Life Insurance Company at 13-percent interest.

Having come to terms with the scientists, having agreed on the selling price and rental for bay 9, and having arranged financing for the new business, one detail remained, and that was to obtain a work force. Of course, there was a staff of workers already in place. These were the employees from the Johnstown bargaining unit who had expressed an interest in working with lasers, who had been assigned to the laser operation by Fabrication Department Manager Larry Lear, and who had been trained with the help of Penn State subsidies for up to a year and a half by December 1989, and who were currently operating the equipment in the laser room, doing preparation work, cleaning, messenger work, and whatever functions were required.

Stardyne could have done several things in this hiring process. It could have merely retained the current employees. They had been there for the whole time the laser operation had been in existence, from June 1988. There was no indication in this record that their work was in any way wanting. Indeed, the only problem voiced by Ed Sheehan Sr. and John Nurminen was that, under the union contract from time to time, one or more of these employees would be bumped out of the laser room and replaced by another worker with more seniority, but less laser experience.

Alternatively Stardyne could have laid off the Johnstown laser crew and gone outside to hire people. In this case it would have been necessary to train the new employees. A variant on this could have been a testing process for current and new employees to select the most capable people.

What Stardyne did was none of the above. In December 1989 they prepared employment applications. There is some question whether the applications were handed out by Foreman Paul McMullen or someone else from management or were merely laid on a desk or table in the office. It really makes no difference how the applications were distributed because, as the record shows, the distribution was limited solely to the current employees of the laser room.

After the applications were distributed, a meeting was held on December 18 for all of those employees who had filled out applications, together with Ed Sheehan Sr., Ed Sheehan Jr., Nurminen, Smith, McMullen, and Tom Renchko, an engineering specialist and quality control inspector. Ed Sheehan Sr. led off the meeting with a description of his background, the physical properties of the lasers, and the absence of personal danger to employees. He went on to discuss Stardyne, what it was and what they hoped to accomplish with it. The new officers were introduced. Ed Sheehan Jr. talked about an employee benefits package to be offered, and the employees

<sup>22</sup>This price was subject to adjustment after the transfer depending on revised figures showing costs to Johnstown which would be added to the selling price. This may reflect the disparity between the \$2,405,962 authorized by the Stardyne Board on December 1 and the \$2.6 million specified as the selling price by the Johnstown board on December 18. See agreement between Stardyne, Johnstown, and the Sheehan, dated December 1, 1989, where the sale price is given as \$2,552,962.

present were urged to meet privately with management people, after the meeting ended, to discuss their own rates of pay.

Robert Carbaugh, a FWB who had worked in the laser room since September 1989 testified that he asked at the meeting whether this new operation would be union. Ed Sheehan Sr. replied<sup>23</sup> that it was up to the employees, but that he felt, in view of the new management approach and “everything else,” that they could “work together as a team.”

After the meeting Carbaugh met with Smith, McMullen, and Ed Sheehan Jr. They discussed the fringe package and offered Carbaugh a rate of \$9.50 per hour. Carbaugh was not happy, and after he was assured by Larry Lear that he could come back to Johnstown, he worked at the laser room until the end of December, then returned to Johnstown.

So far as the record indicates, Carbaugh was the only employee then employed in the laser room who did not accept Stardyne’s offer. All of the others were offered and accepted jobs with Stardyne, and none were rejected. Those employees were:<sup>24</sup>

Thomas R. Burgan	William F. Killinger
Christopher R. Driggs	Richard D. Manges
John G. Edwards	Roland Miljenovich
David A. Fenchak	William J. Urbassik
Norman F. Funyak	

Up to December 10, 1990, there was one additional employee hired. None had left or been terminated as of the time of this hearing.

These employees continued to work through December under the terms of the union contract, had dues checked off from their wages, and had filed at least two grievances which were processed under the contract to a negotiated solution. Their wages and progression and regression rights were the subject of the negotiations described above.

At no time during the lengthy and arduous process, which culminated in the establishment of Stardyne, was the Union notified of the depending changes in the laser room, and the Union was not invited either to participate in the decision nor on its effects.

#### D. *The Single Employer—Alter Ego Issues*

##### 1. Single employer

It has been said that:

A “single employer” relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a “single employer.” The question in the “single employer” situation, then, is whether the two nominally independent enterprises, in reality, constitute

only *one integrated enterprise*. [*NLRB v. Browning-Ferris Industries* 691 F.2d 1117, 1122 (3d Cir. 1982).]

Over the years the Board has established criteria to be used in determining whether a single employer relationship exists. As affirmed by the Supreme Court in *Electrical Workers IBEW Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255 (1965), the criteria are interrelations of operations, common management, centralized control of labor relations, and common ownership.

In determining the relative weight to accord each of these areas, I will consider all of the circumstances appearing in the record, *Overton Markets*, 142 NLRB 615, 619 (1963).

Under the particular circumstances of this case I think it is important to consider the facts surrounding the establishment of Stardyne before approaching the Board’s criteria for measuring the existence or nonexistence of a single employer relationship. I am at something of a disadvantage in this task because we have no testimony in the record from the one person who knows more about the situation than any other. Jack Sheehan’s silence, however, can be compensated for by the testimony of others, Ed Sheehan Sr. and John Nurminen, and, more importantly, by documents such as the minutes of Johnstown’s board of directors and a communication to the stockholders of Johnstown.

Jack Sheehan started the Johnstown Company in 1984, an act both visionary and daring, in view of the condition of heavy industry in what was described as the “rust belt” of America. That he was sensitive to working people as well as to the industrial relations realities of this Western Pennsylvania area, is shown by his recognition of the Steelworkers Union as the collective-bargaining representative for Johnstown’s employees.<sup>25</sup>

Ed Sheehan Sr.’s testimony on Johnstown’s adoption of the Technology Transfer Facility for Laser Metalworking, orphaned by a shift in corporate policy at the Westinghouse Corporation, shows that Jack Sheehan continued to have the vision to attract jobs and a new and promising technology, to Western Pennsylvania. In this case, that vision may have been aided by the fact that Penn State, through its ARL, would provide considerable support, including materials and equipment, salaries for the scientists, and paid training for rank-and-file employees in the formative stages of the enterprise.

After less than a year in operation, however, Jack Sheehan grew troubled by what he described to his brother Ed as “losses.” These most likely stemmed from the expenses involved in the transformation of a dingy corner of a dingy old steel mill into a sanitized capsule suitable for delicate, high-technology laser operations. Then, too, as Nurminen stated, the Navy forced Johnstown’s laser operation into production before the Company was ready for it, undoubtedly resulting in added costs.

<sup>23</sup> According to testimony of Ed Sheehan Jr.

<sup>24</sup> See stipulation of the parties as to members of Local 9089 employed at Johnstown until December 31, 1989, then at Stardyne through December 10, 1990. One employee, Allen Novotny, was a temporary employee, who may or may not have actually been paid by Johnstown, assigned to the laser operation. Robert Carbaugh, as noted above, was assigned to the laser room from September to December 31, 1989.

<sup>25</sup> The Respondents argue that the fact of voluntary recognition of the Union by Johnstown at a time when a majority of employees may not have indicated their preference for the Union, renders the Union’s claim, now, to be the exclusive representative, is not binding on them, the Respondents. This argument is wholly without merit, *Clarion Hotel—Marin*, 279 NLRB 481 (1986). See also *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Eklund’s Sweden House Inn*, 203 NLRB 413 (1973).

Jack Sheehan did not, like Westinghouse, just walk away from the laser operation. He commissioned his brother to study the people, the products, equipment, and the market, and to come up with a business plan to penetrate the market for this new technology. This was done by Ed Sheehan Sr. in January and February 1989 and resulted in his conviction that there was a future in this technology. He then brought his plan to Jack Sheehan, Chuck Slater, and Caryl Warner Jr. There were discussions and some resistance on the part of the Johnstown people. The record shows that these differences were resolved, but not how they were resolved. I think the record warrants an inference, and I infer and find that Jack Sheehan made the decision to go ahead and, further, that he determined how it was to go ahead, by the spin-off of the laser operation into a new corporation which would then borrow the money necessary to implement Ed Sheehan Sr.'s business plan.<sup>26</sup>

The borrowing took more time than Ed Sheehan Sr. had anticipated. Apparently an application and proposal was submitted sometime February or in March 1989, but there was no response from the Principal Financial Group of Des Moines until July. On August 11, Jack Sheehan informed his board that it had been decided to go ahead with the establishment of Stardyne. There was some murmuring among the directors, and no recorded vote, but the plan went ahead. As Jack Sheehan described it, they would "form a split group," put in financing (the individual contributions of the Sheehan brothers, together with \$500,000 in some form or other from Johnstown), then borrow \$3 million from Principal Financial Group.<sup>27</sup> Jack Sheehan went on to say that "the losses" (not explaining what losses) would never show up on the Company's books and would be absorbed by the new enterprise. The new enterprise was to lease buildings and improvement from the Company, and will "generate a significant amount of income to the Company." Chuck Slater added a postscript at this meeting stating that the new enterprise expected to turn a profit by August or September, but that it would "compensate the Company for any losses."<sup>28</sup>

Johnstown's shareholders, at least those who were not involved in management or serving on the board of directors, were informed of his transaction, after the transaction was completed, by letter from Chuck Slater dated January 12, 1990, which is quoted at length above. In summary, the reasons for the "sale" were to allow the new Company to borrow money which Johnstown could not supply and to allow

for equity participation by the scientists involved with the laser operation. As in Jack Sheehan's message to the directors the previous August, it was emphasized to the shareholders that there was a minimum risk, and the possibility of substantial gain if the new enterprise was successful.

All of this shows that the intent of the managers of Johnstown was to establish a new enterprise, which would receive capital and borrow additional money in order to free Johnstown from any losses incurred in the fledgling laser operation; to absorb those losses at no cost to Johnstown; to pay rent and reimburse costs of improvements made to bay 9 by Johnstown; and, finally, to make profits for Johnstown, if any there were, from the new enterprise.

The new enterprise began life, then, with common ownership, in that Jack Sheehan, the majority and controlling stockholder of Johnstown, controlled his own 20 percent and Johnstown's 40 percent<sup>29</sup> of Stardyne's stock.

As far as common management is concerned, at the top Jack Sheehan, Chuck Slater (representing not his own ownership of Stardyne stock, but representing the 40 percent of Stardyne stock owned by Johnstown) and Ed Sheehan Sr. constituted a majority of the five-person board. The minutes of Stardyne board and shareholders' meetings show that Jack Sheehan and Slater were not merely spectators, but took vigorous and aggressive roles in the proceedings, moving and seconding items concerning directors' compensation; termination of Stardyne Vice President Barnes; changing bylaws; electing officers; and retaining an accounting firm (the same one used by Johnstown).

We do not know from the record here how much day-to-day interest Jack Sheehan and Slater took, or were able to take, in the operations of Stardyne. Stardyne had its own slate of officers, duly elected on motion of Jack Sheehan, seconded by Slater.<sup>30</sup> Those officers were:

Ed Sheehan Sr., chairman and chief executive officer  
 John I. Nurminen, president  
 Edward J. Sheehan Jr., executive vice president  
 Paul McMullen, production supervisor  
 John T. Barnes, vice president, marketing and sales<sup>31</sup>  
 James E. Smith, vice president, manufacturing and operations

The record shows that these people were not spectators either. Barnes, for as long as he was there, was primary a salesperson. There is no indication that he participated in day-to-day operations. Smith and Nurminen were the scientists who had performed the research and developed the systems in use in bay 9. McMullen was a floor supervisor. All three of these men were involved in the actual running of the laser operation. Ed Sheehan Jr. brought in as executive vice president, was a general manager, with overall supervision of operations, finance, and personnel. Ed Sheehan Sr. represented the final authority between board meetings.

<sup>29</sup> I am sure that Jack Sheehan could count on the support of the additional 20 percent of Stardyne stock owned by his brother, Ed Sheehan Sr.

<sup>30</sup> As I have noted, Cassidy testified that Jack Sheehan stated, at another meeting, that he had appointed Slater, but if he did not do the job, then he could dismiss him.

<sup>31</sup> Terminated as of November 1990 by vote of the board of directors.

<sup>26</sup> The fact that Johnstown had borrowed up to its limit with its lenders probably influenced the decision to go with a new enterprise.

<sup>27</sup> I have some questions about this loan. Ed Sheehan Sr. testified that neither he nor his brother assumed any personal liability on the loan. I believed Ed when he testified that his \$250,000 cash contribution represented most of his personal worth. I am not so sure about his testimony that his brother Jack was not required to guarantee any of the loan. Lending institutions ordinarily demand security, including personal guarantees, and I do not see how a laser costing, initially, \$1.2 million and a leasehold interest in bay 9 at Johnstown's plant would be a whole lot of security for a \$3 million loan. But there is not enough on the record for me to make any inferences in the matter.

<sup>28</sup> I note also that Caryl Warner Jr., Johnstown's vice president for finance, at this same meeting, announced the formation of a foreign sales corporation "to show that we are in the export business and we hope to receive an 8 percent tax savings on international shipments."

There is nothing in the record to show that anyone else participated in day-to-day operational or personnel decisions.<sup>32</sup>

The same analysis, I think, applies to control of labor relations at Stardyne. While we do not know who set the policy which established the wages, hours, and working conditions for the new Stardyne employees, the actual hiring of these employees and the setting their working conditions were accomplished by Ed Sheehan Jr. together with McMullen and Nurminen. At Johnstown, the working conditions were established in the union contract negotiated by Ed Johnson, vice president for human relations, and his committee, with the union bargaining committee.

After Stardyne began operations the record does not show what happened in day-to-day labor relations, but Ed Sheehan Jr. apparently handled any problems which arose.

The question of interrelation of operations is easy to answer. There was no interrelation of operations when the laser operation was part of Johnstown. The Penn State people were hired directly by Jack Sheehan, without reference to, or approval in the normal course, by Ed Johnson's office. The nature of the laser operation was completely different from the work performed in the rest of the Johnstown plant, and the nature of the laser work even required that it be conducted in a controlled, sanitized environment, cut off from the rest of the plant. If by interrelation is meant the relations between the work at Stardyne and the work at Johnstown, then there is no interrelation between them. If, on the other hand, the relationship is between the work at Stardyne, and work in the laser operation at Johnstown, then the interrelation is total. The new Company performed exactly the same work by the same people, in the same place, and in the same manner.<sup>33</sup>

In considering all the circumstances on the question of whether Stardyne and Johnstown are a single employer, the common ownership issue is not in doubt. The interrelations has been established. However, the other two standards set up by the Board are not so clear. In these circumstances, and without more evidence on the participation by Johnstown management particularly by Jack Sheehan in the day-to-day operations, and the labor relations policies of Stardyne, I cannot conclude that these two employers are a single employer.<sup>34</sup>

<sup>32</sup> I would be naive if I did not feel that Jack Sheehan could have influenced his brother and his nephew in their daily tasks, especially in the formulation of management policy. He had the money, the power, and the will to do so. But there is no direct evidence bearing on this. Indeed, Jack Sheehan gave up the CEO position at Johnstown because of other interests. It could be that he simply didn't have time to run the Stardyne operation, or the Johnstown plant, in any detail.

<sup>33</sup> In making this finding I did not consider important the performance of some maintenance work in the laser section by Johnstown employees, or measurements taken by Johnstown employee Nick Kolar, or use of electricity, or the same telephone number, or common shower facilities. These are insignificant in view of the total interrelation of the work at Stardyne and the former laser operation at Johnstown.

<sup>34</sup> See, e.g., *Sakrete of Northern California v. NLRB*, 332 F.2d 902 (9th Cir. 1964); *NLRB v. Lee's Sewing Co.*, 571 F.2d 462 (9th Cir. 1978); *Geo. V. Hamilton, Inc.*, 289 NLRB 1335 (1988).

## 2. The alter ego issue

The Board's criteria for finding that two entities are alter egos are somewhat broader than its standards for finding a single employer relationship. Factors to be considered in this facet of the case are the factors considered above, together with the factors of substantially identical business purposes, operations, equipment, customers and supervision, as well as ownership. *Crawford Door Sales Co.*, 226 NLRB 1144 (1975); *Denzil S. Alkire*, 259 NLRB 1323 (1983); *Advance Electric*, 268 NLRB 1001 (1984). A further consideration in finding alter ego status is whether the new company was created "to evade responsibilities under the Act." *Fugazy Continental Corp.*, 265 NLRB 1301 (1982).

The questions as to common management and common control of labor relations are as unclear when considering this issue as with the single employer issue.

As to the other criteria applied by the Board in alter ego situations, the record is clearer. There is no dispute in this case that the business purposes of the laser operation at Johnstown, and at Stardyne were identical, to market the metal working capacities of lasers, to use those processes to perform welding and cladding of metal products for customers, and to make a profit by so doing. The operations at Johnstown and Stardyne were identical. They did buy a new, more powerful laser at Stardyne, but this did not require any change in operations. The work performed as Stardyne, as the record shows, was exactly the same work that was performed in the same place, by the same people, using the same equipment, as at Johnstown. The equipment, other than the new laser remained the same at Stardyne as it was at Johnstown. The same customers who had been served by Johnstown became, for the most part, customers of Stardyne, even in one case, where the customer balked at the assignment of its contract with Johnstown, the work was performed by Stardyne and then shipped by Johnstown. Moreover, Johnstown's president and CEO, Chuck Slater, volunteered to seek out business opportunities for Stardyne. Lastly, the supervision at Stardyne remained substantially as it was at Johnstown.

Nurminen, Smith, and McMullen continued as floor supervisors and as well as day-to-day managers at Stardyne just as they had at Johnstown. There is no evidence that Ed Sheehan Sr. or Ed Sheehan Jr. were involved in supervision, as contrasted with overall management and policy making for Stardyne.

The General Counsel and the Union here argue that the establishment of Stardyne was motivated by a desire to cut off the laser operation from the Union and the collective-bargaining process. I do not agree.

In this case Johnstown has about 390 production and maintenance employees covered by the union contract at the time of the 1989 negotiations. When Stardyne went into operation at the end of that year, 12 of those 390 employees were employed by Stardyne. It seems illogical to me that Johnstown would have staged such an elaborate charade, involving the borrowing of \$3 million; considerable investment in time and money by the Ed Sheehans, father and son, who became officers in Stardyne and by Jack Sheehan, who became a director; what must have been substantial sums of money paid to accountants, bankers, and lawyers to set up the new corporation, arrange for loans and bank accounts, incorporate Stardyne and draft numerous documents such as

agreements of purchase and sale, and, complex long-term lease, where in the end, the object was to carve out a unit of 12 or so people from the bargaining unit. Whatever long-term goals Johnstown may have envisioned for Stardyne, or may have now, it does not seem to me to have been a businesslike decision to incur all of these expenses for such a meager result.

I can understand the Union's concern about the position of Johnstown during the 1989 negotiations. The Company and the Union were both concerned with trained laser employees being bumped under the contractual seniority progression and regression terms.<sup>35</sup> The Union wanted a reclassification and a pay raise for its members who were working in the laser room. The Company's response to this was that these people were just fitter-welder-burners (FWB), no matter where they worked, and the work was no different in the laser room from that which they had performed once in other sections of the mill.<sup>36</sup> Leaving aside for the moment Johnstown's concealment of the ongoing development of the Stardyne transfer during the spring and early summer, I do not see in these differences of opinion over the pay, seniority rights, and job status of the Johnstown laser operation employees a foreshadowing of the decision to establish Stardyne. Indeed, that decision was made sometime in February or March 1989, well before the final stages of the negotiations in June and July.

Further, I do not read any significance in Jack Sheehan's call to Cassidy after the contract was wrapped up, when Sheehan told Cassidy that Ed Johnson had given the Union "more than he instructed him to give up." This impresses me as a postnegotiation attempt by Sheehan to convince Cassidy that the Union had gotten a bargain at a bargain price. Cassidy was not fooled, because he informed Sheehan in this conversation that the Union had not gotten as much as it was entitled to get. I do not believe that anything more should be read into this exchange.

There was, in the testimony of Ed Sheehan Sr. and John Nurminen, a kind of antiunion sentiment. Both of these witnesses complained about the bumping of trained laser operators and helpers by untrained more senior employees. Ed Sheehan Sr. also indulged in some complaining about the FWB employees, indicating that good trade school graduates with some interest in mathematics could, and would, do a better job.

This evidence is not sufficient to convince me that the decision to establish Stardyne was made for any reason other than the fact that Johnstown was experiencing losses in the laser operation, that they wanted to retain a proprietary interest in the laser business, but in a way which would minimize risk of loss and ensure a share in profits in the care of success.<sup>37</sup>

<sup>35</sup> Although, as I have mentioned, above, the record does not indicate that this was a chronic or recurring problem.

<sup>36</sup> In contrast to Stardyne's position at the hearing and in its brief, that these employees had to be technical employees, certified by the Navy to run the lasers and subject to rigorous training and testing.

<sup>37</sup> The decision to operate nonunion may or may not have been a factor in this decision, but in the absence of any evidence on that issue, I conclude that the decisions to proceed without notifying the Union, and to hire a nonunion work force, were made after the decision to go ahead with the Stardyne operation.

On the basis of all of the factors I have considered here, I find that the establishment of Stardyne is merely a technical change in operation of one department of the Johnstown Corporation, *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974); *Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989); *TKB International Corp.*, 240 NLRB 1082 (1979). This is evidenced by the fact that Johnstown, through its stock ownership and the ownership interest of Jack Sheehan," continues to maintain a substantial degree of control over the business claimed to have been sold to the new entity." *NLRB v. Scott Printing Corp.*, 612 F.2d 783 (3d Cir. 1979); *McCallister Bros.*, 278 NLRB 601 (1986). The two companies here have substantially identical ownership, business purposes, operations, equipment, customers, and supervision. *Kenmore Contracting Co.*, 289 NLRB 336 (1988); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). The fact that the laser operation was only a portion of Johnstown's operation is not controlling, *Better Building Supply Corp.*, 283 NLRB 93 (1987), nor is the fact that we cannot determine whether or not there is centralized control of labor relations, *Blake Construction Co.*, 245 NLRB 630 (1979), or the lack of demonstrated antiunion motivation for the establishment of Stardyne, *Gilroy Sheet Metal*, 280 NLRB 1075, 1076 fn. 1 (1986); *Goodman Piping Products v. NLRB*, 741 F.2d 10 (2d Cir. 1984).

I find, therefore, that Stardyne was and is the alter ego of Johnstown.

#### E. The Successorship Issue

While I do not agree, in the light of the above findings, that this situation presents a successorship question,<sup>38</sup> I do believe that the findings I have made in deciding the single employer and alter ego issues amply demonstrate that this case satisfies the Board's requirements for finding a successorship under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Fall River Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

Here, as I have found, the business of Stardyne is essentially the same as Johnstown's laser operation; the employees of Stardyne are the same people, working on the same jobs in the same area, turning out the same finished products, under the same products, under the same supervisors, as they were and did while working for Johnstown; and Stardyne uses the same processes to produce the same finished products for basically the same group of customers as Johnstown.

So far as we can determine from the record, the same employees, with one or two additions or exceptions, who were members of the bargaining unit represented by the Union in December 1989, were still working in the same jobs at Stardyne at the time of this hearing in December 1990.

When the Union made its demand for recognition on January 18, 1990, 9 out of the 10 employees then working for Stardyne had been employed by Johnstown, and were members of the Union.<sup>39</sup> While the size of the unit was much smaller, this did not relieve the successor employer of its duty to bargain, *NLRB v. Albert Armato & Wire Speciality*

<sup>38</sup> See *Esmark*, supra, and *Sterling Processing Corp.*, 291 NLRB 208 (1988).

<sup>39</sup> The 10th employee apparently was a temporary employee from an agency which supplied temporary employees.

*Co.*, 199 F.2d 800 (7th Cir. 1952); *Boston-Needham Industrial Cleaning Co.*, 216 NLRB 26 (1975).<sup>40</sup>

#### F. *The Bargaining Unit*

The Respondents Stardyne and Johnstown both denied the paragraph in the complaint setting forth the alleged appropriate unit. It is possible that these denials were based on the fact that the unit described in the complaint is different from that in the June 27, 1989 collective-bargaining agreement, or there may have been understandable confusion on the part of the named Respondents as to who or what was described in the complaint as "Respondent Alter Ego." In any event, no evidence was introduced by any party as to the composition of this unit or that the Union did not enjoy majority status in the unit. I cannot make a finding that the unit as described in the complaint is appropriate, since there is a variance from the unit described in the contract, so I shall find that the appropriate unit here is that adopted by Respondent Johnstown in that June 27, 1989 document, as follows:

All full-time and regular part-time manufacturing and maintenance employees employed by the Company at its plant, but excluding supervisors, assistant supervisor, professional employees, technical consultants, clerical employees, quality control technicians, guards and any other supervisors as defined in the National Labor Relations Act.

Neither Respondent presented any evidence to contravene this description in a document executed by Johnstown. It may, therefore, be presumed that this unit is appropriate for purposes of this case.<sup>41</sup>

#### G. *The Refusal to Bargain*

The complaint alleges that "since December 18, 1989 'Respondent Alter Ego' bypassed the Union and dealt directly with unit employees engaged in laser metal working operations by soliciting said employees to enter into individual employment contracts."

The facts as I have found show that during almost all of the year 1989, Respondent Johnstown was engaged in first investigating, then planning, then deciding, to spin off the laser operation located in bay 9 of Johnstown's mill in order to cut its own corporate losses; to furnish both a source of funds from rental income and "repayment" of money already expended to renovate bay 9, and, hopefully, to serve as a reservoir of future profit for Johnstown. During all this time Johnstown was negotiating with the Union for a collective-bargaining agreement to replace one which was due to expire on June 26, which agreement covered the employees then working in the laser operation in bay 9. There were several issues which specifically concerned these employees, including one on progression and regression which proved tricky enough so that it did not settle until sometime after the contract itself was agreed on. Yet during all the period

<sup>40</sup> I wish people would stop citing this case. Compare *Nova Services Co.*, 213 NLRB 95 (1974).

<sup>41</sup> That is, based on the finding that Stardyne is the alter ego of Johnstown. In case of a finding that Stardyne is a successor to Johnstown, then the same quoted unit description would apply to each. See *Bennington Iron Works*, 267 NLRB 1285 (1983).

of planning for the new enterprise on the one hand, and negotiating with the Union, on the other, at no time did Johnstown notify the Union of its intentions or its decision to go ahead with the establishment of Stardyne. However, there are no allegations in the complaint concerning this, so I make no findings thereon.

The allegation which does appear in the complaint says, as far as I can discern, that on or about December 18, 1989, Respondent Johnstown bypassed the Union and dealt directly with employees. It has to be Johnstown at this point because the transfer of the bay 9 facility did not occur until December 29. Up to that point Stardyne, which had been incorporated on September 22, had no assets, no lease, and no employees.

On December 18, as I have found, Ed Sheehan Sr., Ed Sheehan Jr., Nurminen, Smith, and McMullen met with the employees of the laser operation in bay 9 without notice to the Union. The management people explained what Stardyne was, what they were going to do, informed the employees that there was going to be no union at Stardyne at present, and had each employee interviewed individually with management. The employees were offered jobs with Stardyne at different rates of pay and with different benefits and working conditions from those which the employees were receiving at that time under the new 1989 contract between Johnstown and the Union.

All but one (Carbaugh) of the employees accepted the new terms and began to work as employees of Stardyne at the beginning of January 1990.

In view of the timing of this incident, in a period when all the decisions had been made to establish Stardyne, but before those decisions had been implemented, I think that Johnstown alone must bear the responsibility, and I find that by bypassing the Union and dealing directly with these employees and inducing the employees to enter into separate employment agreements, in derogation of the Union's position as exclusive bargaining representative for the employees, Johnstown has violated Section 8(a)(1) and (5) of the Act.

The Respondents, Johnstown and Stardyne, completed their arrangements by the end of December<sup>42</sup> and Stardyne commenced operations on January 1, 1990. At this time the terms and conditions of the unit employees working in bay 9 were changed to those imposed by Stardyne's officers in the individual employment agreements on December 18.

I find this unilateral change in working conditions by Johnstown's alter ego was a further violation of Section 8(a)(1) and (5) of the Act.

As further alleged in the complaint, these actions constituted a repudiation by the alter ego, Stardyne, of its alter ego's collective-bargaining agreement, and I find a further violation of Section 8(a)(1) and (5) of the Act.

#### IV. THE REMEDY

Having found that the Respondent alter egos, Johnstown and Stardyne, have violated Section 8(a)(1) and (5) of the Act, I shall order them to cease and desist therefrom and to

<sup>42</sup> I note Ed Sheehan's comments that Stardyne was forced to accept whatever terms on the lease, additional payments, and computation of losses by Johnstown, in order to commence operations. If this was truly an arms' length transaction, Stardyne could, and probably should, have renegotiated, or just canceled the deal.

take certain affirmative action designed to effectuate the policies of the Act. I recommend that the Respondents Johnstown and Stardyne shall immediately recognize and, on request, bargain with the United Steelworkers of America concerning the wages, hours, and working conditions of employees currently employed in the laser operations located in bay 9 of Respondents' mill in Johnstown, Pennsylvania. Further, I recommend that Respondents abide by the terms of a collective-bargaining agreement dated July 27, 1989, between Johnstown and the Union, making whole any employees employed in the said laser operation for any money to which they would have been entitled but for Respondents' failure to observe such terms from and after January 1, 1990. I shall also recommend that Respondents reimburse said employees for any expenses resulting from the Respondents' changing of benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), with interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, I shall recommend that the Respondents shall make the Union whole for any moneys due to it under the terms of the said collective-bargaining agreement.

#### CONCLUSIONS OF LAW

1. Respondent Johnstown Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Stardyne, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Respondents Johnstown Corporation and Stardyne are alter egos of each other within the meaning of the Act.

4. The United Steelworkers of America and its Local 9089 are labor organizations within the meaning of Section 2(5) of the Act.

5. The Respondents are and were bound by a collective bargaining with the United Steelworkers of America dated June 27, 1989.

6. By bargaining individually with its employees, by imposing new working conditions and by repudiating its collective-bargaining agreement as to certain of their employees, the Respondents have violated Section 8(a)(1) and (5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>43</sup>

#### ORDER

The Respondents, Johnstown Corporation and Stardyne, Inc., Johnstown, Pennsylvania, alter egos, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Dealing individually with their employees without notice to or bargaining with the Union.

(b) Entering into individual arrangements with their employees and changing wages, hours, and working conditions for those employees without notice to or bargaining with the Union.

<sup>43</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Repudiating and refusing to honor their collective-bargaining contract with the Union.

(d) In any like or related manner interfering with, restraining, or coercing their employees in the rights guaranteed then under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay to all employees affected by their unilateral and unlawful actions, any sums due those employees by reason of changed wages, hours and working conditions with interest thereon as set forth in remedy section of this decision.

(b) Pay to the Union any dues or other moneys owed to it by reason of their unilateral recession of their collective-bargaining agreement with the Union.

(c) On request bargain collectively in good faith with the Union concerning the employees affected by Respondents' unilateral actions.

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

(e) Post at its their facilities in Johnstown, Pennsylvania, copies of the attached notice marked "Appendix."<sup>44</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>44</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT deal with our employees unilaterally and without notice to the Union.

WE WILL NOT unilaterally and without notice to the Union change wages, hours, and working conditions of our employees.

WE WILL NOT repudiate our collective-bargaining agreement dated June 27, 1989, with the United Steelworkers of America, by failing and refusing to bargain with the Union as the collective-bargaining representative of our employees.

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

WE WILL pay all losses in wages or other benefits due our employees because of our charges in those wages and benefits from January 1, 1990.

WE WILL pay to the Union any dues and other moneys owed under our collective-bargaining agreement from January 1, 1990.

JOHNSTOWN CORP. AND STARDYNE, INC.