

Joe Costa Trucking Company; Edjo, Inc., d/b/a Joe Costa Trucking and General Teamsters and Warehousemen, Local 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 20-CA-13451

September 29, 1979

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On August 18, 1978, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, and Respondent Edjo, Inc., d/b/a Joe Costa Trucking (herein Edjo), filed exceptions, a supporting brief, and an answering brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge, with the exceptions and modifications noted below.

Edjo and counsel for the General Counsel have excepted to portions of the Administrative Law Judge's discussion of the obligations of a successor employer under *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), and counsel for the General Counsel has excepted to certain aspects of the recommended Order based on the Administrative Law Judge's interpretation of *Burns*. We note that the Court in *Burns* unequivocally stated that a successor employer is not bound by the predecessor's collective-bargaining agreement absent an agreement to be so bound. The Court indicated that a successor employer who decides to retain all of the predecessor's employees could be bound to maintain the preexisting terms and conditions of employment, rather than being free to set its own initial terms; however, there was no implication that the predecessor's collective-bargaining agreement would thereby have any continuing viability. Therefore, regardless of whether or not the contract between the predecessor, Joe Costa Trucking Company (herein Costa), and the Union would be enforceable against Costa if that entity were

still engaged in business, such a contract would not be enforceable against the successor, Edjo, unless Edjo were an *alter ego* of Costa or had adopted the contract.

We agree with the Administrative Law Judge that Edjo was a successor, but not an *alter ego*, of Costa. We further agree that Edjo retained all of the former employees of Costa without indicating to them that the terms and conditions of their employment would differ in any manner from those under Costa and thereby brought itself within the special circumstances which the Court in *Burns* indicated would obligate a successor employer to maintain the preexisting terms and conditions of employment while it bargained with the incumbent union. There is no evidence in the record, however, that Edjo ever adopted, or agreed to be bound by, its predecessor's agreement with the Union. In light of the foregoing, we do not adopt any inference in the Decision of the Administrative Law Judge that Edjo's unilateral changes were a "repudiation" or "modification" of any existing collective-bargaining agreement. Rather, we agree with the finding of the Administrative Law Judge that Edjo violated Section 8(a)(5) and (1) of the Act by making unilateral changes in the terms and conditions of employment of its employees at a time when it was legally bound, by virtue of its successor status, to bargain with the Union concerning any such changes. We shall, therefore, modify the Order to clarify Edjo's obligations.

We also do not adopt the Administrative Law Judge's suggestion that Edjo was *contractually* precluded from questioning the majority status of the Union. In this contention, Edjo has excepted to the refusal of the Administrative Law Judge to accept its offer of proof concerning its alleged good-faith doubt of the Union's majority status. Edjo's offer of proof, submitted again with its brief to the Board, alleged that of 29 unit employees at the time Edjo took over Costa, 8 were new hires, 3 were sons of owners, and 8 had indicated to the new owners that they did not want to be represented by the Union. We agree with Edjo's contention that the evidence which it sought to present was relevant to the issues raised herein, and that the Administrative Law Judge erred in excluding it. However, we have examined the evidence and conclude that the error was harmless, inasmuch as the evidence, even if true, would not establish sufficient objective bases for sustaining a good-faith doubt of the Union's majority status. We shall apply our usual presumption that new employees support the Union in the same ratio as those whom they have replaced. *Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965). Therefore, Edjo's offer of proof, if accepted, would have established, at best, that 11 out of 29 employees did not support the Union and would not, without

¹ Counsel for the General Counsel has excepted to the failure of the Administrative Law Judge to include wages in his make-whole order. We note that there is no allegation or evidence that Edjo has unilaterally changed wages of employees in the unit. We shall, however, clarify the make-whole section of the Order. We shall also correct an inadvertent error of the Administrative Law Judge and indicate that compliance with the Order shall be reported to the Regional Director for Region 20 rather than Region 21.

more probative evidence, provide sufficient bases for withdrawing recognition.

Finally, contrary to the Administrative Law Judge, we find it unnecessary to consider or decide whether the Union followed proper procedures in the merger of Locals 684 and 137. The charge herein was filed on October 19, 1977, and it is undisputed that the merger occurred in mid-1976, outside the 10(b) period. Furthermore, we note that Costa recognized Local 137 and reached agreement with it concerning terms and conditions of employment for its employees shortly after the merger. This agreement also was consummated well outside the 10(b) period. Therefore the alleged improprieties in the merger of these two locals cannot provide a defense to a refusal-to-bargain charge based on the withdrawal of recognition over a year after the merger occurred.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Edjo, Inc., d/b/a Joe Costa Trucking, Arcata, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Teamsters Local 137 as the exclusive representative of all employees in the appropriate unit by withdrawing recognition from the Union; by making unilateral modifications of the terms and conditions of employment of employees in the appropriate unit; and by failing and refusing to make payments to the Union's pension trust funds from September 1, 1977, at which time it became legal owner and successor to the Joe Costa Trucking Company.

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

2. Take the following affirmative action:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees in the aforesaid appropriate bargaining unit, with respect to any modifications of the terms and conditions of employment of employees in the appropriate unit and, if agreement is reached, embody such agreement in a signed document.

(b) Make whole the employees in the appropriate

² The Administrative Law Judge's proposed notice to employees of their right to file a decertification petition, such as that ordered in *Morse's Foodmart of New Bedford, Inc.*, 230 NLRB 1092 (1977), is inappropriate where, as here, the Union has historically represented employees and negotiated successive contracts on their behalf, and we are directing that Respondent remedy its violation of Sec. 8(a)(5) by recognizing and bargaining with the Union in good faith. We shall, accordingly, amend the remedy to delete this notice.

unit by remitting all pension contributions and/or other wages or benefits that would have been paid absent Respondent's unlawful conduct as found herein from September 1, 1977, until agreement between the parties is reached or an impasse occurs. Backpay, if any, shall be computed in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as specified in *Florida Steel Corporation*, 231 NLRB 651 (1977).

(c) Post at its principal place of business in Arcata, California, copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that any and all allegations of the complaint not specifically found herein to be violative of the Act shall be dismissed.

³ In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

WE WILL NOT refuse to bargain collectively with General Teamsters and Warehousemen's Local 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all employees in the bargaining unit described below by withdrawing recognition from the Union; by making unilateral modifications of the terms and conditions of employment of employees in the appropriate unit; and by refusing to make payments to the Union's pension trust funds from September 1, 1977.

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

WE WILL, upon request, bargain with the above-named Union as the exclusive bargaining representative of all employees in the bargaining unit described below with respect to any modifications in the terms and conditions of their employment and if agreement is reached, embody such agreement in a signed document. The bargaining unit is:

All lumber, veneer, log, wood chips, and other forest products hauling truckdrivers of Edjo, Inc., at their Arcata, California, facilities, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

WE WILL make whole, with interest, the employees in the appropriate bargaining unit by remitting all pension contributions as formerly made under the terms of the contract between Joe Costa Trucking Company and the Union from September 1, 1977, until a new agreement is reached between Edjo, Inc., and the Union or an impasse occurs.

WE WILL make whole each and every employee for any wages and benefits which may have been lost to them by our unlawful modification of the terms and conditions of their employment, with interest.

EDJO, INC., D/B/A JOE COSTA TRUCKING

DECISION

STATEMENT OF THE CASE

JAMES T. RASBURY, Administrative Law Judge: A hearing was held in this case at Eureka, California, on March 16, 17, and 28, 1978, pursuant to a charge filed by General Teamsters and Warehousemen, Local 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter Union) on October 19, 1977, and amended thereafter by the Union on November 28, 1977, copies of which were served by registered mail upon Joe Costa Trucking, Inc. (herein called Respondent Costa), and Edjo, Inc., d/b/a Joe Costa Trucking (herein called Respondent Edjo). A complaint and notice of hearing issued on December 14, 1977, by the Regional Director of Region 20 of the National Labor Relations Board, which was also served by registered mail upon each of the Respondents on December 15, 1977.

The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* (herein the Act), by refusing to recognize and bargain collectively with the Union, by refusing to honor a certain collective-bargaining agreement, by unilaterally changing terms and conditions of employment of employees in an appropriate bargaining unit without notification to the Union and without affording the Union the opportunity to bargain about such changes, and

by interrogating an employee concerning employee support for the Union. Respondent has denied the commission of any unfair labor practices.

At the hearing all parties were represented by counsel. The parties were given full opportunity to examine and cross-examine witnesses, to introduce evidence, and to file briefs. Excellent briefs were filed by all parties and have been carefully considered.

Upon the entire record in this case, including the briefs and my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent Edjo is, and at all times material herein has been, a California corporation with an office and place of business in Arcata, California, where it is engaged in the business of transporting forest products. Respondent Edjo, during the past calendar year, in the course and conduct of its business operations, provided services valued in excess of \$50,000 to employers, including Simpson Building Supply, Simpson Timber Company, and Louisiana Pacific Corporation, each of which meets the Board's jurisdictional standards on a direct basis.

Respondent Costa is, and at all times material herein has been, a California corporation with an office and place of business in Arcata, California, where it is engaged in the business of transporting forest products. During the past calendar year, in the course and conduct of its business operations, Respondent Costa provided services valued in excess of \$50,000 to employers, including Simpson Building Supply, Simpson Timber Company, and Louisiana Pacific Corporation, each of which meets the Board's jurisdictional standards on a direct basis.

On the basis of the jurisdictional information set forth above, which is not contested by either of the named Respondents herein, I herewith find Respondents Edjo and Costa to be, and at all times material herein to have been, employers within the meaning of Section 2(2) of the Act and engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondents do not deny, and I herewith find, the Union to be, and at all times material herein to have been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

1. Did Respondent Costa have a valid contract with the Union?
2. Because of the merger of Local 684 into Local 137 without membership or bargaining unit approval, is the contract a bar to an election?
3. Is Respondent Edjo an *alter ego* of Respondent Costa?
4. Is Respondent Edjo a successor to Respondent Costa?
5. Did Respondents, or either of them, violate Section 8(a)(1) of the Act during the course of a conversation be-

tween a supervisor and an employee. Warren Snowhill, concerning the Teamsters pension plan?

IV. THE UNFAIR LABOR PRACTICES

A. *The Facts Concerning the Disputed Contract Between Respondent Costa and the Union*¹

Joe Costa established a trucking business with its headquarters in Arcata, California, in 1953, which was incorporated as Joe Costa Trucking, Inc. All of the stock in Joe Costa Trucking, Inc., was owned by Joe Costa and his wife, Zella. When they disposed of their stock on September 1, 1977, Respondent Costa had approximately 20 truckdrivers and operated about 30 tractors and 60 trailers. In addition to the hauling done by Respondent Costa's own drivers with his tractors and trailers, approximately an equal amount of business was generated through the use of sub-haulers.

The evidence indicates that there was an informal relationship between Local 684 of the Teamsters and Respondent Costa for a number of years during which there was never a signed contract. However, Respondent Costa signed a contract covering the period from July 1, 1973, through July 1, 1976 (see G.C. Exh. 2). On March 30, 1976, Teamsters Local No. 684 advised Respondent Costa of their desire to open negotiations for changes and modifications of the then-existing contract. By letter dated July 28, 1976, Joe Costa advised Local 684 of its "final proposal on the changes and/or modifications that you originally sent 6/16/76." In a letter dated August 26, 1976, from the Union (Teamsters Local 137), the Union accepted the proposals contained in Respondent Costa's July 28 letter and stated: "By signing of this letter and returning one for our files, the attached will become a part of the master agreement incorporating the changes, additions, deletions and modifications." (See G.C. Exh. 4.) The letter was signed by Al Andrade, business representative of General Teamsters Local 137, on August 26, 1976. It was signed by Joe Costa Trucking, Inc., on September 8, 1976, and also signed on that same date by Joe Davis, a union business representative. Some time later, when the changes (as negotiated and reflected by G.C. Exh. 4, just described) were incorporated into a total labor agreement (G.C. Exh. 5), Joe Costa refused to sign the agreement and merely stated, "I don't need to sign this. I already signed the other document. That should take care of it."²

B. *The "Merger" or "Takeover" of Local 684 by Local 137*

During this period of time, when negotiations were taking place for the new 1976-79 labor agreement, a "merger" of Local 684 into Local 137 (the Union herein) was taking place. This merger or "takeover" has been the subject of previous Board decisions wherein the facts have been de-

scribed as follows:³ In the spring of 1976, some members of Local 684's executive board began examining the possibility of a merger with Local 137. The merger was discussed by members of both boards, and on July 13, 1976, the proposal was approved by the International, which determined that Local 137 would be the surviving local with jurisdiction over IBT Local 684's assets, territory, etc. On July 20, 1976, the merger was discussed at the final meeting of IBT 684's executive board and approved without any member expressing dissent. By virtue of the merger, all of the approximately 900 members of IBT Local 684 were transferred to Local 137 and issued cards from that local. Although the members of the two locals were not given an opportunity to voice their approval or disapproval of the action, it appears that the merger was in accordance with the International's constitution and has been duly recorded with the Labor Department. The effective date of the merger was July 21, 1976.

As I perceive the several cases that have followed the merger,⁴ the Board and Regional Director for Region 20 have found the Union (Local 137) to be a bona fide successor to Local 684, in that it has the same national union affiliation, officers, dues, purpose, etc., but have *not* found their contracts to be a bar to a petition for election *unless the membership of a particular appropriate bargaining unit had voted their approval of the contract or voted approval of representation by Local 137*. The parties stipulated that the Joe Costa Trucking Company bargaining unit employees were never polled regarding the union merger, although Joe Davis testified they approved the contract changes.

C. *The Facts Surrounding the Ownership and Operation of Joe Costa Trucking, Inc., and Edjo, Inc.*

Joe Costa started Joe Costa Trucking, Inc., in 1953, and he and his wife remained the sole stockholders until September 1, 1977. In 1966, Joe Costa formed a second corporation known as Edjo, Inc. This corporation initially had one other stockholder besides Joe Costa and was formed to purchase a tractor and trailer to be used on a specific hauling job. After a short period of time, Joe Costa acquired the other stockholder's interest and became the sole owner of Edjo. Edjo continued to serve as a subhauler for Costa. In either 1970 or 1971, Joe Costa gave one-third of the stock of Edjo to Tony Gilbert as a Christmas bonus and another one-third of the Edjo stock to his brother, Fred Costa, as a Christmas bonus. Both Fred Costa and Tony Gilbert had been long-time faithful and trusted employees of Joe Costa Trucking, Inc. Tony Gilbert was a supervisor and served as the dispatcher for Respondent Costa. From the time of his partial ownership of Edjo, Gilbert pretty much managed and ran that company. So far as the evidence reveals, Fred Costa played no managerial role in Edjo or Costa but continued to be a truckdriver.

³ See *McKesson Wine & Spirits, Co., a Division of Foremost-McKesson, Inc., and General Teamsters Local 137*, 232 NLRB 208 (1977); and *Fuhrer Bakeries, Employer Petitioner, and General Teamsters Local 137*, 232 NLRB 212 (1977).

⁴ Besides the two previously cited cases, see also *Tom Lazio Fish Company, Case 20-RM-2021; Trombetta Distributors, Case 20-RM-2014; and Fortuna Ready Mix, Case 20-RM-2045*.

¹ There were no serious conflicts in the facts of this case—the conflicts arise as to the legal conclusions to be drawn therefrom.

² The quoted portion is from the testimony of Joe Davis, but was not denied by Joe Costa.

By the year 1977, Respondent Edjo had increased in size and owned three trucks and six trailers. It was one of many subhaulers utilized by Respondent Costa, but the big difference was that it operated from the same location as Respondent Costa and there was some interchange of truck-driving personnel, although the worktime charges were carefully separated for each company. Respondent Edjo had separate accounting records, separate bank accounts, separate employer numbers, separate PUC permits, and separate trucks painted differently and with the name Edjo painted on them. However, the officers of the two Respondent corporations were similar. Joe Costa was president of Respondent Costa, his wife, Zella, was vice president, and Tony Gilbert was secretary-treasurer. Respondent Edjo's officers were Joe Costa, president, Fred Costa, vice president, and Tony Gilbert, secretary-treasurer. All of Respondent Costa's subhaulers were permitted to utilize Costa's credit cards to pay for accessories, such as tires, tubes, minor repairs, and fuel. Edjo operated in exactly the same manner, except that it had the privilege of operating out of the Costa location and was not separately billed for its use of the office clerical telephone or other utilities. Promotional advertising was handled separately for each company. Tony Gilbert handled the day-to-day administration for both companies, but Joe Costa handled the contract negotiations with the Union for Costa. Joe Costa did not concern himself too much with Edjo, but was definitely in charge of Respondent Costa. Edjo was never unionized, although if a member of the Union was transferred from the payroll of Respondent Costa to Edjo and remained a member of the Union, his pension payments were continued. All employees of both companies were accorded identical working conditions.⁵ Joe Davis, the union business agent, acknowledged that he knew of the Edjo Company because he had seen trucks with that name, but thought it was connected with Joe Costa because they parked in the same yard. Warren Snowhill, an employee called by the General Counsel, who had worked for both companies, acknowledged that he knew that they were separate companies, but both were doing the same kind of work.

D. The Sale of Respondent Costa's Stock by Joe Costa to Respondent Edjo

In the year 1977, Joe Costa became 65 years of age and decided that he wanted to retire from the trucking business. Consistent with this desire, Costa had a number of conversations with his accountant, Mr. Nunnemaker, seeking to determine how he might dispose of the business in a manner that would be most beneficial to him from the standpoint of the tax consequences. After a series of consultations, Nunnemaker's suggestions and alternatives were set forth in a letter to Costa dated August 22, 1977 (Resp. Exh. 5). It was Nunnemaker's advice that of the alternatives suggested the most advantageous was for Joe Costa to give his one-third interest in Edjo stock to his daughter and son-in-law, Bonnie and Bob Thomas, and then Edjo, Inc., would in turn buy all of the stock of Joe Costa Trucking, Inc.

⁵ Respondent Costa did not participate in the Teamsters health and welfare plan but maintained its own hospitalization coverage, and this same coverage was extended to the employees of Edjo.

Nunnemaker testified that the value of the Joe Costa Trucking, Inc., stock was determined by taking all of the capital assets as recorded on the company books as of September 1, 1977, and adjusting those figures in keeping with the fairmarket value of each asset as determined by competent, independent appraisers. Various appraisers were used, depending upon the type of equipment being appraised. By using this process, the fair market value arrived at was \$730,433 (see Resp. Exh. 6 for the working papers prepared by Mr. Nunnemaker and Resp. Exh. 7 for a complete summary in balance-sheet form). Having arrived at a fair market value of the stock, the term of the sale was a 15-year, 6-1/2-percent interest-bearing note secured by the Edjo, Inc., stock. Payments on the note are made monthly in the sum of \$6,300. Joe Costa and his wife, Zella, will receive in excess of \$1 million over the 15-year period.

E. Evidence Regarding the 8(a)(1) Allegation

All of the evidence relating to the 8(a)(1) allegation consisted of the testimony of Warren Snowhill. He testified to the following conversation on an occasion in June 1977 when he (Snowhill) was riding in a company pickup truck with Mr. Tony Gilbert on a mission to pick up another company truck:

Q. (By Mr. Dvorin) Now, if you can recall your conversation.

A. As I started to say, I don't know exactly how it got started, but it got around to the benefits of belonging to the Union.

Mr. Gilbert said, "I don't see what you fellows are getting for your money." He said, "I don't think you are getting very much for your money."

Q. Yes.

A. It went on from there. I explained to him, at my age I could not leave the Teamsters Union, whatever pension plan was left.

He said, as far as the younger fellows are concerned, if [sic] felt they would be better off if they started a pension plan among themselves, to be contributed to by the company and the drivers, and controlled by the company.

That was about—he did say, he said, "You know Redwood Construction has thrown the Union out."

I said, "Yes, I know that."

Finally, something was brought up about a fellow who came in; I don't know his name, who thought he was going to get quite a lot of money from his Teamster retirement and it turned out he was only going to get \$91 a month, or something like that. Tony said, "In view of that, what are you fellows are [sic] going to get out of that pension fund?"

That was about the size of the conversation.

Before presenting its evidence in defense of the General Counsel's complaint, Respondents moved that paragraph XI of the complaint be dismissed because of insufficient proof. Paragraph XI reads as follows:

On an unknown date in June, 1977, Respondents, by Tony Gilbert, while driving in a truck, interrogated an employee concerning employee support for the Union.

Although the motion to dismiss was denied with the comment that the issue would be disposed of in the course of the Administrative Law Judge's written decision, the Respondents did not deem it necessary to elicit Gilbert's version of the conversation during the course of his testimony on behalf of the Respondents.

Analysis

(1) The interrogation: There was no additional evidence offered which would suggest antiunion animus other than that set forth above in the testimony of Warren Snowhill. Inasmuch as Snowhill was unable to state who may have initiated the conversation and in view of the fact that a casual conversation in a truck is a far cry from the normal interrogation that takes place within the confines of a supervisor's private office, it can hardly be said it was coercive, interfering, or restraining in nature. Carefully considered, Snowhill's testimony on this issue appears to be nothing more than a mutual expression of views regarding the pros and cons of the Teamsters' pension program. Certainly there was no interrogation. When an employer acts intrusively to ascertain employee views and sympathies regarding unionism, it may be said that an employer creates fear of reprisal in the mind of the employee. But where, as here, the employee was a known member of the Union, it strains credulity to believe such a casual indifferent conversation about a topic that is frequently in the newspapers could cause restraint or fear in the mind of the employee. I shall recommend that the Section 8(a)(1) allegation (par. XI of the complaint) be dismissed.⁶

(2) The union contract: Respondent Edjo argues that there is no enforceable union contract because the 1973-76 contract was executed with Local 684, which is no longer in existence, and the 1976-79 agreement is unsigned (G.C. Exh. 5) and all negotiations were with Local 684. Counsel argues that the Board will not find a surviving union to be a successor where there were inadequate procedural safeguards in the merger process to protect the employees' rights under Section 7 of the Act.

Even though Joe Costa never signed the completed 1976-79 agreement, under Board and court holdings I am compelled to find that a contract existed between Joe Costa Trucking, Inc., and Local 137. The letter agreement dated August 26, 1976, that was signed by all parties (G.C. Exh. 4), when read in conjunction with the expired contract (G.C. Exh. 2), is perfectly clear as to the contract terms. It is immaterial that Joe Costa was unwilling to sign the finished document (G.C. Exh. 5). In reaching this conclusion, I am mindful of the fact that the Board, in deciding whether an employer and a union have in fact arrived at an agreement, is not bound by technical rules of contract law.⁷ A collective-bargaining contract is not an ordinary contract for the purchase of goods and services, nor is it governed by the same common law concepts which control such private contracts.⁸ I find, therefore, that Respondent Costa entered into a collective-bargaining agreement with Local 137 covering its employees in an appropriate bargaining unit on

September 8, 1976, to cover the period from July 1, 1976, through July 1, 1979.⁹

But Respondent Edjo properly argues that the merger of Local 684 into Local 137 was never approved by the employees of Joe Costa Trucking and that therefore the contract is an unenforceable contract. However, General Counsel points out that this argument is inaccurate under Board decisions and the facts of this case. It was never denied that Joe Costa Trucking generally performed in accordance with the terms of the now-disputed contract (see G.C. Exh. 8).¹⁰ In other words, by its course of conduct for nearly a year, Respondent Costa recognized Local 137 as the bargaining agent for the employees in an appropriate unit. In a case¹¹ remarkably similar to the instant dispute, the Board made it crystal clear that Respondent Edjo's argument is barred by Section 10(b) of the Act. In the *North Bros.* case, there was a merger of the Teamsters local into another Teamsters local without the required safeguard of allowing the members to approve of the merger. The Administrative Law Judge concluded that the surviving local was not a legal successor. The Board reversed the Administrative Law Judge with these comments:

Section 10(b) of the Act confines the issuance of unfair labor practice complaints to events occurring during the 6 months immediately preceding the filing of a charge and has been interpreted by the Supreme Court to bar finding any unfair labor practice, even though committed within that period, which turns on whether or not events outside that period violated the Act. *Bryan Manufacturing Co.*³ The Court, holding that maintenance and enforcement of a contract more than 6 months after recognition of a minority union did not violate the Act, relied in part on the legislative history indicating that Congress specifically intended Section 10(b) to apply to agreements with minority unions in order to stabilize bargaining relations. Noting that labor legislation traditionally entails compromise, the Court observed

that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in "industrial peace which it is the overall purpose of the Act to secure."⁴

The Board, in light of *Bryan*, has since held that Section 10(b) is applicable to a refusal-to-bargain defense that the bargaining relation was unlawfully established.⁵

The Respondent admittedly recognized Local 376

³ *Local Lodge No. 1424, IAM, AFL-CIO [Bryan Manufacturing Co.] v. N.L.R.B.*, 362 U.S. 411 (1960).

⁴ *Id.* at 428, citations omitted.

⁵ *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom. Tragniew, Inc., and Consolidated Hotels of California v. N.L.R.B.*, 470 F.2d 669 (C.A. 9, 1972); *Roman Stone Construction Company, and Kindred Concrete Products, Inc.*, 153 NLRB 659, fn. 3 (1965).

⁹ The appropriate unit was not an issue.

¹⁰ Although there is a dispute pending between Joe Costa Trucking and Local 137 as to whether or not Costa paid all of the pension funds that were due (see G.C. Exh. 11).

¹¹ *North Bros. Ford, Inc.*, 220 NLRB 1021 (1975).

⁶ *Bushnell's Kitchens, Inc.*, 222 NLRB 110 (1976).

⁷ *Lozano Enterprises v. N.L.R.B.*, 327 F.2d 814 (C.A. 9, 1964).

⁸ *John Wiley & Sons v. David Livingston*, 376 U.S. 543, 550 (1964).

on May 8, 1974. No charges were filed until December 6, 1974, more than 6 months later and at a time when that recognition could no longer be attacked directly as an unfair labor practice because of Section 10(b). Accordingly, the Respondent may not defend its refusal to execute a contract on the ground that Local 376 was not the lawful representative of its employees when it recognized that local in May.⁶

⁶ *Walter E. Heyman d/b/a Standwood Thriftmart*, 216 NLRB 852 (1975).

In view of this unmistakable language, it seems clear that under the circumstances of this case, Local 137 must be found to be a valid successor to Local 684 and Respondent Edjo's argument that the contract between Respondent Costa and Local 137 is unenforceable must fail.¹²

(3) *Alter ego* or successor?: Respondent Edjo does not contend that it does not meet the normal criteria for concluding that it is essentially the same employing industry; i.e., the same employees providing the same services under the same name from the same location. But Edjo does contend that it should not be obligated to bargain with the Union in the manner spelled out by the Supreme Court in the *Burns* case, *supra*, because the Union's contract and status as the bargaining representative is unenforceable. As indicated above, this argument is without merit, because Respondent Costa recognized and adhered to a contract relationship with the Union for almost a year that does not expire until July 1, 1979, and thus Edjo must be found to be at least a successor with certain bargaining obligations.

The General Counsel argues that the sale of Costa to Edjo was a sham and that Edjo is the *alter ego* of Costa.

The difference between a determination of *alter ego* status and a determination of successorship is that the *alter ego* is required to assume its predecessor's collective-bargaining agreement,¹³ whereas a successor normally assumes only the obligation to recognize and bargain with the exclusive bargaining representative of its predecessor's employees.¹⁴

There are factors which indicate the conclusion that Respondent Edjo is the *alter ego* of Respondent Costa, based on the evidence as set forth *supra*. However, there are mitigating circumstances, and the issue is not a simple one.

I have carefully examined all of the cases cited by the General Counsel,¹⁵ as well as some recent cases which he did not cite.¹⁶ Based on my analysis and understanding of

these numerous cases, I have concluded that the sale of all the Joe Costa Trucking Company stock to Edjo was not a sham and that Edjo is not the *alter ego* of Respondent Costa for the following reasons.

(a) General Counsel's primary argument for contending that the sale was a sham stems from the failure to include a price for "good will" as a factor which would tend to enhance the selling price. I do not agree. There is not one scintilla of evidence to indicate any aspect of fraud or deceit in connection with this sale. There is nothing illegal or fraudulent *per se* in selling a business to friends or relatives at a bargain price. Moreover, there was undisputed expert testimony that the manner in which the price was determined is an acceptable business practice and that the value placed on the business was a reasonable one. Based on all the evidence, I find the sale of the stock of Costa to Edjo to have been an honest, reasonable, and practical business transaction.

(b) In nearly every instance where an *alter ego* has been found by the Board, there has been an element of antiunion animus which, in turn, has motivated the guilty company (or companies) to resort to corporate connivance in order to rid itself of the union. No such motivation exists in the instant case. Joe Costa had reached the age of 65 and wanted to retire; thereafter he followed the advice of legal and tax experts. According to the testimony of the union business agent, Joe Costa's relationship with the Union had always been very good. There is not one scintilla of evidence to indicate that the sale was motivated by antiunion animus.

(c) In *Crawford Door Sales Company*, 226 NLRB 1144 (1976), the Board used the following language:

The Administrative Law Judge also found that Respondent Cordes was not Respondent Crawford's *alter ego* because in his view identical corporate ownership is the *sine qua non* of *alter ego* status. We disagree. Clearly each case must turn on its own facts, but generally we have found *alter ego* status where the two enterprises have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, *as well as ownership*. [Emphasis supplied.]

In the instant case, it cannot be said that there was "substantially identical" management. While there is no doubt that prior to September 1, 1977, Tony Gilbert had substantial authority and definitely qualified as a supervisor, Joe Costa was the management and boss of the Joe Costa Trucking Company. Since September 1, 1977, Joe Costa has not only been totally removed from the management of Respondents Edjo and/or Costa but has completely removed himself as an owner. There was testimony that he has not been seen on the premises of Edjo since his retirement. There exists absolutely no common ownership between Joe Costa Trucking Company before September 1,

Inc., and Compton Service Company, Jointly, 225 NLRB 698 (1976); *Parklane Hosiery Co., Inc., and Meryn Roberts d/b/a Parklane Hosiery, its alter ego*, 203 NLRB 597 (1973); *Davenport Insulation, Incorporated*, 184 NLRB 908 (1970); *The Boeing Company*, 214 NLRB 541 (1974), *aff'd*, 98 LRRM 2787 (C.A.D.C., 1978); and *Ski Craft Sales Corporation, et al.*, 237 NLRB 122 (1978).

¹² See *Morse Shoe, Inc.*, 227 NLRB 391 (1976).

¹³ *Marquis Printing Corporation and Mutual Lithograph Company*, 213 NLRB 394 (1974).

¹⁴ *N.L.R.B. v. William J. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

¹⁵ *Johnson Electric Company, Inc., and William A. Johnson and Albert M. Thompson d/b/a Johnson Electric Company*, 196 NLRB 637 (1972); *Helrose Bindery, Inc. and Graphic Arts Finishing, Inc.*, 204 NLRB 499, 506 (1973); *Edward E. Schultz d/b/a Schultz Painting and Decorating Co.*, 202 NLRB 111 (1973); *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F.2d 902, 905, fn. 4 (C.A. 9, 1964); and *The Bell Company, Inc., et al.*, 225 NLRB 474 (1976).

¹⁶ *Frank Naccarato, a sole proprietor d/b/a Naccarato Construction Company and Tacoma Framing Company; and Naccarato Construction Company, Inc.*, 223 NLRB 1396 (1977); *Blazer Industries, Inc., a/k/a Blazer Corporation and Tru-Air Corporation*, 236 NLRB 103 (1978); *The Carvel Company and C and D Plumbing and Heating Company*, 226 NLRB 111 (1976); *Limco Mfg. Inc., and/or Cast Products, Inc.*, 225 NLRB 987 (1976); *Am-Del-Co,*

1977, and Edjo, Inc., d/b/a Joe Costa Trucking, after September 1, 1977. While the Board has made it clear that identical corporate ownership is not necessary in order to find an *alter ego* status, nevertheless some identical management and some identical ownership would seem to be a requirement. In this case those requirements are missing.

(d) The labor relations policies and the people in charge of those policies are quite different under Respondent Edjo than they were under the Joe Costa Trucking Company. Prior to September 1, 1977, although Tony Gilbert aided in the administration of the union-management contract, the employee relations policies were established by Joe Costa, and he negotiated the contracts with the Union. After Edjo acquired the stock of Joe Costa Trucking, it hired Comb and Associates, labor relations consultants of Santa Rosa, California, to advise them in all matters relating to labor relations. Comb and Associates have remained continuously employed by Edjo.

(e) Comb and Associates represents a number of other clients in the immediate area of Arcata, California, and thus was very much aware of the uncertain "status" of Local 137 because of the merger procedure which has heretofore been discussed. Thus, while I have found that they were inaccurate as to their legal conclusion, nevertheless they had the right to raise the issue and proceeded to do so at a reasonably prompt date by filing an RM petition with the appropriate Regional Office of the National Labor Relations Board on September 29, 1977.

(f) Finally, the application of the *alter ego* doctrine is essentially an equitable one to be applied in a given case at the discretion of the trier of the facts.¹⁷ An inequitable result will not follow if the *alter ego* doctrine is not applied in this instance. Respondent Edjo refused to accept the predecessor's union contract, but sought an election conducted by the National Labor Relations Board, which would give the employees an opportunity to express their free choice in an open election, because it held an honest, albeit erroneous, belief that the Union's contract was unenforceable. Respondent Edjo has refused to be saddled with *all* the terms of the predecessor's labor agreement. Under such circumstances, it would be unfair to apply the doctrine of *alter ego*.

After a careful consideration of all the factors which favor the finding of a single integrated enterprise and/or an *alter ego*, and the factors which weigh heavily in opposition to such a conclusion, I am convinced that it would be manifestly inequitable to conclude that Respondent Costa and Respondent Edjo are one and the same.¹⁸

Conclusions

Having reached the conclusions that a valid and enforceable contract existed between Respondent Costa and the Union until July 1, 1979, and that Respondent Edjo is a successor to Respondent Costa, it remains to spell out the obligations owed to the Union by Respondent Edjo. Simply stated, a successor normally assumes only the obligations to

recognize and bargain with the bargaining representative of its predecessor employees.¹⁹ But as the Court said in *Burns, supra*, "There will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." The instant case is just such a situation. All of the predecessor's employees were retained. Respondent Edjo does not seriously deny that it has refused to recognize or bargain with the Union as the representative of its employees and so indicated to the Union in its letter dated October 25, 1977, from its industrial relations consultants to Joe Davis, business representative of Local No. 137 (G.C. Exh. 7). Accordingly, I find that Respondent Edjo has refused to abide by the general terms and working conditions of the predecessor's contract²⁰ and has refused to bargain collectively with the exclusive representative of the employees in an appropriate bargaining unit, and that by such refusal Respondent Edjo has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.²¹

V. THE REMEDY

The appropriate remedy for Respondent's unilateral action in discontinuing contributions to the pension fund in accordance with the terms of the predecessor's contract is to reinstate the *status quo ante* and retain it either until Respondent fulfills its bargaining obligation by consummating a new agreement covering the areas of dispute, or until the good-faith efforts of the parties are unsuccessful and they reach an impasse. For this reason I shall order Respondent Edjo to make all required payments to the union pension fund and/or reinstate any other fringe benefits or terms of employment which may have been denied the employees from September 1, 1977, until complete agreement is reached or an impasse occurs.²² Because the employees in-

¹⁹ *N.L.R.B. v. Burns Security Services*, 406 U.S. 272, *supra*.

²⁰ I regard Respondent Edjo's obligation to be similar to that of any employer where a labor management contract has expired and the employer is prohibited from making immediate changes in the wages, hours, and other terms of employment, except those provisions requiring employees to join the union after 30 days and any clauses relating to dues deduction checkoff. See *Bethlehem Steel Company, Shipbuilding Division*, 136 NLRB 1500 (1962), 320 F.2d 615 (C.A. 3, 1963).

²¹ During the hearing Respondent Edjo sought to offer evidence of its good-faith doubt that the Union represented a majority of the employees. This evidence was refused, but Respondent's counsel made an offer of proof which was denied. In counsel's brief the argument is renewed with a request that the evidence, or offer of proof, be received. The evidence was denied because, as I understand the *Burns* case, *supra*, where the union contract with the predecessor employer continues to be enforceable at the time of the ownership change, the "successor" is barred by the contract from questioning the union's majority representation. In the instant case it was immediately known by the court that Edjo took over the Joe Costa Trucking Company "lock, stock, & barrel." The normal criteria for establishing a "continuing employing industry" or successorship was never a serious issue. The primary issue was whether there was an enforceable contract which obligated the "successor" to recognize and bargain with the representative of the predecessor's employees. Had the contract issue been resolved in favor of the Respondent, the entire complaint herein would have failed. However, having determined that there was an enforceable contract, Respondent herein is precluded from questioning the majority status of the Union. See *fn. 19 of Eklund's Sweden House Inn, Inc.*, 203 NLRB 413, 418 (1973).

²² *Harold W. Hinson, d/b/a Hen House Market No. 3*, 175 NLRB 596 (1969).

¹⁷ See *Goldsmith v. Tub-O-Wash*, 199 Cal. App. 2d 132, 140, 18 Cal. Reporter 446 (1962); *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825, 836-837, 26 Cal. Reporter 806 (1962).

¹⁸ *United Constructors and Goodwin Construction Company*, 233 NLRB 904 (1977); *Jersey Juniors, Inc.*, 230 NLRB 329 (1977).

volved were never given the opportunity to approve the union merger and the conclusions reached herein stem from technical legal requirements of the Act, I shall recommend that the notice contain language advising employees of their right to a decertification election. *Morse Foodmart of New Bedford, Inc.*, 230 NLRB 1092 (1977).

CONCLUSIONS OF LAW

1. Respondent Edjo, Inc., d/b/a Joe Costa Trucking, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. General Teamsters and Warehousemen Local 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent Edjo constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All lumber, veneer, log, wood chips, and other forest products hauling truckdrivers of Edjo, Inc., at their Arcata, California, facilities, excluding all other em-

ployees, office clerical employees, guards and supervisors as defined in the Act.

4. By refusing on or about September 1, 1977, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive representative of all the employees in the appropriate bargaining unit; by making unilateral modifications of the collective-bargaining agreement with the Union by refusing to make payments to the Union's pension trust funds after September 1, 1977; and by withdrawing recognition from the Union and repudiating the contract, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

5. By the aforesaid conduct, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]