

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

A.D. CONNER, INC., GAS CITY, LTD.,
HEIDENREICH TRUCKING COMPANY,
MCENERY ENTERPRISES, MCENERY
TRUCKING & LEASING, LLC, and WJM
LEASING, LLC as single employers and/or
A.D. CONNER, INC. and HEIDENREICH
TRUCKING COMPANY, as alter egos

and

Cases 13-CA-46359
13-CA-46360

TRUCK DRIVERS, OIL DRIVERS, FILLING
STATION AND PLATFORM WORKERS UNION
LOCAL NO. 142, an affiliate of THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

and

TRUCK DRIVERS, OIL DRIVERS, FILLING
STATION AND PLATFORM WORKERS UNION
LOCAL NO. 705, an affiliate of THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Brigid Garrity, Esq.,

for the General Counsel.

L. Steven Platt, Esq., of Chicago, Illinois,

for the Respondents.

Ronald M. Willis, Esq., of Chicago, Illinois,

for Charging Party, Local No. 142.

Edward Burke, Esq., of Chicago, Illinois,

for Charging Party, Local No. 705.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Chicago, Illinois, on March 8, 9, and 10, 2011. The Charging Parties filed their initial charges on October 15, 2010,¹ and amended charges on January 19, 2011. The Acting General

¹ All dates are in 2010 unless otherwise indicated.

5 Counsel² issued a consolidated complaint on January 31, 2011.³ On February 16, 2011, the General Counsel filed an amended consolidated complaint.

10 As the trial commenced, counsel for the General Counsel sought leave to make two oral amendments to the amended consolidated complaint. The first alleged that Heidenreich Trucking Company began operating as a successor to A.D. Conner, Inc., and that, in so doing, it violated Section 8(a)(5) of the Act by refusing to recognize the Charging Parties as the exclusive representatives of its truck driver employees.⁴ Applying the Board's standard set forth in *Folsom Ready Mix, Inc.*, 338 NLRB 1172, 15 fn. 1 (2003), I granted this request, finding that the amendment merely constituted an alternate legal theory that was very closely related to the primary thrust of the complaint. I concluded that there was no material prejudice to the Respondents since the amendment would involve the same issues and evidence as were required to litigate the matters arising from the original complaint.

20 Counsel for the General Counsel also sought permission to add an amendment alleging a violation of Section 8(a)(1) consisting of an asserted coercive interrogation of an employee by counsel in violation of *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), 25 enf. denied 344 F.2d 617 (8th Cir. 1965). This constituted an entirely new matter whose only relationship to the existing issues was that the allegedly unlawful interview concerned the trial in this case. It was evident that permitting this amendment would deprive counsel for the Respondents of any opportunity to prepare a defense to this newly-raised allegation. As a result, applying *Folsom Ready Mix*, supra, I denied the motion to allow this amendment.

30 Because there are six Respondents in this case, I will abbreviate most of their names for ease of reference and clarity. The lead Respondent, A.D. Conner, Inc., will be referred to as "Conner." The alleged alter ego corporation, Heidenreich Trucking Company, will be referred to as "Heidenreich." Additional entities that are alleged to form a single-integrated enterprise with Conner and Heidenreich will be referred to as 35 follows: Gas City, Ltd. will be referred to as "Gas City," McEnergy Trucking & Leasing, LLC will be called "McEnergy Trucking," and WJM Leasing, LLC will be designated as "WJM." Finally, McEnergy Enterprises will not be abbreviated.

40 The complaint, as amended, alleges that all of the Respondents constitute a single integrated business enterprise. It also alleges that, as of October 18, Conner

² The Acting General Counsel was appointed June 21. For ease of reference, I will refer to him in this decision as the General Counsel.

³ An erratum to the consolidated complaint was filed February 8, 2011.

⁴ In making her oral motion, counsel for the General Counsel incorporated the existing complaint allegations regarding disguised continuation into her proposed revised language. It appears that the lawyers for both the Charging Parties and Respondents may have misconstrued this to mean that she was seeking leave to add an allegation of disguised continuation. See CP Br., at fn. 2, and R. Br., at p.34. Actually, this allegation was raised in both the original complaint and the amended complaint. See GC Exhs. 1(i), at p. 3, and 1(n), at p. 3. The only new contention contained in the oral motion to amend was the allegation regarding successorship.

5 ceased its business operations and that, at the same time, Heidenreich assumed those business operations as a disguised continuance and alter ego of Conner. Alternatively, it is alleged that, on October 18, Heidenreich became a successor employer to Conner.

10 In addition to characterizing the relationships among the six Respondents, the General Counsel alleges the commission of various unfair labor practices. He asserts that supervisors and agents of Conner uttered unlawful threats to employees and solicited those employees to decertify their Unions in violation of Section 8(a)(1) of the Act. He also alleges that Conner ceased its operations, transferred its work to Heidenreich, and discriminatorily discharged all of its bargaining unit employees due to
15 their union affiliation and activities in violation of Section 8(a)(3). Finally, the General Counsel contends that the Respondents committed a variety of bargaining violations within the meaning of Section 8(a)(5), including the withdrawal of recognition of the Unions as representatives of the employees, refusal to abide by collective-bargaining agreements with those Unions, bypassing the Unions by dealing directly with
20 employees, refusing to bargain about the effects of the decision to shut down the operations of Conner, and failing to provide information sought by Local 705 that was necessary for it to perform its proper functions as representative of certain employees.

25 In response to the amended consolidated complaint, counsel for the Respondents⁵ filed answers on behalf of Conner, Heidenreich, McEnergy Trucking, McEnergy Enterprises, and WJM. Those answers denied the material allegations of the amended complaint. On behalf of Respondent, Gas City, counsel filed a pleading that stated that it “does not answer” the amended complaint “as Gas City has filed
30 bankruptcy . . . and this matter is subject to the automatic stay of the bankruptcy court.”⁶ (GC Exh. 1(q), p. 1.) In light of Gas City’s failure to properly answer the complaint,⁷ counsel for the General Counsel moved for entry of a default against it. In response, Gas City’s counsel observed, “It’s in the bankruptcy court lawyer’s hands, so if you wish

⁵ At trial, Mr. Platt confirmed that he represents each and every named Respondent. (Tr. 6.) See also R. Br., at p. 1.

⁶ The Board has held that it is “well established” that unfair labor practice proceedings are not subject to the automatic stay. *Ivaco Steel Processing, LLC*, 341 NLRB No. 47, fn. 2 (2004) (not reported in Board volumes) (“Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers.”) See also *Matter of Shippers Interstate Services, Inc.*, 618 F.2d 9, 13 (7th Cir. 1980) (in unfair labor practice proceeding alleging disguised continuance, Court holds that “regulatory proceedings of the National Labor Relations Board are not subject to the automatic stay provisions of that bankruptcy rule.”)

⁷ While Gas City’s pleading is denominated as an “Answer to the Amended Consolidated Complaint,” it specifically states that it is not an answer. (GC Exh. 1(q), p. 1.) In any event, it is not an adequate answer to the complaint as it utterly fails to comply with the requirements of Sec. 102.20 of the Board’s Rules which provides that an answer must, “specifically admit, deny, or explain each of the facts alleged in the complaint” or assert lack of knowledge as to those facts. It is clear that this document is simply a notice to the Board that Gas City has filed a bankruptcy proceeding. An answer that simply reports facts without responding to the specific complaint allegations is fatally defective. See, *Moo & Oink, Inc.*, 356 NLRB No. 156 (2011), and the cases cited therein.

5 to default, you wish to default. I have nothing I can say about that. I have no control
over that.” (Tr. 38.)

10 While Gas City has provided a notice to the Board that it has filed for bankruptcy
protection, this is not a sufficient excuse for its failure to submit an answer to the
consolidated complaint that meets the Board’s procedural requirements. See *Miami*
Rivet of P.R., 307 NLRB 1390, fn. 2 (1992), where the Board held:

15 If the Respondent is contending . . . that it did not file an answer
to the amended complaint because it believed that it was exempt
from Board proceedings under §362 of the Bankruptcy Code, we
find that the Respondent has not established good cause for its
failure to answer the amended complaint. The Board has
rejected a respondent’s attempt to invoke its bankruptcy petition
as a defense to its failure to file an answer. [Citations omitted.]

20 The matter is a bit more complicated, however, since the allegations against Gas
City are directed toward the General Counsel’s claim that all of the Respondents
constitute a single, integrated business enterprise. In such circumstances, “[t]he Board
has declined to enter a default judgment against a nonanswering respondent . . . where
25 its alleged liability was derivative and stemmed from its alleged status as a single
employer with (or alter ego of) another respondent who filed a timely answer.” *Metro*
Demolition Co., 348 NLRB 272 (2006).

30 In my view, the proper solution to this problem was devised by the administrative
law judge in *Liberty Source W, LLC*, 344 NLRB 1127, 1131-1132 (2005), rev. denied
478 F.3d 172 (3d Cir. 2007), cert. denied 522 U.S. 818 (2007). In that case, the Board
adopted the trial judge’s decision that granted a motion for entry of default due to the
respondent’s failure to file an answer to the complaint, but declined to give it conclusive
effect as to allegations that the defaulting entity was an alter ego of another respondent
35 who had filed a timely and sufficient answer. In similar fashion, counsel for the
Respondents was not precluded in any manner from defending all of the Respondents
against the allegations of single employer and alter ego status.⁸ I will proceed to decide
these issues as to all Respondents on their merits.

40 Regarding the merits, for the reasons that will be discussed in detail in the body
of this decision, I have concluded that five of the six Respondents do constitute a single,
integrated business enterprise and are a single employer within the meaning of the
Board’s precedents. I have also concluded that, as of the date alleged in the amended
consolidated complaint, Heidenreich became an alter ego of Conner. Additionally, I
45 have determined that the General Counsel has met his burden of proving that
supervisors and agents of Conner and Heidenreich engaged in the forms of misconduct
alleged in the amended consolidated complaint constituting violations of Section 8(a)(1),
(3), and (5) of the Act.

⁸ Indeed, the lawyers for the opposing parties did not make any effort to preclude such a
defense by counsel for Gas City.

5 On the entire record,⁹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Parties, and Respondents, I make the following

10 FINDINGS OF FACT

I. JURISDICTION

15 Respondent Conner, an Illinois corporation, had been engaged in the business of hauling fuel, while operating from its facility in Frankfort, Illinois, where it annually performed services valued in excess of \$50,000 in states other than the State of Illinois. Conner admits,¹⁰ and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

20 Respondent Heidenreich, an Illinois corporation, has also been engaged in the business of hauling fuel, while operating from its facility in Frankfort, Illinois, where it annually performs services valued in excess of \$50,000 in states other than the State of Illinois. Heidenreich admits,¹¹ and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

25 The General Counsel does not make specific jurisdictional allegations regarding the remaining Respondents, Gas City, McEnergy Trucking, WJM, and McEnergy Enterprises. These are not required due to the nature of the allegations against these entities. See, for example, *G.M. Trimming*, 279 NLRB 890, 892 (1986), where the Board approved an administrative law judge's determination that "[j]urisdiction over one corporation necessarily attached to an alter ego." See also, *Scott Printing Corp.*, 237 NLRB 593, 594 (1978), enf. denied on other grounds, 612 F.2d 783 (3d Cir. 1979). In addition, jurisdiction as to these other entities was stipulated. (Tr. 16.)

35 Finally, Respondents admit, and I find that the two Charging Parties are labor organizations within the meaning of Section 2(5) of the Act.

⁹ The transcript of the trial is generally accurate, but several errors require correction. At p. 33, l. 6, "that's enough evidence to satisfy us" should actually read, "that's not enough evidence to satisfy us." At p. 33, ll. 7-8, I observed that, "It's a Pyrrhic victory if you get too much in the way of sanctions." At p. 84, l. 10, "years" should be "ideas." At p. 92, l. 19, "say" should be "same." At p. 515, l. 14, "fist" should be "fisc." At p. 800, l. 4, "lean" should be "lead." Any other transcription errors are not significant or material.

¹⁰ See Conner's answer to the consolidated complaint, pars. II(a)(b) and (c). (GC Exh. 1(p), p. 2.) See also counsel's stipulation that all of the Respondents fall within the jurisdictional requirements of the statute. (Tr. 16.)

¹¹ See Heidenreich's answer to the amended consolidated complaint, pars. II(d), (e), and (f). (GC Exh. 1(r), p. 2.) See also counsel's stipulation at tr. 16.

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II. ALLEGED UNFAIR LABOR PRACTICES

1. Background

10 The central figure involved in this case is William J. McEnery. He is an entrepreneur who, as he described it, “spent all my life” acquiring the various business enterprises named as the Respondents. (Tr. 688.) He founded Gas City in 1966 as an “independent petroleum marketer.” (Tr. 627.) Operations began at one gas station in Chicago and have since expanded to include 51 locations containing retail gas stations and convenience store outlets. Included among these locations are 10 large truck stops. Gas City employs approximately 800 persons.¹²

20 Over the years, McEnery acquired the remaining five Respondents. Each of these entities engages in business operations that interrelate with Gas City in some fashion. Of particular interest to this case, McEnery purchased Conner in 1979. Prior to its cessation of operations on October 18, Conner delivered the majority of petroleum products to Gas City for retail sale. In addition, Conner made similar deliveries for other consumers of petroleum products, including various retail gas stations, maritime shippers, railroads, and governmental entities.

25 Conner employed truck drivers to make its deliveries. The drivers operated 18-wheeler tankers between 17 petroleum distribution facilities and its various customers. These drivers worked out of two locations. The larger location was Conner’s headquarters at 160 South LaGrange Road in Frankfort, Illinois.¹³ During the months

¹² This number is based on a report to the bankruptcy court filed by Gas City’s Chief Restructuring Officer. (CP Exh. 2, p. 21.) I have relied on this document as to this information due to the difficulties encountered in evaluating McEnery’s own testimony. When asked this question regarding the number of Gas City’s employees, he responded, “I don’t know, 1,200 Approximately. I don’t know. I[t] could be 1,200 or 800, you know.” (Tr. 629.) This episode illustrates the paradoxical nature of McEnery’s presentation and demeanor as a witness in this trial. Although he readily agreed that he was the sole owner of all of the entities involved in this case and personally made the major decision under scrutiny in the trial, he also professed an inability to answer many basic questions about his enterprises. To cite one striking example, counsel for the General Counsel asked McEnery, “[w]hat kind of business is McEnery Trucking and Leasing?” He replied, “I can’t tell you. I don’t know.” (Tr. 635.) Counsel persisted, asking, “[w]ho is the Chief [O]fficer of McEnery Enterprises?” He responded, “I haven’t got a clue. Call the office. I don’t know.” (Tr. 637.) This testimony stood in stark contrast to a pattern of evidence demonstrating that McEnery took a hands-on approach to the management of many of the enterprises’ operations. A telling illustration occurred during the testimony of Robert Lofrano, a veteran employee. In the course of describing his duties as a dispatcher for Conner, he indicated that McEnery would be aware of which customers required deliveries. When asked how McEnery possessed this information, Lofrano observed that, “[h]e knew everything.” (Tr. 324.) It is difficult to place reliance on McEnery’s testimony given that it ranged from passionate intensity and sharp focus to blithe indifference and professed ignorance of basic information. No explanation for this dramatically inconsistent presentation has been offered.

¹³ For unexplained reasons, this building also bears the address of 21660 LaGrange Road in Frankfort. Despite the two addresses, it is all the same property.

5 prior to Conner's closing, it employed 7 dispatchers and 20 drivers at Frankfort and
operated around the clock, making close to 100 deliveries daily. Conner also ran a
smaller facility in Porter, Indiana. This was co-located with one of Gas City's truck
stops. Approximately 15 drivers worked out of the Porter facility in the months prior to
10 the cessation of Conner's operations. They were dispatched by Frankfort dispatchers
and received their delivery orders through a facsimile machine located in the Gas City
retail building.

15 In May 2005, McEnergy purchased a second petroleum transport company,
Heidenreich. McEnergy testified that, while Conner and Heidenreich were both in the
business of delivering petroleum products, they had "different customer bases." (Tr.
668.) Heidenreich hauled "all over the country," while Conner "stayed close to home."
(Tr. 668, 669.) Heidenreich hauled mostly ethanol products that it delivered to
refineries. Conner primarily hauled gasoline that it delivered to retail outlets and end
20 users. In another significant difference between the two firms, Conner used only truck
driver employees to make its deliveries while Heidenreich relied exclusively on owner-
operators who were subcontracted to deliver its product.

25 While McEnergy's testimony emphasized the differences in his two petroleum
delivery firms, other testimony established a significant degree of overlap between the
two operations. They both operated out of the headquarters building in Frankfort. Both
organizations parked their tanker trucks in the lot at Frankfort. Conner dispatcher
Robert Lofrano testified that drivers for both companies obtained the fuel used to run
their trucks from the same fuel tank on the Frankfort property.

30 The most significant evidence demonstrating longstanding interrelationship of
operations between Conner and Heidenreich concerned deliveries of product to Gas
City retail locations. In his testimony, McEnergy initially claimed that these deliveries
were made by Conner, with "very, very little" of Gas City's fuel being delivered to it by
Heidenreich. (Tr. 631.) Much evidence was presented that contradicted this picture.
35 David Pippin, a longtime Conner driver, testified that he observed Heidenreich trucks
making deliveries to Gas City locations starting in 2006. Another Conner driver, Darin
Meadows, reported that he had witnessed Heidenreich trucks delivering gasoline to the
Gas City truck stop in Porter on multiple occasions over the past 5 years.

40 Dispatcher Lofrano presented a detailed account regarding a longstanding
pattern of shared deliveries to Gas City. He reported that, as a Conner dispatcher, he
had daily interaction with Pete Casper, the individual who made dispatching decisions
for Heidenreich. He testified that he would "give him three or four loads on day shift and
three or four on night shift, every day." (Tr. 310.) Casper would then assign these runs
45 to Heidenreich drivers. Indeed, Lofrano reported that the assignment of work to
Heidenreich was a subject of great interest to McEnergy and a source of some tension
between the two men. Lofrano explained that, on Saturdays, McEnergy would "always
ask me how many loads I dispatched to Heidenreich. I'd tell him three or four, he'd say
give them five, give them six." (Tr. 310.) Lofrano indicated that this occurred every
50 Saturday for a period of "at least two or three years." (Tr. 347.)

5 Apart from being corroborated by the observations of Pippin and Meadows, the
reliability of Lofrano's account was underscored when counsel pressed McEnergy on the
issue, obtaining his concession that Heidenreich did, indeed, deliver "a couple loads a
day" to Gas City. (Tr. 631.) Lofrano also provided an additional insight into the degree
10 of overlap in operations between Conner and Heidenreich. It will be recalled that
McEnergy contended that Conner specialized in deliveries of gasoline in the local area
around Chicago. Heidenreich specialized in nationwide ethanol deliveries. As already
discussed, despite this contention, the evidence demonstrated that Heidenreich
regularly performed work of the same type as Conner's asserted field of specialization.
Beyond this, Lofrano explained the Conner occasionally performed work identical to that
15 of Heidenreich's claimed field of specialization. Thus, Lofrano testified that, when
Heidenreich "had an overabundance of work," Conner drivers would make ethanol
deliveries for Heidenreich. (Tr. 348.) This account was corroborated by Meadows who
indicated that Conner drivers were occasionally dispatched to make ethanol deliveries
when "Heidenreich couldn't handle the work." (Tr. 288.) These assignments were
20 called "overflows." (Tr. 288.)

Apart from the two fuel delivery companies, McEnergy owns other enterprises that
maintain a connection with Gas City's operations. For example, WJM owned the tanker
trucks that were operated by Conner drivers. As counsel for the Respondents
25 explained, "WJM Leasing owns the vehicles, they leased them to Conner. When
Conner was out of business they then, in turn, leased them to Heidenreich." (Tr. 801-
802.) In addition, McEnergy Enterprises performs various services across the corporate
structures. It provides maintenance mechanics and administers employee benefit
programs such as health insurance policies.

30 The top of McEnergy's corporate pyramid is occupied by The William J. McEnergy
Revocable Trust. This was established in 1993 with McEnergy as its president,
secretary, and sole trustee. The Trust is the sole owner of each of the Respondents in
this case.¹⁴ In turn, McEnergy is the president and secretary of each of those
35 Respondents. All of the companies operate from the building on LaGrange Road in
Frankfort. That building and almost all of the Gas City retail locations are owned by the
Trust.¹⁵ This headquarters building contained the administrative, clerical, and
bookkeeping staff for all of the Trust's subsidiary entities.

40 The testimony and documentary evidence clearly demonstrated that these
employees were not simply located together, but intermingled their duties and functions.

¹⁴ This includes the one remaining Respondent that I have not yet mentioned, McEnergy
Trucking. McEnergy testified that the Trust owned this entity and that he personally served as its
president and secretary. Beyond that, little is revealed in the record. To illustrate, Witness
Lofrano was asked, "[w]hat do you know about McEnergy Trucking and Leasing?" His terse reply
was, "[n]ot much." (Tr. 343.) Furthermore, it is not clear whether this corporation is identical to
another firm named McEnergy Trucking Company. There is documentary evidence regarding the
latter corporation demonstrating that it effectively merged with Heidenreich at the time that
McEnergy purchased Heidenreich. (GC Exhs. 45, 46, and 47.) Significantly, the role, if any, of
McEnergy Trucking in the alleged single-integrated enterprise is not revealed in the record.

¹⁵ A few Gas City locations are leased by the Trust.

5 Perhaps the most obvious example was provided by Lofrano who reported that, “[i]f
 someone would call our phone and ask for A.D. Conner and we were busy on the
 phone . . . the receptionist would answer it, Gas City, then she’d transfer it to us.” (Tr.
 304.) Lofrano provided another telling illustration, reporting that if he was in the
 10 building on a Saturday performing his duties as a Conner dispatcher and a customer at
 a Gas City carwash called to report a breakdown in the equipment, he would take the
 report, contact a maintenance employee of McEnergy Enterprises, and dispatch that
 mechanic to the Gas City car wash to make the repairs

15 It is apparent from the foregoing discussion of the relationships among the
 Respondents that McEnergy played a key role. Under direct examination, McEnergy was
 inconsistent and enigmatic regarding the extent of his participation in the matters
 involved in this case. Nevertheless, on cross examination by counsel for Local 142, he
 did acknowledge his key position. The discussion went as follows:

20 COUNSEL: [A]s the president, when you were the president
 of A.D. Conner, you made the ultimate decisions,
 correct, for the company?

25 MCENERY: Yeah, at the end of the day, yeah.

COUNSEL: At the end of the day. I mean, the buck stops
 with you.

30 MCENERY: Right.

(Tr. 663.) The evidence established that this was equally true for each of the
 Respondents.

35 The second key figure involved in the management of these enterprises during
 the events in controversy in this case was McEnergy’s son-in-law, David Christopher.
 McEnergy was more forthcoming in describing Christopher’s role. He confirmed that,
 prior to Conner’s cessation of operations, Christopher served as its vice president of
 operations responsible for “day to day overall operations of A.D. Conner during 2010.”
 40 (Tr. 664-665.) [Counsel’s words.]

Christopher maintained a similar role for Heidenreich. In McEnergy’s phrase, at
 the present time Christopher is “running the whole show” at Heidenreich. (Tr. 667.) His
 formal title is identical to his former title at Conner, vice president of operations.
 Christopher testified that he has held this position at Heidenreich “for the last couple of
 45 years.” (Tr. 807.) McEnergy also noted that Christopher made the key leasing decisions
 for WJM, including the selection of the lessees of WJM’s tanker trucks and the terms of
 the leases. Finally, McEnergy testified that Christopher is the executive vice president of
 marketing and finance for Gas City.¹⁶

¹⁶ Throughout much of the trial, the Respondents took the position that Christopher was not
 a statutory supervisor and agent of the companies. Ultimately, counsel for the Respondents did
 stipulate that Christopher was both a statutory supervisor and agent of each of the Respondents

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The General Counsel asserts that one other individual, Ted Lowery, spoke and acted on behalf of Conner during the events involved in this case. Lowery did not testify at the trial but numerous witnesses provided accounts as to his position with Conner and his authority to act on Conner's behalf. There was widespread agreement among the witnesses that Lowery was a dispatcher and that he served as the lead person among Conner's complement of dispatchers. Beyond that, there was a genuine and significant dispute as to Lowery's legal status. I will resolve that controversy in the legal analysis portion of this decision.

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Turning now to the Charging Parties, the evidence showed that Local 705 had represented Conner's truck drivers at the Frankfort facility since the mid-1980's. Local 705 and Conner were parties to a collective-bargaining agreement that was signed by them on November 29, 2004, and was to "continue in full force and effect until October 31, 2010" and thereafter absent notice of contrary intent by either party. (GC Exh. 26, p. 28.) Local 705 employed a contract administrator, Neil Messino, to supervise and monitor its contractual relationship with Conner.

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Truck drivers employed by Conner at its Porter facility were organized by Local 142 during 2004. The Company extended voluntary recognition to the Union in that year. Local 142 and Conner were also parties to a collective-bargaining agreement that was entered into on December 1, 2004, and was to continue in effect until October 31, 2010, in the same manner as the agreement between Conner and Local 705.¹⁷ Administration of this agreement for Local 142 was in the hands of its business agent, Lesley Lis. In March 2010, Lis and Christopher concluded an addendum to the parties' contract that resolved disputes regarding the amount of payments made by Conner to the Union's pension fund.

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2. Events in controversy

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As is often true in labor litigation, the events alleged to constitute unfair labor practices in this case took place against a background of financial distress. It was evident that management of the Respondents viewed labor costs and contractual obligations toward the Unions as a major factor contributing to that distress. Longtime Conner employee, Lofrano, testified that as long ago as October 2009, McEnery told him that "the Union was killing him." (Tr. 314.) Lofrano indicated that McEnery returned to this theme in four or five conversations on different occasions.

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with the sole exception of Gas City. (See, tr. 665-666.) His stipulation as to the majority of the Respondents was entirely consistent with the overwhelming evidence regarding Christopher's central role in the management of their affairs. Counsel did not present any rationale for his contention that Christopher lacked this status at Gas City despite occupying the position of its executive vice presidency for marketing and finance. Christopher, himself, admitted that he was a supervisor for Gas City. See GC Exh. 1(m), p. 4. I need not resolve the matter. Gas City's sole liability in this case arises from its relationship with Conner and Heidenreich. The amended consolidated complaint does not allege any unlawful conduct by Christopher while acting on behalf of Gas City.

¹⁷ Indeed, the two collective-bargaining agreements appear to be substantially identical.

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Conner's financial difficulties were made manifest to the Unions in early 2010. In February, McEnergy decided to cease making contractually required contributions to Local 705's health and welfare fund on behalf of the bargaining unit members.¹⁸ When asked why the Employer ceased making these contributions, McEnergy's succinct response was that, "We had no money. We were broke." (Tr. 593.)

10

Christopher testified that, at this time, he began a series of discussions with officials of the Unions in an effort to obtain concessions designed to improve Conner's fiscal situation. These efforts included a series of meetings with Business Agent Tony Sarwas of Local 705 and telephone contact with Local 142's agent, Lis. Christopher explained that he did not hold meetings with Lis because, "I felt that whatever was accomplished with 705, we would accomplish the same thing with 142." (Tr. 808.) He based this conclusion on the fact that the collective-bargaining agreements with the two locals were "mirror images of each other." (Tr. 808.) Witnesses on behalf of the Unions confirmed that Christopher raised the topic of Conner's negative financial situation with them in an effort to obtain concessions. As Lis described it, Christopher told him that the Employer was "on hard times." (Tr. 489.)

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Discussions between Christopher and Local 705 continued in March with a meeting at the union hall attended by several union officials, including someone "on the legal side." (Tr. 809.) Christopher explained that, "we needed significant concessions because there [were] issues, not only with A.D. Conner, but with Gas City and Mr. McEnergy's entities and, we needed, we needed significant concessions in order to continue to operate." (Tr. 809-810.)

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Christopher reported that, in June, the Respondents' financial problems were greatly exacerbated when Bank of America withdrew Gas City's line of credit. This forced Gas City to pay cash for the gasoline it needed to purchase for resale to its retail customers. Discussions with the Union continued that summer, culminating in an audit of Conner's books by the Union. That audit confirmed some of management's claims of financial problems.

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At this point in early August, Christopher sent Local 705 a proposed pay chart, asserting that, even with these proposed concessions, compensation was "still way better than the market." (GC Exh. 30, p. 1.) Subsequently, union officials met to formulate their response. They decided that negotiations regarding concessions would require advance authorization from the membership.

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While these rather desultory discussions about concessions for Conner were underway, both Unions also served notice of their intent to terminate the collective-bargaining agreements on their scheduled expiration dates in October. Lis reported that, after providing written notice of termination, he made numerous phone calls to Christopher, leaving messages that, "I would like to talk to him about setting up times and dates to meet for contract negotiations." (Tr. 472.) Lis reported that the two men

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¹⁸ McEnergy testified that Conner also ceased making payments to Local 142's health and welfare fund, but he was not able to recall the date when this occurred.

5 played phone tag but never actually spoke to each other. As a result, the parties did not engage in any contract negotiations.

10 Although Christopher held another meeting with Local 705 officials in August, the parties had not arrived at any agreements. By September, the unresolved nature of the discussions led to tension between Christopher and McEnergy. As Christopher described it,

15 I was telling him [McEnergy] over the past several months that I felt we were making progress with the Union, we were going to come to some sort of understanding with concessions. He said you've been telling me that since last February, it's September. Where are the concessions?

20 (Tr. 862.) McEnergy asked Christopher if the Union had communicated with the drivers and was told that Christopher did not know. As a result, McEnergy decided that he would meet with drivers to discuss the issue directly.

25 On September 20, Christopher sent two communications that illustrate the Employer's dual approach to resolving the issue of labor costs. The first was a notice to a select group of 10 Conner drivers informing them that McEnergy would meet with them on the next day. The notice did not provide the drivers with any sort of agenda for this meeting. On the same day, Christopher sent an email to Lis asking, "[w]hen would you like to meet to discuss the contract renewal?" (GC Exh. 22, p. 1.)

30 On September 21, McEnergy and Christopher held the scheduled meeting with drivers in McEnergy's office. Two of those drivers, Pippin and Gregory Knorr, provided dramatic testimony regarding what was said by McEnergy at the meeting. Knorr testified that McEnergy entered the room and began by telling the employees, "[G]uys, I've got some bad news, I fucked up, we're broke." (Tr. 83.) He then asserted that, "there will be no fucking union at A.D. Conner. There will be no fucking union, no more." (Tr. 83-84.) Knorr reported that McEnergy elaborated by telling the drivers that, "if the company wanted to continue on[,] that we would have to decertify" (Tr. 84.) Knorr indicated that, throughout the meeting, McEnergy, "kept referring that the Union broke our company." (Tr. 121.)

40 After McEnergy made his announcements regarding the Company's financial troubles and expressed his opinion as to the impossibility of continuing the relationship with the Union, Christopher passed out a document that contained a new pay scale for drivers. This reflected a decrease in hourly wage from \$25.15 to \$21, representing an approximately 17 percent pay cut. (See GC Exh. 3.) Christopher told the assembled drivers that "this is what the concessions would have to be for our company to move forward." (Tr. 123.) McEnergy confirmed this and concluded by instructing the drivers that, "we had seven days to come up with a solution to the problem and [he] would like a representative to come back and try ideas to keep A.D. Conner afloat." (Tr. 84.)

50

5 Driver Pippin's testimony matched that of Knorr as to every significant detail regarding the meeting. He indicated that McEnery began the discussion by informing the drivers that,

10 [H]e didn't have any good news for us and that he was fucking broke and he wasn't paying the Union anymore fucking money. And if we wanted to keep working that we would have to decertify from the Union and go to work for him for less money.

15 (Tr. 167.) After this preamble, the drivers were presented with the written proposal for wage reductions. It was explained that this represented "what we would have to work for if we were going to stay there once we got rid of the Union." (Tr. 167-168.) Pippin testified that McEnery told them that, if they refused to eliminate the Union, "[h]e was going to shut the doors." (Tr. 168.) Thus, he instructed the group of drivers attending the meeting to "talk to everybody and decertify and let the Union know that we didn't
20 want to be unionized anymore." (Tr. 169.)

Understandably, Christopher provided a less colorful account of McEnery's conduct and statements at this meeting. Nevertheless, in its essentials, Christopher's version served to confirm and corroborate the descriptions provided by the drivers. He
25 reported that McEnery told the select group of drivers that "he needed concessions." (Tr. 822.) When the drivers asked why this was necessary, he told them that "the company was broke." (Tr. 823.) Christopher indicated that he distributed a proposal for specific concessions and informed the drivers that the subject of the concessions had been discussed with their Union. The drivers replied that they were not aware of these
30 discussions, whereupon Christopher reiterated that, "something needed to be done and something needed to be done quick." (Tr. 824.) Finally, Christopher testified that the meeting concluded with McEnery demanding that the group of drivers "get back to me and find out what we can do to get this resolved." (Tr. 864.)

35 To the extent that the three accounts regarding the content of this meeting differ, I credit the versions offered by the two drivers.¹⁹ Their testimony was consistent with each other, while Christopher's more circumspect version served to confirm the key points made by the other witnesses, albeit without the dramatic flourishes. Beyond this, the drivers' description of the content of McEnery's message is substantiated by the
40 events that followed. His predictions regarding the Company's future behavior came to pass in precisely the way he outlined at the meeting.

Two days after meeting with the selected group of drivers, Christopher took steps to continue the process of working outside the framework of collective bargaining while,

¹⁹ At trial, three current employees of Heidenreich, Pippin, Knorr, and Darren Meadows, provided testimony adverse to the interests of the Respondents. In evaluating their accounts I have taken into consideration the Board's analytical principle that "testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *PPG Aerospace Industries*, 355 NLRB No. 18, slip op. at p. 2 (2010). [Footnote omitted.] Application of such a conclusion here reinforces the other indicators demonstrating the reliability of these witnesses.

5 at the same time, communicating his agreement to meet with Local 705. He issued a memorandum to all drivers at Frankfort and Porter in which he informed them that management had met with a “group of select senior drivers” because “[w]e felt that meeting with several drivers would be more productive vs. getting in front of our entire group of Frankfort and Porter drivers.” (GC Exh. 5, p. 1.) He advised that management had stressed “the importance of getting concessions passed through due to the financial condition of AD Conner.” (GC Exh. 5, p. 1.) He then outlined the nature of the Company’s proposal including a wage reduction, switching of benefit plans from the Union to the Company’s insurer and 401(k) plan, and imposition of a co-pay for health insurance. He solicited “ideas on what to do to make things work” from the drivers. (GC Exh. 5, p. 1.) Coupled with this request for concessions, he warned that, “[o]ne thing is for certain, we cannot continue to operate at our current cost structure. We need to work together to fix this.” (GC Exh. 5, p. 1.) He concluded by informing the drivers that, “[w]e want to be able to come to an amicable solution and move forth with the organization.” (GC Exh. 5, p. 2.)

20 On the same day he wrote this memo, Christopher also exchanged emails with Messino. Messino began the communication by proposing dates for bargaining about the terms of a new contract. He advised that, “Local 705 will also present our initial proposal.” (GC Exh. 28.) Christopher responded by accepting the date of October 18, adding that he would like to include Local 142. Implicitly confirming the ongoing relationship with both Unions, Christopher told Messino that, “I do not know if we will have the same agreements [with the two unions] moving forth, that is something we can initially discuss.” (GC Exh. 28.)

30 Having already held a meeting with a select group of drivers at Frankfort, Christopher now proceeded to meet with drivers at Porter. The meeting was held in the trailer at the Porter truck stop on September 28. Twelve drivers attended, including two who provided testimony about this event.²⁰ James McClelland reported that Christopher told the drivers that “the company was losing money and that we needed to take a pay cut and pension, cut in our pension.” (Tr. 223.) He warned that if this did not occur, “the company would have to close.” (Tr. 223.) He also attributed Conner’s financial problems to “our pay rate and for, the amount for our pension and health and welfare.” (Tr. 224.) He also expressed frustration that “the Union wasn’t returning his phone calls.” (Tr. 224.) Tellingly, Christopher also made a suggestion that proved to be a prediction of management’s future intentions, telling the assembled drivers that “we could go to be owner operators or to be, disband the Union.” (Tr. 225.)

45 Driver Meadows largely confirmed McClelland’s account, including Christopher’s demand for “a reduction in pay, or something, benefits to help the company survive.” (Tr. 265.) He reported that a driver asked Christopher if one option would be “to go non-union.” (Tr. 266.) Christopher replied that, “yes, that could be one option.” (Tr. 266.) Christopher also distributed a document outlining the changes in driver compensation. (See GC Exh. 10.) Finally, he warned that if these proposals were not accepted, “[t]he company would probably, or would close.” (Tr. 268.)

²⁰ Christopher did not testify regarding this meeting. I credit the detailed and generally consistent accounts of the two drivers.

5

As the month of October began, matters reached a crisis. In a reflection of Conner's deepening financial problems, on October 6, Christopher emailed Lowery advising that the Union's health fund was terminating all employees as of November 1 due to the Employer's failure to make required contributions. He added that he was working on the problem with the Union and that the parties were "close to reaching an agreement." (GC Exh. 17.) He asked Lowery to "please circulate this e-mail to all the drivers" and promised to keep everyone informed of developments. (GC Exh. 17.)

Three days later, officials of Local 705 finally took action to implement their decision to inform bargaining unit members of the outcome of the Union's audit of Conner's finances and seek authorization to negotiate with management regarding concessions. The meeting was conducted at a VFW Hall and a large number of drivers attended. Messino testified that he informed those drivers that, "we had completed an audit" and had discussed proposals with Christopher on September 19. (Tr. 552.) He reported that he told the drivers that he was "recommend[ing]" wage concessions "based on the audit that we performed [which] showed some loss in the company." (Tr. 553.)

Messino testified that, on October 11, he informed Christopher that he had met with the drivers and that the drivers "gave me authorization to the concessions he offered." (Tr. 904.) While Christopher initially denied that Messino provided him with this information on October 11, he later conceded that the two men spoke by telephone sometime between October 9 and 18. During their conversation, he affirmed that Messino told him that union officials had spoken with the drivers and, "[t]he drivers were in agreement with concessions. We needed to negotiate concessions." (Tr. 865.) I credit Messino's account, particularly since it is fundamentally corroborated by Christopher's own testimony.

Unfortunately, at the very moment when the Union's leadership finally took steps to recognize the Company's financial problems and implement a response to them, McEnergy made an abrupt and unilateral decision to pursue his own alternative course of action.²¹ Christopher testified that on either October 11 or 12 he met with McEnergy. McEnergy informed him that he was shutting down Conner. When asked if McEnergy explained his rationale for this decision, Christopher reported that the Company was closed because it "was out of moneyThe Company wouldn't have met payroll. If we went any longer, the company wouldn't have met payroll." (Tr. 867.) Significantly, Christopher also testified that, after McEnergy's announcement to him that Conner was closing, the two men discussed how many of the drivers they would need to hire at Heidenreich. McEnergy confirmed that the two managers made plans to add former bargaining unit drivers as employees at Heidenreich. As he put it, "Dave [Christopher] gave me a list of how many drivers he thought we might need . . . for maintaining our

²¹ Messino testified that Christopher told him that "Bill McEnergy made the decision out of the blue on October 12 or 13." (Tr. 557.) I credit this account as it jibes with the sequence of events and is consistent with the sense of exasperation and irritation articulated by McEnergy in his own testimony at trial.

5 units all over where we were at.” (Tr. 677.) He noted that, “we hired as many drivers as we could for the work we had.” (Tr. 676.)

10 McEnery’s decision was communicated to all of the Conner drivers by letter dated October 12. In that letter, McEnery told the drivers that, “[a]s a result of certain business circumstances, A.D. Conner is now forced to shutdown all of its operations on October 18, 2010, and to terminate all of its employees on that date.” (GC Exh. 6.) He added that the shutdown would be “permanent.” (GC Exh. 6.)

15 After making this announcement, management lost no time in implementing its decision to hire former Conner drivers at Heidenreich. Pippin testified that, on October 12, he received a telephone call from Lowery. Lowery advised him, “that there would be applications online for Heidenreich if I wanted to fill one of those out, that I could fill one of those out and drop it off.” (Tr. 173.)

20 Management’s plans were fully and clearly revealed on the next day, October 13. On that busy day, Christopher emailed Conner’s dispatchers. The subject line of the email was “Heidenreich Trucking.” (GC Exh. 18.) In the email, Christopher told the dispatchers that applications for positions at Heidenreich were available “on the web.” (GC Exh. 18.)

25 Later that day, Christopher emailed Lowery, providing him with a candid explanation of management’s intentions. He asked Lowery to “verbally convey[]” to the drivers that he “would like all of them to fill out an application for Heidenreich.” (GC Exh. 13.) He explained that, “I need to see how the work is going to shift from AD Conner to Heidenreich.” (GC Exh. 13.) He outlined the wages and benefits that were going to be offered to drivers who were to be employed at Heidenreich and informed Lowery that “[w]e are still determining the number of drivers that we would need to service Gas City and any other customers through Heidenreich.” (GC Exh. 13.) Finally, Christopher explained to Lowery that he was requesting that Lowery discuss these matters with the drivers because, “I could not put the above into a formal letter due to union issues.”²² (GC Exh. 13.)

40 In addition to drafting this correspondence regarding Conner’s shutdown and Heidenreich’s hiring plans, Christopher also engaged in discussions about these matters. Knorr testified that he went to Conner’s offices to pick up his paycheck and met with Christopher. Christopher told him that “we were shutting down.” (Tr. 90.) He added that Knorr could submit an application to Heidenreich by going online or by

²² It has been my experience that the record rarely affords “smoking gun” evidence, particularly regarding the intent and motivation of parties to lawsuits. This email represents a striking exception to that general experience and constitutes clear and compelling evidence as to, not only what the Respondents did, but why they did it. Christopher’s choice of language is quite similar to that of another indiscreet letter writer in *International Union of Operating Engineers, Local 150, AFL-CIO v. Centor Contractors, Inc.*, 831 F.2d 1309, 1313 (7th Cir. 1987), where a company official wrote to customers explaining that there would be a corporate name change “[b]ecause of union labor problems.” The Court characterized this choice of wording as “[p]articularly damning” evidence of unlawful motivation. 831 F. 2d at 1314.

5 obtaining a paper application from the dispatchers. By the same token, Pippin also
reported to Conner's offices to submit his own application for employment by
Heidenreich. It will be recalled that Lowery had informed him about the application
process on the preceding day. While at Conner, he encountered Christopher, who told
10 him that "he wasn't sure who he was hiring yet and he would let me know." (Tr. 175.)
At the same time, Christopher handed him a written description of the wages that
Heidenreich was going to pay its drivers.

Dispatcher Lofrano testified that Christopher also met with the dispatchers on this
date. He told them that due to the Company's financial situation it would be "shutting
15 down all operations" as of October 17. (Tr. 319.) He invited all of the dispatchers to
complete applications for employment at Heidenreich and return them to him. Lofrano
reported that he completed his own application that day and gave it to Christopher.

On the same day, Christopher also engaged in various communications with
20 union officials. These began with an early morning email from Messino in which he told
Christopher that he had "just been informed" of the decision to "cease operations at
A.D. Conner" and that the scheduled negotiating session on October 18 was being
cancelled by the Company. (GC Exh. 29, p. 2.) He asked Christopher to propose
another date for a meeting, promising that he would clear his own calendar to "expedite"
25 the process. (GC Exh. 29, p. 2.) Christopher replied, promising to contact Messino
later in the week to propose a "new date." (GC Exh. 29, p. 1.) Messino responded with
some suggested dates and asked, "Is this confirmation that you are ceasing operations
as A.D. Conner, Inc.?" (GC Exh. 29, p. 1.) Christopher ended the exchange of emails
by promising to let Messino know about a meeting date later in the week. He added,
30 "[y]ou can use this as confirmation but I will be sending a formal letter today via UPS to
Tony Sarwas indicating that we will be ceasing operations." (GC Exh. 29, p. 1.)

Also on this day, Lis wrote a letter to Christopher on behalf of Local 142. In it, he
advised Christopher that he was giving "official notice of our desire to enter into
35 negotiations relative to the decision and effects of the closure of your terminal located at
. . . Porter, IN." (GC Exh. 23.)

In the remaining days before Conner's permanent shutdown, matters continued
to evolve. In particular, on October 14, a meeting regarding the closure was held at
40 Porter. Christopher testified that he sent Lowery to Porter to conduct the meeting "to
deal with the drivers . . . and let them know what's happening." (Tr. 880-881.) The
meeting was attended by the majority of the Porter drivers and also by their Union
representative, Lis.²³ McClelland, Meadows, and Lis provided consistent and credible
testimony regarding events at the meeting. Lowery told the drivers that Conner "would
45 be closing its doors as of October 18th." (Tr. 229-230.) He also told them that they
"could fill out applications as company drivers for Heidenreich." (Tr. 230.) Lowery also
distributed written materials, including the pay scale for Heidenreich's new employee
drivers.

²³ Lis testified that he was not notified of the meeting by management. He was informed
about it by one of his bargaining unit members.

5 Also on this date, Messino telephoned Lowery to ask him for information about
the shutdown of Conner. Lowery outlined management's plans, advising Messino that
"they were going to retain as many customers as they could and service them through
Heidenreich, and it looks like he's going to need, that Ted was going to hire roughly four
10 or five drivers right now into Heidenreich from A.D. Conner." (Tr. 554.) Finally, Knorr
reported that he dropped off his application for employment with the dispatchers at
Heidenreich. In so doing, he encountered Christopher in his office and was told that,
"they would let me know if I was rehired or not on the 15th." (Tr. 91.)

15 On the next day, as promised, Knorr was contacted by Christopher and told that
he was being "rehired" and was to report for work on October 18. (Tr. 92.) By contrast,
Lofrano was called into Christopher's office and informed that he would not be hired by
Heidenreich. He then spoke with McEnery who told him that, "the Union's been killing
me, it's been costing me a million dollars a year for the past 15 years, and I just can't
20 put up with it anymore."²⁴ (Tr. 324.)

25 On October 16, Christopher telephoned Pippin and offered him employment at
Heidenreich. Two days later, both Pippin and Knorr reported for work as employees of
Heidenreich. Knorr testified that he was given a dispatch sheet on the same form as he
had been receiving from Conner. The only change was that the form had the
30 Heidenreich name in place of the Conner name on it. The assignment contained on the
form was the same assigned route he had been driving for Conner. He was directed to
use the same truck he had been using at Conner. Once again, the only difference was
that the Conner logo had been replaced by a Heidenreich sticker on the door. In fact,
Knorr testified that he inspected the leasing papers contained in the vehicle and they
35 still showed a lease from WJM to Conner. He reported this discrepancy to the person
responsible for such paperwork. On the following day he was given new paperwork
showing the truck as being leased from WJM to an entity described as, "HEIDENREICH
TRUCKING CO/ A D CONNER." (GC Exh. 7.) [Capitalization and punctuation in the
original.]

40 Pippin also testified regarding his first day of work at Heidenreich. He reported to
the usual Frankfort location and punched the same time clock he had been using as a
Conner driver. He was issued the same truck he had been driving for Conner. It had
the same unit number on it, but now had Heidenreich lettering on the doors. Tellingly,
45 he also testified that he was not asked to fill out any new tax forms, I-9 form, or other
paperwork, apart from his application for employment.

 On this date, Meadows chose to fax a Heidenreich application to Lowery. He
followed this with a phone call to Lowery that afternoon. Lowery told him that, "I was
45 good to go for Tuesday, the 19th." (Tr. 274.) On that date, Meadows did report for work
at the Porter facility. Once again, it is significant to note that Meadows testified that he
simply showed up for work and began working. Nobody met him at Porter and he did

²⁴ I credit Lofrano's account of McEnery's explanation for closing Conner. It is generally consistent with McEnery's explanations on the witness stand. Furthermore, in that testimony, McEnery did not deny this account.

5 not undergo any formalities related to his new employment.²⁵ He simply used the truck key that had been issued to him by Conner and began driving. The vehicle he used was not his usual truck, but he recognized it as one that had belonged to Conner's fleet. It now bore a new Heidenreich logo.

10 With Conner no longer engaged in operations, management took another major step. On October 26, Gas City filed a bankruptcy petition. Two days later, Christopher met with officials from both Unions. Messino testified that he took the opportunity to ask Christopher, "what's going on with A.D. Conner?"²⁶ (Tr. 557.) Christopher explained that:

15

[A] lot of financial things weighed into it, weighed into the shutdown, that A.D. Conner is gone, that Bill McEnergy made the decision out of the blue on October 12 or 13, that he couldn't handle it anymore and just needed to shut the place down.

20

(Tr. 557.) Christopher also reported the Gas City bankruptcy filing and told the union representatives that deliveries to Gas City were now going to be made by Heidenreich.

25 Messino took this occasion to hand Christopher a written list of questions. This set of documents began with a cover letter explaining that the information was being sought due to concern that the employer was using an alter ego, single-employer arrangement, or subcontracting scheme as a means to avoid its contractual obligations toward the Unions. The questions called for the production of all correspondence relating to the shutdown of Conner, lists of customers and vendors and copies of
30 communications with them, lists of all drivers and other employees, information regarding the hiring by Heidenreich of former Conner drivers, truck leases and delivery schedules, and names of all stockholders, directors, and officers of the corporations. Responses were requested by November 12. (See GC Exh. 33.) As Messino testified, the information being sought was required "to know where Local 705 was going to go if
35 it was truly a shutdown, and bargain the cessation of operation, the effects, or go after the alter-ego single employer entity of Heidenreich." (Tr. 567.)

40 Lis reported that Christopher provided brief verbal responses to the first three questions, but then told the assembled union representatives that "he needed to get back to us on some of the questions, on all of the questions, really." (Tr. 504.) At this point, Christopher terminated the meeting, indicating that he had a conflicting commitment. The parties scheduled another meeting for November 1.

²⁵ Meadows advised that he was never asked to fill out a new W-4 tax reporting form or I-9 form to show eligibility to work in the United States. He did complete new insurance forms. Of course, this would have been necessitated by the discontinuation of Conner's participation in the Unions' insurance plans and the enrollment of the newly hired Heidenreich driver employees in that firm's insurance plans.

²⁶ At trial, it was stipulated that during this meeting, Messino was acting on behalf of both Unions. See, tr. 890-891.

5 Messino reported that the Unions have not received any additional information in
 response to their request. Furthermore, Christopher subsequently telephoned Messino
 to cancel the November 1 meeting. Messino then requested a conference with
 Christopher and McEnery “to get into Heidenreich successor negotiations.” (Tr. 567.)
 10 This request was denied and the parties have not engaged in any additional
 discussions, meetings, or negotiations.

On January 19, 2011, both Unions filed the initial unfair labor practice charges in
 this case.²⁷ The Regional Director issued the original complaint on January 31, 2011.

15 As of the time of the trial, Conner remained closed and has not employed any
 bargaining unit members since October 18. Former Conner drivers who are now
 working for Heidenreich described that Company’s current and ongoing operations.
 Knorr testified that a total of 16 former Conner drivers now work as drivers for
 Heidenreich, 11 out of Frankfort and 5 at Porter.²⁸ He also reported that Heidenreich
 20 employs the same 3 dispatchers that he used to work with at Conner, including Lowery.
 In addition, Heidenreich employs various nonbargaining unit personnel that used to
 work for Conner, including office staff and the safety director.²⁹ He also described
 continuity in the work processes, including the use of the same procedures regarding
 paperwork.

25 Several drivers testified about the significant differences in terms and conditions
 of employment between their work at Conner and their current positions at
 Heidenreich.³⁰ Knorr reported that his wages have declined from \$25.15 per hour at
 Conner to \$22.75 per hour at Heidenreich. At Conner, he did not have to make any
 30 separate contribution for his participation in the Union’s health insurance. At
 Heidenreich, he pays \$114 biweekly for participation in the Employer’s health insurance
 plan for individual coverage. Similarly, he used to have dental coverage through the
 Union without any additional cost. He now pays \$55 biweekly for such coverage
 through Heidenreich. As a bargaining unit employee of Conner, he participated in the
 35 Union’s pension plan. Heidenreich does not offer him any form of pension or 401(k)
 retirement plan. His paid vacation time is reduced from 4 weeks annually at Conner to
 2 weeks at Heidenreich. At Conner, he received paid holidays and personal days.

²⁷ Months earlier, Local 142 had filed grievances with Conner, alleging violation of the
 parties’ collective-bargaining agreement related to the recognition clause, seniority, transfer,
 and subcontracting of business. (See GC Exh. 24.) Lis testified that he never received any
 response from the Company.

²⁸ The parties reached a stipulation that demonstrated the accuracy of Knorr’s count. Thus,
 the stipulated list of former Conner drivers who now work for Heidenreich out of Frankfort
 consists of: Lames Lippie, James Vermett, Leonard Fox, David Howard, Thomas Geary, Greg
 Vincent, Clyde Coyle, Vincent Moldeven, David Pippin, David Thomas, and Gregory Knorr. The
 former Conner drivers working for Heidenreich out of Porter are: Christopher Grochowski,
 Jimmy Strong, Darren Meadows, Gerald Meyers, and Jarret Roe. (See, tr. 712-714.)

²⁹ Christopher confirmed the transfer of nonbargaining unit personnel to Heidenreich after
 the closure of Conner, including the person who did the billing and the accountant.

³⁰ Counsel for the Respondents verified that the terms and conditions of employment
 between the two fuel hauling firms are different. As he put it, “there’s no question there’s a
 difference. . . . We’re not disputing that.” (Tr. 293.)

5 These do not exist at Heidenreich. All of this was confirmed through the similar detailed accounts of Pippin and Meadows.

10 While the compensation and benefits offered by Conner and Heidenreich differ markedly, the nature of the work processes remains largely the same for the driver employees. Knorr noted that, while Heidenreich never hired driver employees before the closure of Conner, it now does so. All of those driver employees happen to be former Conner bargaining unit members. Similarly, the trucks those Heidenreich driver employees operate happen to be trucks formerly used to deliver fuel for Conner. To illustrate this point, McClelland testified that he paid a visit to the Porter location after
 15 Conner's closure and observed the Conner trucks in the parking lot bearing Heidenreich signs on them. When asked how he knew these were the same trucks, he replied, "[f]rom the pinstripes on the hoods, pinstripes on the side of the trailers, and the truck numbers on the side of the trucks." (Tr. 238-239.) Meadows described the continuity in his work processes. While his delivery customers have changed, he continues to
 20 obtain the product from the same terminals, uses the same vehicles, and is dispatched by the same dispatcher, Lowery. The extent of the similarity in work processes was confirmed in the testimony of Meadows. He currently delivers to Gas City, Steel City, and Marathon stations. The person that he views as his supervisor continues to be Lowery.

25

3. Legal Analysis

A. *The Status of Ted Lowery*

30 Ted Lowery was a significant participant in the personnel matters involved in the shutdown of Conner and the hiring of former Conner drivers by Heidenreich. He conducted a meeting on October 14 at which he informed the Porter drivers that Conner "would be closing its doors as of October 18th." (Tr. 229-230.) He also told the Porter drivers that they "could fill out applications as company drivers for Heidenreich." (Tr.
 35 230.) In addition, Lowery informed Frankfort drivers that they could seek employment at Heidenreich. He also outlined the changes in corporate structure to Messino.

40 The General Counsel contends that Lowery's statements and actions are binding on the Respondents because he was both a supervisor and an agent within the meaning of Section 2(11) and (13) of the Act. (GC Exh. 1(n), p. 3.) The Respondents contend that Lowery did not possess the attributes of supervisory or agency status. Their counsel characterized his role as that of a "low-level foreman, a working foreman." (Tr. 800.)

45 Turning first to the matter of supervisory status, it is necessary to assess this issue using the Board's recently enunciated refinements of its standards as contained in the *Oakwood* trilogy of cases. These are found at: *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), *Croft Metals, Inc.*, 346 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006). It is also important to note that the party
 50 asserting that an individual is a statutory supervisor bears the burden of proof as to this issue. *NLRB v. Kentucky River Community Care, Inc.*, 525 U.S. 706, 711 (2001). In this case, that burden rests with the General Counsel. Finally, it should be observed

5 that job titles are not dispositive. As the Board has held, “[t]he status of a supervisor under the Act is determined by an individual’s duties, not by his title or job classification.” *T.K. Harvin & Sons, Inc.*, 316 NLRB 510, 430 (1995).

10 In attempting to meet her burden of proof, counsel for the General Counsel relies on one specific aspect of the analytical formulation. Thus, she asserts that Lowery “issued discipline through the use of independent judgment sufficient to imbue him with the status of supervisor.”³¹ (GC Br., at p. 33.) In reaching this conclusion she relies on the testimony of Driver Wayne Flora regarding two specific incidents. In the more recent of these, there is no doubt that Flora was subjected to serious disciplinary action. 15 Thus, he testified that, in September 2009, he was involved in a safety infraction at a gas station. As a result, he was required to attend a meeting at which he was issued an unpaid suspension. The difficulty with counsel’s reliance on this episode is that Flora clearly testified that Lowery did not attend the meeting. (Tr. 441.) Flora reported that the supervisor who conducted that disciplinary meeting and imposed the suspension 20 was Christopher. (Tr. 442.)

The second incident relied on by counsel took place 2 years earlier, in September 2007. There is no dispute that the person involved was Lowery. Flora’s account of the incident was somewhat murky. At first, he appeared to contend that 25 Lowery suspended him for 3 weeks without pay. Ultimately, he clarified this in a manner that demonstrated that Lowery’s action was not of a disciplinary nature, but rather was merely a routine application of the Employer’s attendance rules related to workplace injuries. The matter arose after Flora had suffered a work-related injury and was receiving medical treatment for it. His physician issued him a return-to-work note 30 containing a restriction that he not work more than 5 days per week. When he reported this to Lowery, he was told that the Employer operated around the clock and required employees to be able to work at least 6 days per week. Flora testified that, as a consequence, Lowery told him, “if I couldn’t [work six days a week], I had to go to the doctor to get the note reversed before I could come back to work.” (Tr. 437.) It took 35 Flora 3 weeks to obtain an appointment with the physician. Once he did so, his restriction was lifted and he returned to work.

40 Examination of this episode does not demonstrate that it involved either the imposition of discipline or the exercise of independent judgment as required by the Act. Lowery’s actions were not based on his appraisal of Flora’s conduct or behavior. They were merely an application of the Employer’s scheduling policies in response to Flora’s

³¹ She also cites to a variety of so-called “secondary indicia” of supervisory status, including Lowery’s salaried status, possession of his own office, and participation in company meetings. As the Board has long held, “[i]n the absence of primary indicia as enumerated in Sec. 2(11), these secondary indicia are insufficient to establish supervisory status.” *S.D.I. Operating Partners, L.P.*, 321 NLRB 111, fn. 2 (1996), and the cases cited therein. Beyond this, as to one particular indicia, Lowery’s ability to approve time off requests, the Board has observed that if the putative supervisor’s “role in processing time-off requests was limited to assessing staffing adequacy,” it constituted “a routine task that did not involve independent judgment.” *Pacific Coast M.S. Industries Co.*, 355 NLRB No. 226, slip op. at fn. 13 (2010). Such was the case with Lowery.

5 doctor's note. This is illustrated by the fact that, once Flora obtained a revised note
 from the doctor, he returned to work without further ado. Nothing in Flora's testimony
 indicates that Lowery was exercising any independent judgment in directing him to
 obtain clearance from his physician. In *Oakwood*, the Board cited its own precedents
 as establishing that, "[t]he exercise of some supervisory authority in a merely routine,
 10 clerical, perfunctory, or sporadic manner does not confer supervisory status."³² 348
 NLRB at 693, citing *Bowne of Houston*, 280 NLRB 1222, 1223 (1986).

Although the General Counsel has limited his argument to Lowery's disciplinary
 authority, I have considered the overall record and concluded that no other basis exists
 15 to find supervisory status. When questioned as to Lowery's ability to exercise
 independent judgment, McEnery retorted that, "[h]e can't even order lunch." (Tr. 699.)
 Christopher testified that Lowery would have to obtain his approval before taking such
 simple actions as authorizing a driver to take a day off. This was corroborated by Driver
 Meadows who testified that, when he applied for work at Heidenreich, Lowery told him
 20 that, "he had to check with Dave [Christopher] before, to see if I was going to be hired."
 (Tr. 299.) Finally, Lis reported that, in the past, he had resolved problems at the
 workplace directly with Lowery. However, he also testified that, approximately a year
 and a half ago, they were unable to resolve an issue and he spoke to Christopher about
 it. At that time, Christopher told him, "any other problems, just bring them back to him."
 25 (Tr. 522-523.) This was consistent with McEnery's and Christopher's testimony that
 Lowery did not possess any authority to negotiate with the Unions. To the extent that
 Lowery did engage in such negotiations, the evidence reveals that it was without such
 authorization and that, upon learning of it, Christopher advised Lis to negotiate with him
 instead. Lis confirmed that, after this incident, he did bring all issues to Christopher for
 30 resolution.

For all of these reasons, I conclude that the General Counsel has failed to meet
 his burden of proving that Lowery possessed supervisory authority within the meaning
 of the Act. This conclusion, however, does not end the inquiry. Lowery's statements
 35 and actions may, nevertheless, be considered as authoritative acts of the Employer if he
 was serving as an agent of the Employer. In making such determinations, the Board
 applies Common Law principles which it recently summarized:

40 Apparent authority results from a manifestation by the principal to a
 third party that creates a reasonable basis for the latter to believe the
 principal has authorized the alleged agent to perform the acts in

³² It is interesting to note that the Board's reference to "sporadic" exercise of supervisory
 authority as being insufficient under the statute was emphasized in *Shaw, Inc.*, 350 NLRB 354
 (2007), where the Board declined to find supervisory status in circumstances where the putative
 supervisor did participate in the decision to suspend two employees for a disciplinary violation
 but there was no other evidence of his exercise of disciplinary authority. It held that, "this
 isolated incident—the only instance on this record in which any foreman exercised such
 authority—is insufficient to establish that the foremen were statutory supervisors." 350 NLRB at
 356. [Footnote omitted.] Even if one were to characterize Lowery's action regarding Flora's
 doctor's note as disciplinary in nature, it was clearly an isolated episode. No additional example
 of Lowery's alleged disciplinary authority was described in the record.

5 question. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief. [Citations and internal punctuation omitted.]

10 *Mastec North America, Inc.*, 356 NLRB No. 110, slip op. at pp. 1-2 (2011).

A particularly useful criterion for assessment of an individual's authority to act as an agent on behalf of an employer is whether the alleged agent has been employed as a conduit of information to employees. The Board has stressed the probative value of this concept on many occasions while using a variety of descriptive formulations.³³ See, for examples, *B-P Custom Building Products*, 251 NLRB 1337, 1338 (1980) (agent "relayed information from management to employees and had been placed by management in a strategic position where employees could reasonably believe he spoke on its behalf"); *Einhorn Enterprises*, 279 NLRB 576 (1986) (agent "relayed confidential information obtained from management to rank-and-file employees"); *Southern Bag Corp.*, 315 NLRB 725 (1994) (agent was "an authoritative communicator of information on behalf of management"); *Victor's Café 52*, 321 NLRB 504, fn. 1 (1996) (agent was "the usual conduit for communicating management's views and directives to employees, from the time of their hiring through their daily accomplishment of their tasks"); and *Zimmerman Plumbing and Heating Co.*, 325 NLRB 106 (1997), enf. in pertinent part 188 F.3d 508 (6th Cir. 1999) (agents "acted as the conduits for relaying and enforcing the Respondent's decisions, directions, policies, and views").

30 Compelling evidence consisting of Christopher's testimony and supporting documentation demonstrates that Lowery was used as precisely this sort of conduit of information between management and the employee drivers. Thus, while Christopher emphasized that Lowery was not authorized to hire, fire, discipline, or negotiate with the Unions, he did fulfill a unique function as an intermediary between management and the workforce. This was illustrated in the following exchange:

35 JUDGE: Was there anybody in between . . . a regular dispatcher and you in terms of, for instance, the expression was used, the lead man?

40 CHRISTOPHER: I would communicate with Ted Lowery.

COUNSEL: Okay and then, Ted Lowery would talk to the dispatchers?

45 CHRISTOPHER: Right.

(Tr. 851-852.) Later in his testimony, Christopher elaborated, explaining that,

³³ This is not to say that a finding of use of an employee as a conduit by management is a prerequisite for agency status. In *Albertson's, Inc.*, 344 NLRB 1172 (2005), the Board stressed that, "[t]here is no requirement in the Board's test for agency status that an alleged employee agent must be a conduit for management in order to be found the employer's agent."

5

I need a lead guy in there to talk to. I can't have all dispatchers coming in saying, this is what's going on, this is what's happening because it would just be mass confusion So, I needed one guy to talk to in order to make sure everything was running properly.

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(Tr. 854-855.)

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Christopher's use of Lowery as a conduit of information between management and the drivers was also well-documented in the Respondents' written records. Thus, on October 6, Christopher sent an email to Lowery asking the dispatchers to "please circulate this email to all drivers" to inform them that the health insurer was terminating the employees. (GC Exh. 17.) A week later, Christopher emailed Lowery a detailed account of the plan to "shift from AD Conner to Heidenreich," including the terms and conditions of employment at Heidenreich and a request that Conner drivers submit applications. (GC Exh. 13.) He asked that Lowery "verbally convey" this information to the Conner drivers. (GC Exh. 13.)

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The most striking illustration of Respondents' use of Lowery as a conduit of key information to the bargaining unit members consisted of the uncontroverted testimony that Lowery was sent to Porter to meet with the drivers located at that facility on October 14. Christopher confirmed that he selected Lowery for this assignment in order to "deal with the drivers and let them know what's happening" regarding the closure of Conner and the transfer of operations to Heidenreich. (Tr. 880-881.) As specifically directed by Christopher, at that meeting Lowery told the Porter drivers that Conner was shutting down and that they could seek work at Heidenreich.

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The evidence clearly establishes that Lowery was vested with actual authority to speak on behalf of management regarding both the shut down of Conner and the transfer of personnel to Heidenreich. In addition, by using Lowery as its customary conduit of information to bargaining unit members, management created an entirely reasonable perception among those employees that Lowery was an authoritative spokesman for management. As a result, Lowery was an agent of the Employer within the meaning of Section 2(13) of the Act. His statements regarding all of the matters at issue in this trial are admissible as authorized admissions of a party to the case within the meaning of Fed. R. of Evid. 801(d).

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B. Allegedly Unlawful Threats and Solicitations

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The General Counsel alleges that, during meetings with drivers in both of the Conner operating locations in September, McEnery and Christopher threatened bargaining unit members with the closure of the Company due to their union membership and activities. He also contends that, during these meetings, those management officials solicited the bargaining unit members to decertify the Unions as their exclusive representatives. These actions are alleged to constitute violations of Section 8(a)(1) of the Act.

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5 Relatively recently, the Board provided the following useful summary of its analytical standard for assessment of employers' statements that are alleged to constitute unlawful threats:

10 An employer violates Section 8(a)(1) by acts and statements reasonably tending to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Board employs a totality of circumstances standard to distinguish between employer statements that violate Section 8(a)(1) by explicitly or implicitly threatening employees with loss of benefits or other negative consequences because of their union activity, and employer statements protected by Section 8(c). [Citations and certain internal punctuation omitted.]

20 *Empire State Weeklies*, 354 NLRB No. 91, slip op. at p. 3 (2009). The Board has also observed that, "[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group*, 339 NLRB 303 (2003). [Footnote omitted.] Finally, "in considering whether communications from an employer to its employees violate the Act, the Board applies an objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006). [Citation and internal quotation marks omitted.]

30 In addition to making threats, it is contended that the Employer's officials solicited union members to decertify their Unions. Once again, the Board has provided a concise summary of its standards for adjudication of such issues:

35 An employer may not initiate a decertification petition, solicit signatures for the petition or lend more than minimal support and approval to the securing of signatures and the filing of the petition. It is not determinative that an employer does not expressly advise employees to get rid of the union. Indeed, such direct appeals are not essential to establish that an employer solicited decertification. [Citations and internal punctuation omitted.]

45 *Corrections Corporation of America*, 347 NLRB 632, 633 (2006). The Board has also noted in the context of an allegation that an employer solicited a decertification petition, that "an employer violates Section 8(a)(1) when it threatens that benefits will not be available if the employees are represented by a union." *Unifirst Corp.*, 346 NLRB 591, 593 (2006). [Citation omitted.]

50 Turning now to the content of the Employers' statements, the first meeting was conducted by McEnery on September 21 at the Company's Frankfort headquarters. Attendees included a group of 10 Conner drivers selected by management, as well as, Christopher. I have already noted my finding that the testimony of two of the drivers

5 who attended the meeting was credible and was supported to a significant degree by
 Christopher's own account. Thus, I credit Pippin's report that McEnergy told the
 assembled bargaining unit members that, "he wasn't paying the Union anymore fucking
 money. And if we wanted to keep working that we would have to decertify from the
 10 Union and go to work for him for less money." (Tr. 167.) He added that the drivers
 were given a written proposal for wage reductions and were told that this document
 reflected "what we would have to work for if we were going to stay there once we got rid
 of the Union." (Tr. 167-168.) McEnergy concluded his presentation by warning that, if
 the drivers refused to eliminate the Union, "[h]e was going to shut the doors." (Tr. 168.)
 In order to avert this fate, he advised the group of drivers to "talk to everybody and
 15 decertify and let the Union know that we didn't want to be unionized anymore."³⁴ (Tr.
 169.)

It does not require any extended discussion to conclude that McEnergy's
 statements at this meeting constituted direct and obvious threats to shutdown Conner
 20 and terminate its workforce if the employees decided to maintain their membership in
 the Union. It is equally clear that McEnergy made an overt and explicit solicitation to
 those employees to initiate the process of decertifying their bargaining representative.
 Both the threats and the solicitations constituted violations of Section 8(a)(1) of the Act.

25 A week later, Christopher conducted a similar meeting with 12 of the drivers
 working out of the Porter location. As was the case regarding a comparison of the trial
 testimony of the two top officials, Christopher made a more subtle and nuanced
 presentation to the Porter drivers than had McEnergy to their colleagues at Frankfort. He
 both avoided profanity and spoke somewhat indirectly. Drivers McClelland and
 30 Meadows provided credible accounts of what he told the drivers. He advised them that
 the Company was losing money and that they were required to take both a pay cut and
 a reduction in benefits. He warned that if this did not occur, "the company would have
 to close." (Tr. 223.) More pointedly, he informed the drivers that Conner's financial
 problems were caused by "our pay rate and for, the amount for our pension and health
 35 and welfare." (Tr. 224.) This was a clear reference to the terms and conditions of their
 employment established in the collective-bargaining agreement between Conner and
 the Union. McClelland noted that Christopher offered two suggestions to the drivers,
 that "we could go to be owner operators or to be, disband the Union." (Tr. 225.)
 Meadows testified that, in response to a driver's inquiry, Christopher confirmed that "one
 40 option" would be to eliminate the Union. (Tr. 266.) Meadows also reported that
 Christopher distributed proposed changes in drivers' compensation and underscored
 the seriousness of the matter by warning that if these changes were not accepted,
 "[t]he company would probably, or would close." (Tr. 268.)

45 While I have noted that Christopher's conduct at this meeting was more
 restrained and circumspect than McEnergy's at the earlier meeting, consideration of the
 totality of circumstances surrounding the event persuades me that his statements must
 be reasonably construed as threatening closure of the Company and loss of

³⁴ It will be recalled that Driver Knorr's account entirely corroborated Pippin's version. As
 Knorr put it, McEnergy told them that, "[i]f the company wanted to continue on that we would
 have to decertify to continue as employees." (Tr. 84.)

5 employment due to the drivers' continued participation in the Union and solicitation of
 the drivers to discontinue such participation. Thus, Christopher's language "created the
 impression in the minds of employees that there was an inevitable linkage between
 unionization and job loss." *Homer D. Bronson Co.*, 349 NLRB 512, 513 (2007), enf. 273
 10 Fed. Appx. 32 (2d Cir. 2008). [Internal punctuation omitted.] As a result, Christopher's
 statements at this meeting constituted unlawful coercion of employees directed at their
 exercise of their Section 7 rights. The statements violated Section 8(a)(1) in the manner
 alleged by the General Counsel.

15 C. Allegedly Discriminatory Discharges and Transfers of Work

The General Counsel alleges that Conner engaged in unlawful discrimination
 against bargaining unit members by discharging them from employment and
 transferring work that they had been performing to Heidenreich. He further contends
 that the motivation for these actions was the membership of the bargaining unit
 20 members in the Unions. Such conduct would constitute a violation of Section 8(a)(3) of
 the Act.

Because the resolution of this question turns on the Employer's motivation, I
 must assess the evidence using the methodology mandated in *Wright Line*, 251 NLRB
 25 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation
 Management Corp.*, 462 U.S. 393, 399—403 (1983). In order to meet his initial burden
 under *Wright Line*, the General Counsel must show that the Respondent's employees
 engaged in protected union activities and that the Respondent's officials were aware of
 their participation in those activities. He must also demonstrate that the employees
 30 suffered an adverse employment action and that there was a motivational link between
 the adverse action and the protected activity. If the General Counsel makes this
 required showing, "such proof warrants at least an inference that the employee's
 protected conduct was a motivating factor in the adverse employment action and
 creates a rebuttable presumption that a violation of the Act has occurred. Under *Wright*
 35 *Line* the burden then shifts to the employer to demonstrate that the same action would
 have taken place even in the absence of the protected conduct." *American Gardens
 Mgmt. Co.*, 338 NLRB 644, 645 (2002). [Internal citation and footnote omitted.]

At the first stage of the analysis, it is evident that the Conner drivers had
 40 engaged in the protected activity of obtaining union representation, including the
 negotiation of collective-bargaining agreements that established the key terms and
 conditions of their employment. It is equally evident that management knew of this
 protected activity. Similarly, there can be no dispute that all of the bargaining unit
 drivers at both Conner facilities suffered adverse employment actions consisting of
 45 either their complete termination from employment or their transfer to Heidenreich
 where they were not accorded representation and where their terms and conditions of
 employment were less favorable than those that were contractually required at Conner.

Persuasive evidence establishes that there was a direct and powerful
 50 motivational nexus between these adverse actions and the Employer's animus against
 the two Unions. As long ago as a year prior to the adverse actions, McEnery had
 complained to Lofrano that "the Union was killing him." (Tr. 314.) He repeated this

5 complaint on several occasions during the following year. At a meeting with the drivers
 on September 21, McEnery made his animus against the Unions crystal clear, asserting
 that, “there will be no fucking union at A.D. Conner. There will be no fucking union, no
 more.” (Tr. 83-84.) Just days before the termination of Conner’s operations, McEnery
 10 again told Lofrano that, “the Union’s been killing me, it’s been costing me a million
 dollars a year for the past 15 years, and I just can’t put up with it anymore.” (Tr. 324.)

McEnery’s repeated statements regarding his attitude toward the Unions leave
 no doubt that he bore animus against them and their members.³⁵ When considered in
 relationship to the decision to terminate Conner’s operations and transfer those
 15 operations to Heidenreich, it is clear that there is a strong motivational link. It cannot
 seriously be contended that McEnery’s unlawful antiunion animus was not a substantial
 motivating factor in the ensuing decision to terminate Conner’s existence and move its
 work to Heidenreich.³⁶

20 Before proceeding with the remainder of the *Wright Line* analysis, it is worthwhile
 to note that the adverse action under consideration here is not the closure of Conner,
 but rather the transfer of its operations to Heidenreich and Heidenreich’s subsequent
 decisions to refuse to recognize the Unions and to offer employment to former Conner
 drivers on terms and conditions significantly worse than those required by the collective-
 25 bargaining agreements between Conner and the Unions. Had McEnery merely decided
 to shut down Conner and get entirely out of the business of hauling fuel to retail gas
 stations, his decision would have been privileged under the Act, even if motivated
 entirely by antiunion animus. As the Supreme Court has held, such a decision to close
 a business, “may be motivated more by spite against the union than by business
 30 reasons, but it is not the type of discrimination which is prohibited by the Act.”³⁷ *Textile
 Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 272 (1965).

³⁵ In the typical *Wright Line* case, the General Counsel attempts to show the employer’s
 retaliation against the protected activity of individual employees. Such individualized proof is
 unnecessary here. Where an employer takes adverse action against an entire body of
 employees due to their protected activity, it “manifests its animus toward all of them.” *Ingramo
 Enterprise, Inc.*, 351 NLRB 1337, 1339 (2007), rev. denied 310 Fed. Appx. 452 (2d Cir. 2009).
 See also, *W.E. Carlson Corp.*, 346 NLRB 431, 433 (2006) (knowledge of individual employee’s
 protected activity is “immaterial” where employer bears animus against protected activity by an
 entire group of employees).

³⁶ Beyond this, I have also considered McEnery and Christopher’s unlawful threats to
 eliminate the work at Conner and solicitations toward the drivers to decertify their Unions as
 additional evidence of animus. As the Board has observed, “[t]hreats to eliminate the
 employees’ source of livelihood have a devastating and lingering effect on employees. An
 inference may be drawn from the animus behind such threats, which the discharge[s] would
 gratify, that the animus was the true reason for the discharge[s].” *Vico Products co.*, 336 NLRB
 583, fn. 16 (2001), enf. 333 F.3d 198 (DC Cir. 2003). See also, *St. Margaret Mercy Healthcare
 Centers*, 350 NLRB 203, 204 (2007), enf. 519 F.3d 373 (7th Cir. 2008) (“antiunion animus is
 established here by the Respondent’s [other] unfair labor practices”).

³⁷ I also note that if Heidenreich had acquired the former Conner delivery routes and
 customers in an arm’s-length transaction, the situation would be different from that presented
 here. Later in this decision, I will discuss my conclusion that the transfer of work between
 Conner and Heidenreich was not a bona fide transaction between two independent entities, but

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Since the General Counsel has proven that the bargaining unit employees of Conner engaged in protected union activities and that they suffered adverse actions against them motivated in substantial part by their Employer's animus against those activities, the burden now shifts to that Employer to prove that the same actions would have been taken regardless of those protected activities. In that regard, the Employer asserts that the reason for the shut down of Conner was that, in Christopher's words, "[t]he Company was out of money The Company wouldn't have met payroll." (Tr. 867.)

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What is particularly striking about the Respondents' defense is that, despite the clear evidence that McEnery was strongly motivated by his dissatisfaction with the terms of his collective-bargaining agreements with the Unions and their refusal to make what he viewed as timely modifications in those terms, the Employer has failed to present any corroboration of its alternate hypothesis that Conner was forced to close due entirely to its financial collapse. It is particularly noteworthy that the Respondents did not present a single shred of documentation to support the claims of financial collapse. Indeed, they did not seek to admit a single document into evidence in this case.

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On several occasions, the Board and its judges have warned that employers asserting economic defenses cannot do so by "uncorroborated oral testimony." *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004), citing *Reeves Rubber, Inc.*, 252 NLRB 134, 143 (1980). See also, *Valley Slurry Seal Co.*, 343 NLRB 233, 250 (2004). Indeed, the failure to produce corroborating documentation or testimony from neutral sources such as the Employer's accountants, bankers, or creditors leads me to draw an adverse inference regarding the veracity of the claims of financial collapse. As another judge has put it in similar circumstances, "Respondent's failure to produce such documents and witnesses leads to an inference that such evidence would be harmful to its case."³⁸ *Cooke's Crating*, 289 NLRB 1100, fn. 8 (1988). [Citations omitted.] The vague, conclusory and entirely unsupported assertions of the Employer's partisan officials do not meet its burden of demonstrating that the bargaining unit members would have been terminated and/or transferred to Heidenreich regardless of their membership in the Unions and coverage by the Union's collective-bargaining agreements. To the contrary, the persuasive evidence consisting of the statements made by McEnery and the concrete steps he undertook to rid himself of the Unions while continuing to operate in the local fuel delivery business firmly support a finding that he engaged in unlawful

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rather a disguised continuance of Conner's operation through the use of Heidenreich as an alter ego.

³⁸ This is not to say that I have concluded that Conner was free from financial problems. The Union's audit revealed "some loss in the company." (Tr. 553.) While I do not doubt that there was some financial pressure, this is a far cry from the quantum of proof that would support a conclusion that the Company's financial situation was so dire that it would have closed its doors even in the absence of the powerful antiunion animus harbored by McEnery. The fact that McEnery chose to remain in the business of fuel hauling to local gas stations after closing Conner demonstrates that he perceived this activity as desirable and profitable for him to continue to perform.

5 discrimination against his bargaining unit employees in violation of Section 8(a)(3) of the
 Act. His determined effort to continue to participate in the local fuel hauling business as
 an nonunion employer persuasively demonstrates that the real reason for his actions
 was not some overall financial or market problem in the business of local fuel hauling or
 any wish to divest himself of such an enterprise, but rather his strong desire to eliminate
 10 Conner's organized workforce, its representatives, and their contracts from his local fuel
 hauling operations.

D. The Alleged Alter Ego Relationship Between Conner and Heidenreich

15 The General Counsel alleges that, as of the time when Conner shut down its
 operations, Heidenreich became its alter ego and revised its own business plan in order
 to become a disguised continuance of Conner. The Board has described the applicable
 legal principles for an analysis of this contention as follows:

20 When the General Counsel alleges that an entity is the alter ego
 of a respondent, subject to the latter's legal and contractual
 obligations, the General Counsel has the burden of establishing
 that status. The determination of alter-ego status is a question
 of fact for the Board, resolved by an examination of all of the
 25 attendant circumstances.

The Board considers several factors when determining whether
 alter-ego status has been shown. Specifically, the Board considers
 whether two entities have substantially identical ownership, manage-
 30 ment and supervisors, business purpose, operation, customers, and
 equipment. The Board also looks to whether the purpose behind the
 creation of the alleged alter ego was legitimate or whether, instead,
 its purpose was to evade responsibilities under the Act.³⁹ No single
 one among these factors is determinative, and not all of the indicia
 35 need be present for the Board to make a finding of alter-ego status.
 [Internal punctuation and numerous citations omitted.]

US Reinforcing, Inc., 350 NLRB 404, 404 (2007).

40 The Supreme Court has endorsed the Board's use of the alter ego doctrine to
 secure compliance with the requirements of the Act. In *Howard Johnson Co., Inc. v.*
Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders
Intern. Union, AFL-CIO, 417 U.S. 249, 261 at fn. 5 (1974), it observed that where a

³⁹ The Board has stressed that the absence of proof of unlawful motive is not dispositive since, "it would be anomalous to allow an employer to walk away from a collective-bargaining agreement merely by changing its name but not the substance of its operations, even if the change in form is neither carried out for a nefarious purpose nor accomplished through deception. As the First Circuit has observed, 'if a company merely changed its corporate form for legitimate tax or corporate reasons, it is hard to see why the new entity should be able to disregard an existing collective bargaining agreement.'" *Fallon-Williams, Inc.*, 336 NLRB 602, 602-603 (2001). [Citation omitted.]

5 corporation is merely a disguised continuance of another employer, “the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor.”

10 Turning now to the evidence in this case, I begin by noting that there is no dispute that Conner and Heidenreich have identical ownership. At all relevant times, the two corporations were entirely owned by The William J. McEnergy Revocable Trust. Furthermore, the principal officer of both the trust and the two companies was McEnergy. The Board has characterized such an identity of ownership as “an important factor.” *US Reinforcing, Inc.*, supra at 404. That factor is fully present in this case.

15 As to management and supervision, the situation is the same. The ultimate management of both firms rests in the hands of their sole owner, McEnergy. While this is undisputed, counsel for the Respondents does argue that the supervision of the truck drivers employed by each company is in different hands. Thus, he asserts that,
 20 “Christopher may be a similar manager for both Heidenreich and A.D. Conner, but at Heidenreich, [Pete] Casper has the majority of the labor relations responsibility, since the majority of drivers are owner-operators, and he is tasked with overseeing the owner-operator drivers.” (R. Br., at p. 30.)

25 In this regard, counsel attempts to draw too fine a distinction. It is true that, prior to the shut down of Conner, Casper supervised all of the owner-operators at Heidenreich, while Christopher supervised all of the driver employees at Conner. During that period, Heidenreich did not use any driver employees, while Conner had no owner-operators. However, the evidence is uncontroverted that, after the shut down,
 30 Heidenreich began to utilize driver employees and Christopher was put in charge of this new category of Heidenreich workers. Thus, for the key purposes under consideration, it is entirely accurate to conclude that the two companies shared the identical supervisor of truck driver employees, Christopher.⁴⁰

35 As to business purpose, a similar situation exists. Thus, counsel for the Respondents argues that, “[w]hile both entities may be in the business of hauling, the former hauls ethanol to refineries and the latter hauled petroleum to gas stations.” (R. Br., at pp. 30-31.) This claim is unavailing both because it was never an entirely accurate description of the business purposes of the two firms and, more importantly,
 40 because the business objectives of Heidenreich changed after Conner’s shut down. As I have described, while the two companies were both in operation, they engaged in a significant interchange of operations such that Heidenreich routinely hauled petroleum to retail gas stations, while Conner occasionally hauled ethanol to refineries. Once Conner ceased to operate, it is undisputed that Heidenreich increased its deliveries of
 45 petroleum to retail gas stations, effectively assuming Conner’s former responsibilities in this area to the extent permitted by Conner’s former customers.⁴¹ Thus, during the

⁴⁰ The pattern continues at the next level of management. Lowery was the lead dispatcher at Conner and is now employed in that role at Heidenreich.

⁴¹ This was explained by Lowery, who told Messino that the plan was to “retain as many customers as they could and service them through Heidenreich.” (Tr. 554.)

5 relevant period, Heidenreich and Conner were operated for the same business purposes.⁴²

10 The next group of factors may be considered together as they consist of related concepts regarding the operations, equipment, and customer base for the two firms. Prior to Conner's shut down, there was some significant similarity in these matters between the two companies. They did share operations, particularly the hauling of fuel to customers who operated retail gas stations. More importantly, after the shutdown, Heidenreich assumed many more of Conner's former operations, employed a complement of Conner's former drivers who continued to serve under their former supervisor, and continued making many of Conner's former deliveries using equipment owned by WJM and previously leased to Conner. To the fullest extent permitted by the customers, Heidenreich took over Conner's delivery routes, including deliveries to Conner's largest and most important customer, Gas City.

20 All of this was vividly illustrated by the testimony of former Conner drivers who were hired by Heidenreich. They reported that there was little in the way of hiring formalities and a striking similarity in job duties. Their equipment and work processes were largely indistinguishable from what had existed in their work at Conner. As Meadows explained, on his first day with Heidenreich, he simply showed up at his usual location. Nobody met him there. Instead, he was told to operate a truck with "an old Conner trailer." (Tr. 275.) To accomplish this, he used the ignition key that had been supplied to him as a Conner employee. He started up the truck and drove off. Thus began his so-called "new" job at Heidenreich. To the extent there was any doubt about the identity of the equipment, it was dispelled by the documentary evidence, including a lease agreement for a truck executed between WJM and a lessee named as, "HEIDENREICH TRUCKING CO/A D CONNER." (GC Exh. 7.) [Capitalization and punctuation in the original.]

35 Finally, I have examined the issue of any potential motivation to avoid legal obligations created under the terms of the Act. Often, this unlawful motivation is manifested by the creation of a new entity designed to supplant the original employer as a means to avoid that employer's obligations under a collective-bargaining agreement with a union.⁴³ That is not the situation here. Instead, beginning with the purchase of Heidenreich in 2005, McEnergy's trust operated two trucking companies, one with a unionized workforce and one with a workforce composed of owner-operators. Such an

⁴² In this connection, it is important to emphasize that the finding as to identity of business purposes is not based simply on the obvious fact that both firms haul fuel. I have taken into account the Board's concern that the required analysis should steer clear of "overly simplistic" comparisons of business purposes. *NYP Acquisition Corp.*, 332 NLRB 1041, 1044 (2000), *aff'd*, 261 F.3d 291 (2d Cir. 2001). Here, it is apparent that the key business purpose after the Conner shut down was to have one of McEnergy's remaining entities continue the operating pattern of vertical integration by providing the fuel hauling services to Gas City.

⁴³ There is no requirement, however, that an alter ego must be a newly created entity as opposed to a preexisting firm. See, for example, the Board's adoption of the trial judge's discussion of this matter in *Crossroads Electric*, 343 NLRB 1502, 1505-1506 (2004), *enf.* 178 Fed. Appx. 528 (6th Cir. 2006).

5 arrangement is described as a “double-breasted” operation and, presuming that the
companies are structured and operated separately, it can be lawful under the Act.
Walter N. Yoder & Sons, 270 NLRB 652, fn. 2 (1984). Neither the Unions nor the
General Counsel have contended that the double-breasted operation of Conner and
Heidenreich was unlawful during the period prior to Conner’s shutdown.

10

While there is no claim that McEnery’s original business structure and method of
operation for the two companies was unlawful, the General Counsel vigorously asserts
that the plan developed by him in October was directly motivated by a desire to avoid
lawful obligations to the Unions. That plan consisted of the shut down of Conner, the
15 hiring of former Conner drivers by Heidenreich, and the assumption by Heidenreich of
Conner’s delivery services to retail customers to the extent permitted by those
customers. The evidence strongly demonstrates the validity of this contention.

The record is replete with credible testimony regarding McEnery’s hostility to the
20 Unions and his desire to divest himself of obligations to them. This direct evidence of
unlawful motivation is compellingly corroborated by powerful circumstantial evidence.
Turning first to the direct evidence, there was much credible testimony regarding
McEnery’s own statements as to his relationship with the Unions. These comments
offer probative insight into his state of mind. For example, McEnery repeatedly
25 expressed his ire that the Unions were “killing him.” (Tr. 314.) In his meeting with the
Conner drivers in September, he told them in no uncertain terms that, “there will be no
fucking union at A.D. Conner.” (Tr. 83-84.) At the same meeting, he made his future
intentions perfectly clear, telling the drivers that, “if we wanted to keep working that we
would have to decertify the Union and go to work for him for less money.” (Tr. 167.)

30

McEnery’s expressions of antiunion motivation were echoed by his second-in-
command, Christopher. At his own meeting with drivers at Porter, Christopher told them
that, “it would help if we, well, I’m sorry, that we could go to be owner operators or to be,
to disband the Union.” (Tr. 225.) By what is certainly not a coincidence, it was precisely
35 this plan of action that management initiated in the following weeks. Furthermore,
Christopher provided written confirmation that the antiunion sentiments of management
were at the heart of the decisions to shut down Conner and restructure Heidenreich’s
operations. Thus, in an extensive discussion of these matters in an email to Lowery,
Christopher explained that the plan would be to hire former Conner drivers at
40 Heidenreich, but “I could not put the above into a formal letter due to union issues, but
this can be verbally conveyed to [the drivers].” (GC Exh. 13.) Christopher’s choice of
wording demonstrates that he clearly perceived that a written explanation of
management’s course of conduct would constitute proof of unlawful intent as to “union
issues.” (GC Exh. 13.)

45

Beyond the direct evidence of intent provided in the statements of McEnery and
Christopher, the entire set of circumstances involved in the key events of this case shed
a powerful light on management’s intent and motivation. At the same moment Conner
ceased all operations, Heidenreich hired its first and only complement of driver
50 employees. Those employees consisted entirely of former Conner drivers who were
hired to service former Conner retail customers. All former Conner customers who
chose to consent to this new arrangement made a seamless transition from Conner to

5 Heidenreich as the source of their petroleum deliveries.⁴⁴ The Board and the appellate
courts have often stressed the value of evidence of timing as affording insight into
motivation. Many years ago, the Second Circuit observed that the timing of events can
make the intent underlying those events “stunningly obvious.” *NLRB v. Rubin*, 424 F.2d
10 748, 750 (2d Cir. 1970). That is the situation here.

15 To be clear, the compelling evidence in this case demonstrates that unlawful
antiunion animus was a predominating motive for the shutdown of Conner and transfer
of operations to Heidenreich. This does not mean that it was the sole motive. I do
credit the Respondents’ contention that other motives also formed a part of the
decision-making matrix. These motives certainly included the financial difficulties
arising from Gas City’s loss of its line of credit and the desire to continue to benefit from
the vertical integration of operations among the Trust’s various entities designed to
serve the needs of the predominant enterprise, Gas City. Furthermore, I credit
20 McEnery’s passionate testimony that he hired the former Conner drivers at Heidenreich
to the fullest possible extent in order to enable them to continue earning a living after
the demise of Conner.⁴⁵

25 The fact that there were additional legitimate motives for management’s actions
does not lessen the significance of the strong antiunion component underlying those
acts. For example, in *Metalsmith Recycling Co.*, 329 NLRB 124 (1999), the Board
found that a newly created enterprise was an unlawful alter ego in circumstances where
it was created both to permit the common owner to operate “free” of the union and to
relieve the owner of liability for hazardous waste violations. The Board noted that the
presence of animus against the union was sufficient to establish the violation of the Act,
30 “even when there were legitimate business reasons for the creation of a new corporate
entity.” 329 NLRB at 124-125. [Citations omitted.] Indeed, in *D.L. Baker, Inc.*, 351
NLRB 515, 520 (2007), the Board found an unlawful alter-ego in circumstances where
the employer’s “primary intent” may well have been to evade a tax obligation since “a
reasonably foreseeable benefit was also to escape NLRB liability.”

35 To summarize, I readily conclude that, as of the date that Conner ceased its
business operations, Heidenreich became its unlawful alter ego and disguised
continuation. This conclusion follows from the evidence demonstrating that the two
companies shared identical ownership, management, and supervision of driver
40 employees; were guided by the same business purposes; shared the same equipment,
operating methods, and customers; and that their management had a predominating
motive to use Heidenreich as a means to avoid Conner’s contractual and legal
obligations to the Unions. In consequence of its status as Conner’s disguised

⁴⁴ The Board finds that the lack of “any hiatus in operations” between alleged alter ego
companies is probative evidence of unlawful motivation. *MIS, Inc.*, 289 NLRB 491 (1988).

⁴⁵ In my 25 years of judicial experience, I have often seen that people make major life and
business decisions out of a mosaic of motivations ranging from the base and selfish to the noble
and altruistic. It does not surprise me that McEnery’s thought process included the strong intent
to break his contractual and legal commitments to the Unions, while striving to continue to offer
some form of employment to a number of his long tenured drivers.

5 continuance, as of October 18, Heidenreich assumed those legal and contractual obligations toward the Unions.⁴⁶

E. The Alleged Single Employer Relationship Among the Respondents

10 Apart from the General Counsel's well-founded claim that Conner and Heidenreich became alter-ego corporations, he also asserts that the 6 Respondents represent a single employer for purposes of liability under the Act. As the Board has noted, "'alter ego' and 'single employer' are related, but separate, concepts." *Johnstown Corp.*, 322 NLRB 818 (1997). As with alter ego, the Supreme Court has
 15 endorsed the Board's analytical approach to the single employer issue. As Justice Douglas explained, "we think the Board is entitled to show that . . . separate corporations are not what they appear to be, that in truth they are but divisions or departments of a 'single enterprise.'" *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402 (1960). The Court has also summarized the Board's methodology in this area as
 20 follows:

In determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise. The
 25 controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership. [Citations omitted.]

30 *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 257 (1965).

Turning first to the questions of common ownership and management among the 6 Respondents, the starting point must be with the Trust that owns each of them. There
 35 is no dispute that each entity is owned entirely by that Trust and that the Trust, in turn, belongs to McEnergy. As to common management, once again, the first and foremost reality is the overall control of the companies by McEnergy. Although his own testimony was sometimes puzzling and equivocal, the overall conclusion to be drawn from it was that he exercised the ultimate dominion and control over each enterprise. The entire
 40 record also reflects that, while his degree of day-to-day control of routine matters may have varied, he retained and exercised the power to make all of the key decisions related to these companies. Whether it was alterations to the scope of an entity's operations, setting terms and conditions of employment for employees, purchasing real estate to be used for business purposes, tax planning, filing for bankruptcy protection,

⁴⁶ For a case with a notably similar fact pattern and result, see *RCR Sportswear, Inc.*, 312 NLRB 513 (1993), enf. 37 F.3d 1488 (3rd Cir. 1994) (violation of the Act found where employer convened meeting of employees and told them the company was shutting down, but they could come to work for a new company at the same wages, but without any benefits). See also, *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1365 (7th Cir. 1997), citing *RCR Sportswear* with approval.

5 or even total dissolution of one of the companies, it was McEnergy who decided on the proper course of action.

10 As to interrelationship of operations among the various entities, I have already outlined the longstanding pattern that existed between Conner and Heidenreich. During Conner's active existence, it stepped in to provide services on behalf of Heidenreich whenever the demands of the workload required such assistance. By the same token, McEnergy closely supervised the distribution of work from Conner to Heidenreich on a weekly basis. He was keenly interested in assuring that Heidenreich received a steady flow of such assignments from the Conner dispatchers.

15 Beyond the sharing of responsibilities between the two trucking companies, the record reflects a consistent pattern of integration of operations with the other entities. One noteworthy example was WJM's streamlined method of leasing trucks to the two transport firms. It will be recalled that upon Conner's closure, its fleet of tankers was 20 instantly provided to Heidenreich. Indeed, the shift was so swift that the paperwork lagged behind. Furthermore, no evidence was presented to show that WJM engaged in any negotiation with Conner regarding the sudden termination of its truck leases. Similarly, there was no evidence indicating that WJM engaged in any negotiation with Heidenreich regarding even the most basic terms and conditions that would govern the 25 leases for its newly acquired fleet of trucks. The pattern is reminiscent of that presented in *NLRB v. Borg Warner Corp.*, 663 F.2d 666, 668 (6th Cir. 1981), cert. denied 457 U.S. 1105 (1982). In that case, the Court affirmed the Board's finding of single employer status between two courier companies where the evidence showed that, "Wells Fargo vans were simply repainted and 'sold' to Pony Express via a paper transaction."⁴⁷

30 Beyond the clear integration of WJM, Conner, and Heidenreich, the evidence demonstrated the same pattern with regard to McEnergy Enterprises. Thus, McEnergy Enterprises provided the necessary support services for the integrated operations of the other companies. These included the common headquarters building, health insurance 35 and benefit plans, and maintenance services. Credible testimony established that the integration of these supportive services was so thorough that employees of the various companies commonly answered each other's telephone calls and responded to complaints and problems without regard to any boundaries or distinctions. Thus, for 40 example, Conner employee, Lofrano, related that he would take calls for Gas City and handle operational problems presented by the callers. When those callers reported equipment failures at Gas City stations, Lofrano would dispatch maintenance personnel on behalf of McEnergy Enterprises to fix the breakdowns.

45 An even more vivid illustration of the informality and lack of separate structure among these firms was provided in a brief email authored by Christopher on October 13. It was addressed to "Dispatch ADConner." (GC Exh. 18.) It informed the Conner

⁴⁷ See also, *Bolivar-Tees, Inc.*, 349 NLRB 720, 721 (2007), enf. 551 F.3d 722 (8th Cir. 2008), citing *Georjan, Inc.*, 281 NLRB 952, 954 (1986) ("interrelationship shown where one company purchased trucks to be used by other company, owner negotiated truck leases with self on behalf of his other company and could cancel them at will").

5 dispatchers that job applications for Heidenreich could be found on the internet. It was signed:

Dave Christopher
Gas City, Ltd.

10

(GC Exh. 18.) Finally, it advised the recipients that they could reach Christopher at his email address of Dave.Christopher@mceneryenterprises.com. (GC Exh. 18.) This short missive encapsulates the common management and operational integration among Conner, Heidenreich, Gas City, and McEnery Enterprises. Equally, it illustrates the absence of corporate formalities or boundaries among these entities.

15

The example just cited sheds light on the relationship of Gas City to the other Respondents in this case. Another routine piece of corporate paperwork casts similar light on the subject. Thus, employees were issued note pads that contained the twin logos of Gas City and Conner. Those pads also reflected the same address, telephone number, and facsimile number in Frankfort for the two companies. (See, GC Exh. 16.)

20

The ultimate reality in assessing the interrelationship of Gas City with the other Respondents is that those other entities owed the primary rationale for their existence on the servicing of Gas City's needs. This was particularly evident in considering the motivation for the key decision involved in this litigation. It is apparent that, while the decision to close Conner may have resulted from some mix of financial and labor relations concerns, the companion determination to create a new employee-operated fuel hauling component at Heidenreich was largely designed to service the fuel needs of Gas City. The overall situation was similar to that presented in *Naperville Ready Mix, Inc. v. NLRB*, 242 F.3d 744, 752 (7th Cir. 2001). In that case, the Seventh Circuit concluded that the Board was entitled to find single-employer status where "there was evidence of operational integration among the companies, and the fact that T & W and WEC served primarily, if not exclusively, the hauling and maintenance needs of NRM." In this case, as of October, Conner, Heidenreich, WJM, and McEnery Enterprises existed primarily to serve these, as well as several other, functions for Gas City.

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Finally, with regard to Gas City, the record is less complete than would ordinarily be anticipated. This stems from the manner in which Respondents have conducted this litigation and the way in which they chose to present their defense at trial. Turning first to their defense at trial, I was struck by the fact that these Respondents did not produce a single page of documentary evidence. Instead, they chose to rely entirely on self-serving testimony from management officials. While I recognize that the General Counsel bore the burden of proof on the issue of single-employer status, the fact remains that, ordinarily, respondents facing such an allegation are uniquely well-situated to present paperwork from their files that would tend to support the observance of proper corporate formalities and the existence of arm's-length relationships among separate entities. The utter absence of such documentation in this case is striking.

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Long ago, the Supreme Court noted the significance of the sort of defense presentation that occurred in this case. It held, "[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been

5 adverse.” *Interstate Circuit v. U.S.*, 306 U.S. 208, 226 (1939). The Board has
 repeatedly applied this logic in its cases, citing a well-known legal authority for the
 proposition that, “where relevant evidence which would properly be part of a case is
 within the control of the party whose interest it would naturally be to produce it, and he
 fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference
 10 that such evidence would have been unfavorable to him.” *Martin Luther King, Sr.,
 Nursing Center*, 231 NLRB 15, fn. 1 (1977). This inference has been applied
 specifically in cases where a party has relied on oral testimony despite the existence of
 documentary evidence on the matter at issue. See, *Reeves Rubber, Inc.*, 252 NLRB
 134, 143 (1980). In my view, it is properly applied here as to the issues involving single-
 15 employer status.

It is certainly possible that a defense presentation could decline to include
 documentary evidence without raising an adverse inference. For example, if the
 defense has provided the body of documents to the prosecution, its failure to place
 20 those materials into the record may not suggest any deficiency in the strength of its
 case. It is in this regard, however, that the conduct of the defense in this case is
 particularly troubling. The General Counsel issued a subpoena to the Respondents
 seeking a variety of company documents. The Respondents were also instructed to
 provide such materials that were “in the possession of attorneys . . . directly or indirectly
 25 employed” by the Respondents. (GC Exh. 37, p. 2.) Additionally, the Respondents
 were advised that they could produce “true copies” of any documents whose originals
 were “unavailable.” (GC Exh. 37, p. 2.)

In his written response to this subpoena, counsel for the Respondents reported
 30 that certain documents being sought were not being provided because they were in the
 possession of other lawyers who represented Gas City in other matters, including the
 bankruptcy proceedings. (See, GC Exh. 38.) At trial, counsel for the General Counsel
 raised this issue, reporting that the Respondents had failed to produce materials related
 to issues in this case, including those involved in the single-employer analysis. Counsel
 35 for the Respondents again confirmed that these items were not being produced
 because they were in the possession of other counsel and “we can’t get anything out of
 them because that’s part of the bankruptcy proceeding.”⁴⁸ (Tr. 23—24.)

On hearing the Respondents’ representations, I observed that this turned reality
 40 on its head. Clients issue directives to their lawyers. Lawyers do not withhold important
 paperwork belonging to their clients against the instructions of those clients. Frankly, I
 am not surprised that counsel for the General Counsel has not been able to cite specific
 Board precedents for the obvious proposition that subpoenaed documents in the hands
 of a party’s attorneys must be produced.⁴⁹ In the analogous situation where a union

⁴⁸ To the extent that counsel’s explanation for the failure to provide these documents is due
 to some necessity that they remain in the possession of other counsel or the Bankruptcy Court,
 this borders on the fatuous. While I am old enough to recall a time when paperwork could not
 easily be reproduced, in the era of the duplicating machine, facsimile machine, scanner, and
 computer, this claim may be dismissed out-of-hand.

⁴⁹ There is no contention that these documents are subject to any privilege. No petition to
 revoke the subpoena was ever filed.

5 requests information from an employer, the Board clearly requires that such information
 be sought from outside sources such as sister corporations, parent companies, and
 even subcontractors. See, my discussion in *The Earthgrains Co.*, 349 NLRB 389, 397-
 399 (2007), enf. in pertinent part 514 F.3d 422, 429 (5th Cir. 2008) and the Fifth
 10 Circuit’s observation in that case that, “an employer’s duty to supply relevant information
 also ‘extends to situations where the information is not in the employer’s possession,
 but where the information can likely be obtained from a third party with whom the
 employer has a business relationship.’”).

15 At trial, I found that the Respondents failed to comply with the subpoena issued
 by the General Counsel in this case to the extent that they have not produced records
 that are currently in the possession or control of the attorneys who represent them in
 other proceedings. In consequence, the General Counsel demanded an appropriate
 sanction for such noncompliance.

20 I took the demand for imposition of sanctions under advisement and have now
 concluded that the appropriate sanction for the unjustified failure to produce these
 materials is the drawing of an adverse inference from that failure. This is consistent
 with a long line of Board authority as to an appropriate response to a party’s failure to
 comply with a subpoena. In *Galesburg Construction*, 267 NLRB 551, 552 (1983), the
 25 Board approved the trial judge’s observation that he, “infer[red] from Respondent’s
 failure to produce documents in its control and which were vital to prove its defense that
 the records did not support Respondent’s position.” See also, *Cooke’s Landing*, 289
 NLRB 1100, fn. 8 (1988) (failure to produce documents led to inference that “such
 evidence would be harmful to its case”); *Granite Construction Co.*, 330 NLRB 205, 208
 30 (1999) (error to credit testimony where party failed to provide document on the same
 topic); *Made 4 Film, Inc.*, 337 NLRB 1152, 1159 (2002) (failure to produce corroborating
 document “significantly impacts” on the credibility of testimony); and *Teddi of California*,
 338 NLRB 1032 (2003) (rejection of testimony where party failed to produce
 documentation to support that account).⁵⁰

35 Based on the substantial existing evidence and the inference to be drawn from
 the Respondents’ failure to produce evidence in their possession at trial or provide that
 evidence to the General Counsel pursuant to a subpoena, I find that Conner,
 Heidenreich, McEnergy Enterprises, WJM, and Gas City are thoroughly interrelated
 40 operations to such a degree that this factor may properly be considered as strongly
 probative of a single-employer relationship for purposes of liability under the Act.

45 As to the remaining analytical factor, control of labor relations, I have already
 described the role of McEnergy and Christopher with respect to Conner and
 Heidenreich.⁵¹ Between them, they managed those relations and made all the

⁵⁰ The Board has also endorsed more severe sanctions for similar misconduct. In *The Smithfield Packing Co.*, 344 NLRB 1, 10 (2004), enf. 447 F.3d 821 (DC Cir. 2006), it approved the striking of testimony where the respondent failed to produce films and videos depicting the subject of the testimony.

⁵¹ I note that the quantum of evidence regarding control of labor relations at the other entities is less compelling. To the degree that this results from the Respondents’ failure to comply with

5 personnel decisions regarding the employees of the two firms.⁵² In addition, McEnergy
 Enterprises, another corporation owned and controlled by McEnergy, managed the
 benefit programs for all employees of Conner, Heidenreich, and Gas City.⁵³ Finally, the
 evidence clearly established that McEnergy exercised the ultimate decision-making
 10 authority as to all issues of labor relations and employment for the entire group of
 entities held by his Trust. These circumstances are striking similar to the situation
 presented in *Asher Candy, Inc.*, 348 NLRB 993 (2006), enf. 258 Fed. Appx. 334 (DC
 Cir. 2007). In that case the D.C. Circuit upheld the Board's finding of single-employer
 status where the ultimate decision-making authority for the entities was exercised by the
 15 same top management and one of the related entities provided all of the benefit
 services for the group. The Board specifically found that these facts "proved the
 existence of centralized control of labor relations." 438 NLRB 993 at fn. 1.

For these reasons, I conclude that Conner, Heidenreich, Gas City, WJM, and
 McEnergy Enterprises constitute a single employer within the meaning of the Act and the
 20 Board's precedents. This conclusion results from my findings that these organizations
 share a complete identity of ownership and top management, manifest a highly
 integrated interrelationship of operations, and possess centralized decision-making
 regarding labor relations. Beyond this, I would note that the Board has engaged in
 some debate as to the precise manner of characterizing the role of an additional
 25 concept, the lack of arm's-length relationship among the entities being examined.
 Compare the interesting discussions in *Lebanite Corp.*, 346 NLRB 748 (2006), and
Paint America Services, 353 NLRB No. 100 (2009). However one chooses to
 pigeonhole the precise manner in which one should apply the concept, one key
 conclusion emerges from this record, the virtually complete absence of evidence that
 30 the Trust held its individual component entities in arm's-length relationships with itself or
 with each other.

The lack of arm's-length relationships is vividly illustrated by the events that form
 the heart of this controversy. When McEnergy decided to shut down Conner, the
 35 employees were moved to Heidenreich without any negotiation between these entities
 or even basic employment formalities. Similarly, the trucks were transformed by WJM
 from Conner's fleet into Heidenreich's newly created fleet. There was no controversy
 regarding the abrupt termination of Conner's leases, nor was there any evidence of
 negotiation regarding the terms of Heidenreich's new leases. By the same token, Gas
 40 City acquiesced in the plan to switch responsibility for its crucial petroleum delivery

the General Counsel's subpoena, I draw an adverse inference against the Respondents for the
 same reasons discussed earlier in this decision.

⁵² Indeed, while counsel for the Respondents attempts to highlight Casper's history of
 supervision of Heidenreich's owner-operator subcontractors, even in this regard McEnergy
 conceded that, since October, it has been Christopher who decided the policies as to how they
 were compensated. (See, tr. 594.)

⁵³ It should be noted that there is no evidence regarding labor relations matters at WJM.
 This is not surprising or significant as there do not appear to be employees of this organization.
 As the Board has observed, "where some companies have no employees, [the] factor of
 centralized control of labor relations becomes less important." *Bolivar-Tees, Inc.*, supra at 722,
 citing *Three Sisters Sportswear Co.*, 312 NLRB 853, 863 (1993).

5 services to Heidenreich without any vetting process or further ado.⁵⁴ Similarly, McEnergy Enterprises agreed to assume responsibility for the management of benefit services for the newly created set of driver employees of Heidenreich without any evidence of negotiation, discussion, or demand for compensation for undertaking this new
 10 commitment for Heidenreich. Everything was done so simply and seamlessly that it can only be described using Justice Douglas' wording: these Respondents are not "separate corporations . . . in truth they are but divisions or departments of a single enterprise." *NLRB v. Deena Artware, Inc.*, supra. [Internal punctuation omitted.]

15 I have not yet addressed the status of the remaining entity, McEnergy Trucking. I have already observed that the record is largely barren of evidence regarding this organization. When questioned about it, witnesses generally professed ignorance. It is clear, however, that McEnergy Trucking played little, if any, role in the events that provoked this litigation.⁵⁵ While I am mindful that the Respondents' noncompliance with the General Counsel's subpoena may have contributed to the creation of such a sparse
 20 record as to this entity, there is simply insufficient evidence to premise a finding of liability solely on such noncompliance. I conclude that the General Counsel has failed to meet his burden of demonstrating that McEnergy Trucking forms a part of the single employer involved in this case. I will recommend that the amended consolidated complaint be dismissed as to this organization.

25

Finally, in what struck me as a bit of an afterthought, the General Counsel amended the complaint to add a third alternate theory of liability as to Respondent Heidenreich. Counsel for the General Counsel contends that Heidenreich may be viewed as a successor to Conner with concomitant labor relations obligations under the
 30 Act. Having found that Heidenreich is an alter ego of Conner and a component of the overall single employer involved in these events, I deem it inappropriate to attempt to further characterize it as a successor to Conner. As counsel for the General Counsel notes, the test of successorship incorporates the concept that there are two employers involved in a transaction. (See, GC Br., at p. 12.) Here there are neither two employers
 35 nor any transaction. Conner and Heidenreich are the same thing. Put another way, the General Counsel has gone to great and successful lengths to prove that Heidenreich became the disguised continuance of Conner's fuel hauling operation. Furthermore, the record is devoid of any indication that Conner and Heidenreich engaged in any transaction of the type involved in the successorship doctrine. There was no sale,
 40 transfer of stock, merger, acquisition or any other sort of contractual arrangement involved in the assumption of Conner's fuel hauling operation by Heidenreich. Indeed, the absence of such an event simply reflects the lack of arm's-length relationship

⁵⁴ The lack of any vetting of Heidenreich by Gas City is particularly striking since Christopher testified that, "[t]ypically, the customer gets their safety people involved, their operations people involved to evaluate the viability of the company that they're going to engage with in hauling fuel to their stations, operations records, safety record, business record, things of that nature." (Tr. 893.)

⁵⁵ In her brief, counsel for the General Counsel asserts that, "McEnergy Trucking and Leasing was an entity dedicated to repairing gas pumps at Gas City gas stations." (GC Br., at p. 20.) This merely underscores the lack of any relationship between McEnergy Trucking and the events and circumstances involving fuel hauling operations that constitute the issues in this case.

5 among units of the same single-employer entity. Under these circumstances, I decline to find a successorship relationship.⁵⁶

F. The Alleged Bargaining Violations

10 The General Counsel contends that the Respondents engaged in a variety of practices that violate its collective-bargaining obligations arising under Section 8(a)(5) of the Act. These consist of direct dealing with bargaining unit members, refusal to recognize the Unions as the representatives of Respondents' employees, refusal to abide by the terms and conditions of Respondents' collective-bargaining agreements with those Unions, refusal to bargain with the Unions regarding the effects of the decision to shut down Conner, and refusal to provide Local 705 with information necessary for it to perform its function as the representative of unit employees. I will address each of these allegations in order.

20 Prior to the shutdown of Conner, management convened meetings with groups of drivers at both Frankfort and Porter. The General Counsel asserts that management's conduct during these meetings consisted of unlawful direct dealing with employees. The Seventh Circuit has explained the rationale behind this sort of violation of the bargaining obligation:

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Implicit in the obligation to bargain in good faith is the principle that the employer is not to go behind the union's back and negotiate with individual workers, nor otherwise to undermine the union's status as exclusive bargaining representative. This prohibition forecloses individual negotiations with unit employees, in most cases even if collective bargaining negotiations have reached an impasse. Furthermore, the duty to refrain from undermining the union's status as exclusive bargaining agent precludes promises of benefits or threats of sanctions to union members that have the effect of reducing the employees' support for their union. [Internal punctuation and citations omitted.]

Naperville Ready Mix, Inc. v. NLRB, 242 F.3d 744, 757 (7th Cir. 2001).

40 The Board has recently described its analytical methodology for assessing such an alleged violation as follows:

45 The established criteria for finding that an employer has engaged in unlawful direct dealing are (1) that the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the

⁵⁶ The Board has found a successorship analysis to be "unnecessary" in similar circumstances involving alter ego corporations. *George C. Shearer Exhibitors Delivery Service*, 262 NLRB 622, fn. 3 (1982), enf. 714 F.2d 124 (3d Cir. 1983), and *McAllister Bros.*, 278 NLRB 601, fn. 4 (1986), enf. 819 F.2d 439 (4th Cir. 1987).

5 Union's role in bargaining; and (3) such communication was made
to the exclusion of the Union. [Internal punctuation and citations
omitted.]

10 *El Paso Electric Co.*, 355 NLRB No. 95, slip op. at 2 (2010).

15 Turning to the events under scrutiny, it is undisputed that McEnergy and
Christopher conducted a meeting with Conner drivers in Frankfort on September 21.
Tellingly, not all drivers were invited by management to attend this gathering. As
Christopher explained in a memo to the workforce written 2 days after the meeting,
" [w]e felt that meeting with several drivers would be more productive vs. getting in front
of our entire group of Frankfort and Porter drivers." (GC Exh. 5, p. 1.) Of key
importance, management did not notify Local 705 of the meeting and did not solicit its
participation or consent for the meeting.

20 Having convened what Christopher characterized as a "group of select senior
drivers," management proceeded to discuss specific modifications to the terms and
conditions of employment established for the drivers in the collective-bargaining
agreement between Conner and Local 705. (GC Exh. 5, p. 1.) These included
reductions in pay and benefits. In addition to proposing modifications to working
25 conditions, management threatened the employees with loss of employment in the
event they persisted in maintaining union representation. As Driver Knorr put it,
McEnergy warned that, "we would have to decertify [the Union] to continue as
employees." (Tr. 84.) Finally, McEnergy told the group of drivers that they had a
deadline of 7 days in which "to come up with a solution to the problem and [he] would
30 like a representative to come back and try ideas to keep A.D. Conner afloat." (Tr. 84.)

35 One week after the Frankfort meeting, Christopher convened a similar meeting of
drivers at Porter. Twelve drivers attended. Once again, no notice was provided to their
representative, Local 142. As with the Frankfort meeting, employees were informed
that there would have to be modifications in the terms and conditions of their
employment, including reduction of wages and benefits. In addition, Christopher
threatened loss of employment and solicited the drivers to "disband the Union." (Tr.
225.)

40 Applying the Board's criteria to these events, it is obvious that management
engaged in unlawful direct dealing during both meetings. Thus, management
communicated directly to union represented employees in order to seek agreement to
reductions in contractually mandated wages and benefits. Beyond this, management
sought to undercut the Unions by threatening loss of employment and by soliciting
45 decertification. Lastly, management failed to provide notice of the meetings to the
Unions and failed to seek their participation or consent. This conduct contains all of the
hallmarks of unlawful direct dealing in violation of Section 8(a)(5).

50 The next set of alleged bargaining violations center on the decision to shut down
Conner and transfer its fuel hauling operations to Heidenreich as of October 18. The
most crucial of these allegations is that, upon accomplishing this shutdown and transfer

5 of operations, the Respondents repudiated their relationships with the Unions and their obligations under the collective-bargaining agreements entered into with those Unions.

10 As to the withdrawal of recognition from the Unions, management never made a precise declaration to this effect. Nevertheless, it is clear from its course of conduct that it has repudiated the relationships based on its belief that the shut down of Conner terminated the obligation to recognize the Unions. Thus, Respondents refused to process grievances filed by the Unions and refused to continue to meet with union officials.

15 This decision to sever the relationship with the Unions was made more apparent during a telephone conversation between Christopher and Messino, the contract administrator for Local 705. At that time, Messino asked, “if I could meet with William McEnery . . . Dave [Christopher], to get into Heidenreich successor negotiations. . . . His response was no, we couldn’t meet.” (Tr. 567.)

20 It is also undisputed that, upon shutting down Conner, the terms and conditions of the collective-bargaining agreements with the Unions have not been honored by the Respondents in numerous key respects, including the wage rate and payment of benefits to drivers employed at Heidenreich. It is also obvious that the Respondents have refused to recognize either Union as representing any of these employees. Because I have concluded that Heidenreich was both an alter ego of Conner and a component of the single-employer relationship that included Conner, these actions constituted unlawful repudiation of its bargaining relationships and contractual agreements in violation of Section 8(a)(5). See *R. Sabee Co.*, 351 NLRB 1350, 1357 (2007), and *Midwest Precision Heating and Cooling*, 341 NLRB 435, 440 (2005), *affd.* 408 F.3d 450 (8th Cir. 2005).

35 The next alleged violation also stems from the decision to shut down Conner’s operation. The contention is that the Respondents failed to bargain about the effects of the decision to shut down Conner and transfer its operations to Heidenreich.⁵⁷ On learning of management’s decision regarding Conner, the Unions made an effort to engage in such bargaining over the effects of that action on its bargaining unit members. Thus, as early as October 12, Lis sent a letter to Christopher advising him that it constituted “official notice of our desire to enter into negotiations relative to the decision and effects of the closure of your terminal located at . . . Porter, IN.” (GC Exh. 40 23.) At no time did management of Conner agree to engage in such negotiations.

To some considerable degree, the failure to engage in effects bargaining is subsumed in the Respondents’ other unlawful conduct, including its use of Heidenreich

⁵⁷ At the beginning of the trial, I took pains to obtain clarification that the General Counsel’s theory as to this alleged violation of Section 8(a)(5) was the failure to bargain about effects, not about the shut down decision itself. See tr. 42-43, including counsel’s confirmation that, “[i]t’s the effects, yes.” (Tr. 43.) As a result, I have not considered the Charging Parties’ arguments as to any failure to bargain about the decision itself. See, for example, CP Br., at p.2. Nor have I adopted counsel for the General Counsel’s proposed notice language regarding a failure to bargain about the decision. See, GC Br., at p. 44.

5 as a disguised continuance of Conner. Nevertheless, this alleged violation retains some individual significance, particularly as it affected those Conner drivers who were not offered employment at Heidenreich. Thus, as counsel for the General Counsel observes, among the key topics of effects bargaining would have been “who would be selected to transfer from A.D. Conner to Heidenreich, what those workers’ wages would be, or whether there would be any carryover of seniority at Heidenreich.” (GC Br. at p. 10 30.)

The Board has recently approved a judge’s statement that, “[i]t is well established that a Union is entitled to notice that an employer is closing its facility and that it is entitled to negotiate about the effects of the decision on the employees.” *Kadouri International Foods*, 356 NLRB No. 148, slip op. at 2 (2011). [Citations omitted.] Respondents’ failure to meet this obligation constitutes a violation of Section 8(a)(5).⁵⁸

20 The final alleged bargaining violation is the contention that the Respondents failed to provide relevant and necessary information regarding the shut down of Conner and transfer of its operations to Heidenreich as requested by Local 705. This refers to a letter and questionnaire submitted to Christopher by Messino during a meeting on October 28. Messino’s cover letter explained that the information being sought was related to the Union’s concern that Conner “may have alter ego relationship or a joint employer relationship or a single employer relationship . . . with Heidenreich.” (GC Exh. 25 33, p. 1.) The attached questionnaire requested information relating to the shut down of Conner, the hiring of Conner drivers by Heidenreich, and documentation regarding the ownership, management, customers, equipment, and employees of the two firms.

30 The testimony reflected that Christopher made a half-hearted attempt to answer some of the questions during the meeting. After making partial responses to the first three questions, he told the union representatives that, “he needed to get back to us on some of the questions, on all of the questions, really.” (Tr. 504.) It is undisputed that the Respondents have never again contacted the Union to provide the requested 35 information.

The Board has established a somewhat controversial framework for resolution of disputes regarding requests for information related to the investigation of union concerns about alter ego and single-employer situations.⁵⁹ As it explained in *Cannelton Industries*, 339 NLRB 996, 997 (2003),

⁵⁸ The fact that Conner’s operations were merely transferred to another component of the single employer does not relieve management of this obligation. Indeed, even if one were to conclude that Heidenreich was a legitimate successor to Conner, the duty to engage in effects bargaining would remain the same. As the Board put it, “the existence of a successorship situation does not relieve an employer of its obligation to engage in effects bargaining.” *TNT Logistics North America*, 346 NLRB 1301, 1303 (2006), enf. 246 Fed. Appx. 220 (4th Cir. 2007).

⁵⁹ I refer to this as controversial for the reasons described in Member Hayes’ recent note regarding information requests that are not presumptively relevant in *Embarq Corp.*, 356 NLRB No. 125, fn. 1 (2011).

5 When a union requests information relating to an alleged single-
 employer or alter-ego relationship, the union bears the burden
 of establishing the relevance of the requested information. A
 union cannot meet its burden based on a mere suspicion that
 10 an alter-ego or single-employer relationship exists; it must have
 an objective factual basis for believing that the relationship
 exists. Under current Board law, however, the union is not
 obligated to disclose those facts to the employer at the time of
 the information request. Rather, it is sufficient that the General
 Counsel demonstrate at the hearing that the union had, at the
 15 relevant time, a reasonable belief. Ultimately, it is the Board's
 role, not the employer's, to act as the arbiter of whether the
 union's evidence supports a reasonable belief. [Citations
 omitted.]

20 Among the factors that would support such a reasonable belief are use of the same
 facilities by the allegedly related firms and transfer of work among such firms. *C.E.K.*
Industrial Mechanical Contractors, 295 NLRB 635, 637 (1989), enf. denied on other
 grounds, 921 F.2d 350 (1st Cir. 1990).

25 Examining the state of the Union's knowledge as revealed during the trial
 proceedings, it is apparent that its officials had an entirely reasonable and well-founded
 belief that Conner and Heidenreich were engaged in a course of conduct designed to
 unlawfully evade their obligations toward the Union by use of the subterfuge of
 disguised continuation. The Union knew that Conner had ceased operations and that
 30 Heidenreich had assumed many of those operations using the same facilities and
 equipment previously employed by Conner. More importantly, Heidenreich had just
 hired its first complement of driver employees, all of whom had just been terminated
 from Conner's employ. In addition, the Union knew that the key officials at Conner,
 McEnery, Christopher, and to some extent, Lowery, were all now engaged with
 35 Heidenreich. The Union had ample evidence to support its demand for information on
 the issues of alter ego and single employer.

40 I note that Messino's cover letter to Christopher did not describe this evidence. I
 recognize that some authorities would characterize this as a fatal defect in most
 circumstances.⁶⁰ I do not think it can be viewed in this light in the particular case before
 me. To do so would ignore the critical context including the parties' extant collective-
 bargaining agreement. In that agreement, the parties made the following stipulation:

45 For purposes of this Section it shall be presumed that a diversion
 of work in violation of this Agreement occurs when work presently
 and regularly performed by, or hereafter assigned to, Employees
 of the signatory Employer has been lost and, within sixty (60) days

⁶⁰ For instance, the Board has taken note of the Third Circuit's position that, at the time of its
 request, a union must provide an adequate rationale to the employer for seeking information
 that is not presumptively relevant. *Cannelton Industries*, supra, citing *Hertz Corp. v. NLRB*, 105
 F.3d 868 (3d Cir. 1997).

5 of the loss of the work, the lost work is being performed in the
 same manner (including transportation by owner-operators and
 independent contractors) by an entity owned and/or controlled
 by the signatory Employer, its parent, or a subsidiary. The burden
 10 of overcoming such presumption in the grievance procedure shall
 be upon the signatory Employer.

(CBA, Art. 40(b), GC Exh. 26, p. 26.)

15 Once Messino explained that the Union was concerned that Heidenreich was in
 an alter ego or single-employer relationship with Conner, management was clearly on
 notice as to the reasonable basis for the request for information about the two firms. Its
 contractual agreement regarding this subject plainly and explicitly outlines the
 circumstances that would justify the Union in seeking such information. Given that
 20 management had assigned work performed by Conner drivers to Heidenreich
 immediately after October 18 and that Heidenreich was owned by Conner's parent
 Trust, it was obvious why the Union sought the information regarding these matters.

25 The Board has recently reiterated its policy that a party requesting information
 that is not presumptively relevant must provide an explanation in support of the request
 except where "the relevance of the information should have been apparent to the
 Respondent under the circumstances." *Public Service Company of New Mexico*, 356
 NLRB No. 160, slip op. at p. 5 (2011), citing *Disneyland Park*, 350 NLRB 1256, 1258
 (2007). In light of the parties' contractual agreement regarding improper diversion of
 30 bargaining unit work, Christopher clearly understood why Local 705 wanted this
 material. Indeed, Respondents have never claimed otherwise. The failure to provide
 the information constituted a violation of Section 8(a)(5) of the Act.

Conclusions of Law

35 1. At all material times, Ted Lowery has not been a supervisor of the
 Respondents within the meaning of Section 2(11) of the Act. He has, however, at all
 material times been an agent of the Respondents within the meaning of Section 2(13) of
 the Act.

40 2. Since October 18, 2010, Heidenreich has operated as a disguised
 continuation of Conner. At all material times thereafter, Heidenreich and Conner have
 been alter-egos of each other within the meaning of the Act and are jointly and severally
 liable for the unfair labor practices found in this case.

45 3. At all material times, Conner, Heidenreich, Gas City, WJM, and McEnergy
 Enterprises have operated as a single-integrated business enterprise and single
 employer within the meaning of the Act and are jointly and severally liable for the unfair
 labor practices found in this case.

50 4. The General Counsel has failed to establish that McEnergy Trucking has
 participated in the single-integrated business enterprise and single-employer
 relationship described in Par. 3 above.

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5. Respondent Conner unlawfully threatened to close its facilities because of the participation of bargaining unit employees in union activities and unlawfully solicited those employees to decertify their collective-bargaining representatives in violation of Section 8(a)(1) of the Act.

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6. Respondent Conner unlawfully interfered with, coerced, and discriminated against its bargaining unit employees due to their union affiliation by ceasing its business operation, discharging its bargaining unit employees, and transferring its operations to Heidenreich because of those employees' union affiliation in violation of Section 8(a)(3) and (1) of the Act.

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7. Respondents, Conner, Heidenreich, Gas City, WJM, and McEnergy Enterprises have breached their duty to bargain in good faith with the representatives of their employees by dealing directly with their employees concerning the terms and conditions of their employment; refusing to bargain about the effects of the decision to shut down the operations of Conner; refusing to recognize the Unions as the exclusive representatives of their bargaining unit employees; repudiating their contractual obligations under their collective-bargaining agreements with the Unions; and refusing to provide information to Local 705 that was necessary for it to perform its function as representative of the unit's employees. These actions were in violation of Section 8(a)(5) and (1) of the Act.

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Remedy

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Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take various affirmative actions designed to effectuate the policies of the Act. In particular, the Respondents⁶¹ shall be ordered to cease and desist from coercing, intimidating, or discriminating against their bargaining unit employees in the manner established in this case. They shall also be ordered to recognize and bargain in good faith with the representatives of their employees; provide relevant information requested by those representatives; abide by their contractual agreements with those representatives; and refrain from dealing directly with their employees regarding terms and conditions of employment to the exclusion of those representatives. I shall also order the posting of a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB No. 9 (2010).

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Respondents, having discriminatorily discharged certain of their bargaining unit employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*

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⁶¹ As previously explained, I have concluded that McEnergy Trucking has not been shown to have any liability for unlawful acts committed by the other Respondents. Therefore, no remedial provisions of the order in this case apply to that entity.

5 *for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

10 Respondents, having unlawfully altered the terms and conditions of employment for its remaining bargaining units' employees, must make those employees whole for any loss of earnings or other benefits, computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In addition, Respondents shall be ordered to make whole employees for any expenses resulting from the failure to make contributions to the trust funds provided for in the collective-bargaining agreements, plus interest, and to reimburse those trust funds for those contributions they have failed to make on behalf of bargaining unit employees. Such payments shall be computed in the manner described in *Kraft Heating & Plumbing*, 252 NLRB 891, fn. 2 (1980), and *Merryweather Optical Co.*, 240 NLRB 1213, 1216, fn. 7 (1979).

Respondents will also be ordered to provide the information requested by Local 705 in its questionnaire which is identified in the record as General Counsel Exh. 33.

25 Finally, I note that the General Counsel has requested a so-called *Transmarine* remedy. See, *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). Such a remedy is ordinarily imposed when an employer has unlawfully failed to bargain over the effects of a decision to shut down an operation. It provides a formula for calculation of liquidated damages in order to make an effort to redress the refusal to bargain in a manner that "is not entirely devoid of economic consequences for the Respondent." 170 NLRB at 390. In my view, such an order is not necessary here. Having concluded that the Respondents are a single employer that discriminatorily discharged certain of its employees and unlawfully reduced pay and benefits to other employees, I have ordered the customary make-whole remedies. Those remedies provide complete relief under the Act. There is no cause to impose an additional remedy, particularly one that involves liquidated damages that are, by their nature, somewhat arbitrary. Actual damages are the appropriate relief for the employees involved in this case.

40 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶²

ORDER

45 The Respondents, A.D. Conner, Inc., Gas City, Ltd., Heidenreich Trucking Company, McEnery Enterprises, and WJM Leasing, LLC, of Frankfort, Illinois, and their officers, agents, successors, and assigns, shall

⁶² 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.

- 5 1. Cease and desist from
- (a) Threatening their bargaining units' members with closure of operations, transfers of employees, terminations, or other adverse actions due to their union affiliations or activities.
- 10 (b) Soliciting bargaining units' members to decertify their collective-bargaining representatives.
- 15 (c) Interfering with, coercing, restraining, or discriminating against their bargaining units' members by ceasing any of their business operations, discharging bargaining units' members, or transferring operations because of their union affiliations or their participation in union activities.
- 20 (d) Bypassing the representatives of the bargaining units' employees by dealing directly with members of the bargaining units regarding their terms and conditions of employment.
- 25 (e) Refusing to bargain with the representatives of their bargaining units regarding the effects of the decision to shut down the operations of A.D. Conner, Inc.
- (f) Refusing to recognize and bargain with the Unions as the exclusive representatives of employees in the bargaining units.
- 30 (g) Repudiating and failing to abide by their contractual obligations toward the bargaining unit employees and their representatives contained in collective-bargaining agreements entered into with the representatives of their bargaining unit employees.
- 35 (h) Transferring work among their operations or shutting down any of their operations for the purpose of avoiding contractual and legal obligations to their employees and those employees' bargaining representatives.
- 40 (i) Refusing to provide relevant information to Local 705 that it requests in order to fulfill its responsibilities toward its bargaining unit members.
- (j) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 45 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of the Board's Order, offer all bargaining unit members discharged due to the shut down of Conner's operations full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges enjoyed.
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(b) Within 14 days from the date of the Board's Order, make whole all bargaining unit members discharged due to the shut down of Conner's operations for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of all bargaining unit members discharged due to the shut down of Conner's operations, and within 3 days thereafter, notify these employees in writing that this has been done and that the discharges will not be used against them in any way.

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(d) Comply with all the terms and conditions of collective-bargaining agreements entered into by the Respondents with Local 142 and Local 705.

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(e) Make whole their unit employees by paying to them the amounts due by reason of the Respondents' failure, since October 18, 2010, to comply with the collective-bargaining agreements between them and Local 142 and Local 705 respectively, as provided in the remedy section of the decision.

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(f) Make whole Local 142 and Local 705 and their associated benefit funds by making the payments mandated by their respective collective-bargaining agreements with those Unions, as provided in the remedy section of the decision.

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(g) On request, bargain with Local 142 as the exclusive representative of employees in the following appropriate unit concerning terms and conditions of employment and, if any understanding is reached, embody the understanding in a signed agreement:

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All Drivers employed at Respondents' locations within the jurisdiction of Teamsters Local 142 who make deliveries of petroleum products, caustics, chemicals and all related products of any nature and description however packaged or contained to or from any Bulk Plant, Refinery Pipe Line Terminal, Bulk Storage Terminal or Facility, Water Terminal and customer.

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(h) On request, bargain with Local 705 as the exclusive representative of employees in the following appropriate unit concerning terms and conditions of employment and, if any understanding is reached, embody the understanding in a signed agreement:

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All Drivers employed at Respondents' locations within the jurisdiction of Teamsters Local 705 who make deliveries of petroleum products, caustics, chemicals and all related products of any nature and description however packaged

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or contained to or from any Bulk Plant, Refinery Pipe Line Terminal, Bulk Storage Terminal or Facility, Water Terminal and customer.

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- (i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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- (j) Provide to Local 705 the information it requested in its letter and questionnaire dated October 28, 2010.

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- (k) Within 14 days after service by the Region, post at its facilities in Frankfort, Illinois, and Porter, Indiana, copies of the attached notice marked "Appendix."⁶³ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since September 21, 2010.

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- (l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

⁶³ If this Order is enforced by a judgment of a United States court of appeals, the words on 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."

5 IT IS FURTHER ORDERED that the amended consolidated complaint is
dismissed in so far as it refers to McEnergy Trucking & Leasing, LLC.

Dated, Washington, D.C. June 24, 2011

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Paul Buxbaum
Administrative Law Judge

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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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten our bargaining unit employees with closure of operations, transfer, discharge, or other adverse actions due to their union affiliations or activities.

WE WILL NOT solicit our bargaining unit employees to decertify their collective-bargaining representatives.

WE WILL NOT discriminate against our bargaining unit members because of their union affiliations or activities by closing operations and transferring employees, discharging employees, or taking other adverse actions against them.

WE WILL NOT refuse or fail to recognize or, on request, refuse or fail to bargain with Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union Local No. 142, Affiliate of the International Brotherhood of Teamsters as the exclusive bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All Drivers employed at Respondents' locations within the jurisdiction of Teamster Local 142 who make deliveries of petroleum products, caustics, chemicals and all related products of any nature and description however packaged or contained to or from any Bulk Plant, Refinery Pipe Line Terminal, Bulk Storage Terminal or Facility and customer.

WE WILL NOT refuse or fail to recognize or, on request, refuse or fail to bargain with Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union Local No. 705, Affiliate of the International Brotherhood of Teamsters as the exclusive bargaining representative of our employees in the following appropriate unit concerning terms and

conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All Drivers employed at Respondents' locations within the jurisdiction of Teamster Local 705 who make deliveries of petroleum products, caustics, chemicals and all related products of any nature and description however packaged or contained to or from any Bulk Plant, Refinery Pipe Line Terminal, Bulk Storage Terminal or Facility and customer.

WE WILL NOT refuse or fail to provide information requested by Local 705, where such information is necessary for, and relevant to, Local 705's performance of its duties as the collective-bargaining representative of our employees in the unit defined directly above.

WE WILL NOT repudiate or fail to honor our collective-bargaining agreements with Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union Local No. 142, Affiliate of the International Brotherhood of Teamsters and Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union Local No. 705, Affiliate of the International Brotherhood of Teamsters.

WE WILL NOT, on request, refuse or fail to bargain with the representatives of our bargaining unit employees regarding the effects of any decision to close a facility, operation, or component entity.

WE WILL NOT bypass the representatives of our bargaining unit employees by dealing directly with those employees regarding the terms and conditions of their employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our bargaining unit employees in the exercise of the rights guaranteed them by Federal labor law.

WE WILL within 14 days from the date of the Board's Order, offer to all of our bargaining unit employees who were terminated due to the discriminatory decision to close the operations of A.D. Conner, Inc., full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make our bargaining unit employees who were terminated due to the discriminatory decision to close the operations of A.D. Conner, Inc., whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL within 14 days of the Board's Order, remove from our files any reference to the unlawful discharges of our bargaining unit employees who were terminated due to the discriminatory decision to close the operations of A.D. Conner, Inc., and within 3 days thereafter notify these employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL make all affected bargaining unit employees whole for any loss of earnings and other benefits resulting from our discriminatory decision to transfer their employment from A.D. Conner, Inc., to Heidenreich Trucking Company and from our failure to abide by the collective-bargaining agreements between A.D. Conner, Inc., and Locals 142 and 705, respectively, plus interest.

WE WILL make whole Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union Local No. 142, Affiliate of the International Brotherhood of Teamsters and Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union Local No. 705, Affiliate of the International Brotherhood of Teamsters and their associated benefit funds for our failure to make payments to them as mandated in our respective collective-bargaining agreements with them.

WE WILL, on request, bargain with Locals 142 and 705, respectively, as the exclusive bargaining representatives of our employees in the units set forth above concerning the terms and conditions of their employment, including the effects of any decisions to close a facility, operation, or component entity and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL provide to Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union Local No. 705, Affiliate of the International Brotherhood of Teamsters, the information it requested in its letter and questionnaire dated October 28, 2010.

A.D. Conner, Inc., Gas City Ltd., Heidenreich
Trucking Company; McEnergy Enterprises, and
WJM Leasing, LLC

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

The Rookery Building
209 South LaSalle Street
Chicago, Illinois 60604
Hours: 8:30 a.m. to 5 p.m.
(312) 353-7570

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.