

Edwin R. O'Neill, an Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc. and United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO.¹ Cases 32-CA-848 and 32-CA-928

May 31, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
JOHANSEN AND CRACRAFT

On March 30, 1982, Administrative Law Judge William L. Schmidt issued the attached decision. United Food & Commercial Workers Union, Local 126, AFL-CIO filed exceptions, a brief in support of the exceptions, and a brief in support of the judge's decision. Respondents Edwin R. O'Neill, O'Neill, Ltd., Amalgamated Meat Company, and Food Equipment Leasing Company (O'Neill entities) filed exceptions and a supporting brief. Respondent J & E Transport filed exceptions and a supporting brief, in which it incorporated by reference the exceptions and supporting arguments contained in the briefs filed by the other Respondents. Additionally, Respondents Don Turner Corporation, Fresno Beef Processors, and Sierra Pacific Meat Company joined in and adopted the exceptions and briefs in support of exceptions filed by Respondents O'Neill entities and Respondent J & E Transport. Respondents O'Neill entities joined in and adopted the exceptions and supporting brief filed by J & E Transport.

The General Counsel filed cross-exceptions to the judge's decision, a supplemental brief in answer to the Respondents' exceptions and in support of its cross-exceptions to the judge's decision, and an answering brief in support of the judge's decision. Local 126 joined in and adopted the exceptions and supporting briefs filed by the General Counsel. Respondents O'Neill entities filed an answering brief to Local 126's exceptions and the General Counsel's cross-exceptions to the judge's decision. Respondents Don Turner Corporation, Sierra Pacific Meat Company, and J & E Transport joined in and adopted the answering brief filed by Respondents O'Neill entities.

¹ On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. The caption has been amended to reflect that change.

On March 25, 1985, the Board issued a Notice to Show Cause why the Board should not dismiss the complaint in its entirety in light of *Ducane Heating Corp.*, 273 NLRB 1389 (1985). Respondents O'Neill entities filed a brief on April 8, 1985. Respondent Don Turner Corporation joined in the O'Neill entities brief on April 9, 1985. On May 9, 1985, the General Counsel filed a response to the Notice to Show Cause. Local 126 and Local 431, on May 10 and 13, 1985, respectively, filed responses to the Notice to Show Cause.

On August 1, 1985, the Board remanded this case to Judge Schmidt for further consideration of the 10(b) issues. On April 30, 1986, Judge Schmidt issued the attached supplemental decision. Respondents O'Neill entities filed exceptions and a supporting brief to the supplemental decision.² Respondent J & E Transport filed a brief excepting to the supplemental decision and joined in and adopted the exceptions and brief filed by Respondents O'Neill entities. Local 126 filed a response to the exceptions "of the employers." Local 431 filed an answering brief to the exceptions and brief of Respondent J & E Transport. The General Counsel filed a brief in response to the exceptions of Respondents O'Neill entities to the supplemental decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,³ and

² The request for oral argument made by Respondents Edwin R. O'Neill, O'Neill Ltd., Amalgamated Meat Company, and Food Equipment Leasing Company is denied because record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

³ In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

All the Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondents contend that the judge's credibility resolutions, factual findings, and legal conclusions are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), "total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact."

conclusions,⁴ and to adopt the recommended Order⁵ as modified.

1. We adopt the judge's conclusion in his supplemental decision that the statute of limitations in Section 10(b) of the Act commenced on September 21, 1978, and that the General Counsel reinstated the charges in these consolidated cases within the 10(b) period. We find, for the reasons set forth by the judge, that the Respondents fraudulently concealed from the Charging Parties the operative facts underlying the alleged violations.

The judge found that the Respondents engaged in an elaborate scheme designed to evade a lawful contractual obligation with employee bargaining representatives and the duty to bargain under the Act. As part of this scheme, the O'Neill entities purported to close the meat plant and then reopen it through apparently nonrelated corporations that were, in fact, "fronts" controlled by the O'Neill entities. The Respondents' entire scheme was marked by efforts at concealing the operative facts regarding the closing and reopening of the meat plant.⁶

Further, in finding fraudulent concealment, we also rely, as did the judge, on the misrepresentations made by the Respondents to Local 126 during the effects bargaining.⁷ During the bargaining, Local 126's attorney asked the Respondents' attorney if Edwin O'Neill was going out of the meat packing business, with no intention of returning; the answer was "yes." The Respondents' attorney also denied that O'Neill had any interest in Fresno Beef Processors, the new lessor of the meat plant, when in fact O'Neill controlled it. Also, Local 126's attorney asked the Respondents' attorney if the meat plant was going to be leased and was told that they were trying to work out a lease. In fact, a lease had already been signed, on December 1,

1977, between Food Equipment Leasing Co. and Fresno Beef Processors, Inc.

In *Burgess Construction*, 227 NLRB 765, 766 (1977), enfd. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979), the Board quoted the Supreme Court to the effect:

It has long been recognized that when a party "has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered'"⁸

In *Burgess*, the Board held that an employer "fraudulently and deceitfully concealed its unlawful employment of nonunion carpenters from the Union by assuring the Union on two occasions that it would no longer employ carpenters."⁹ The Board found the 10(b) period was tolled until the union became aware of the employer's actions.

Similarly, in *Strawsine Mfg. Co.*, 280 NLRB 553 (1986), the Board found that the 10(b) period was tolled. The employer had closed a plant and surreptitiously transferred the operations to another plant to avoid union obligations. Although the charge was filed more than 6 months after the alleged unlawful conduct occurred; the Board found the complaint was not time-barred. In so doing, the Board relied on the employer's having misrepresented its plans about closing its facility and having concealed from the union its decision to relocate the work to another plant. The Board ruled that the 10(b) period did not begin until the union gained knowledge of the relocation decision.

Here, as in *Burgess* and *Strawsine*, the Respondents' misrepresentations served to mislead Local 126 regarding the closing and reopening of the meat plant.¹⁰

Finally, we find that Local 126¹¹ exercised due diligence in attempting to ascertain the operative facts regarding the closure and reopening of the meat plant.¹² It requested information from the Re-

⁴ The following are corrections to certain of the judge's citations: *NLRB v. Big Bear Supermarkets*, 640 F.2d 924 (9th Cir. 1980); *Dee Cee Floor Covering*, 232 NLRB 421 (1977), overruled in *John Deklewa & Sons*, 282 NLRB 1375 (1987); *NLRB v. Houston Distribution Services*, 573 F.2d 260 (5th Cir. 1978); *Mason City Dressed Beef*, 231 NLRB 735 (1977), modified 590 F.2d 688 (8th Cir. 1978); *Eltra Corp.*, 225 NLRB 1 (1976), revd. sub nom. *Prestolite Wire Division v. NLRB*, 592 F.2d 302 (6th Cir. 1979); *Bill Johnson's Restaurants v. NLRB*, 660 F.2d 1335 (9th Cir. 1981), vacated and remanded 461 U.S. 731 (1983); *Ogle Protection Service*, 149 NLRB 545 (1964); *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944); *Holmberg v. Armbricht*, 327 U.S. 392 (1946).

In reaching our decision, we have not relied on *Bill Johnson's Restaurants*, above.

⁵ We find no merit in Local 126's request for litigation expenses or other extraordinary remedies *Heck's Inc.*, 215 NLRB 765 (1974). See also *Wellman Industries*, 248 NLRB 325 (1980).

⁶ As the judge noted, a definition of alter ego generally includes the concept of a "disguised continuance." We have adopted the judge's findings and conclusions regarding the alter ego status of the Respondents. However, we need not decide whether every finding of alter ego status would include a finding of disguised continuance or fraudulent concealment. We do find that these Respondents fraudulently concealed the operative facts.

⁷ The effects bargaining took place on December 8, 1977, and January 19, 1978.

⁸ *Holmberg v. Armbricht*, 327 U.S. 392, 397, quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874)

⁹ *Id.*

¹⁰ The mere fact that a party makes exculpatory representations does not, by itself, constitute fraudulent concealment or serve to toll the 10(b) period. See *Al Bryant, Inc.*, 260 NLRB 128, 133-135 (1982). When misrepresentations are part of a scheme of concealment and an effort to avoid a party's obligations under the Act, however, misrepresentations contribute to a finding of fraudulent concealment. This is particularly true when, as here, the facts regarding a party's conduct are peculiarly within the knowledge of that party.

¹¹ As the judge noted, Local 431 may appropriately be charged with knowledge equivalent to that possessed by Local 126. It is evident, however, as the judge states, that Local 126 took the lead in pursuing legal claims against the Respondents.

¹² As the court noted in enforcing the Board's order in *NLRB v. Burgess Construction*, 596 F.2d 378, 383 (9th Cir. 1979): "If the Union actual-

spondents, but it did not receive accurate responses. Local 126's counsel hired a private investigator in December 1977, but Local 126 still failed to discover the facts. Local 126 filed its original charge with the Board in April 1978, but its—and apparently the Regional Office—investigator could not discover at that time sufficient evidence of an unfair labor practice to warrant the issuance of a complaint. In these circumstances, it is clear that Local 126 acted diligently and vigorously to obtain facts that would support an unfair labor practice. The Respondents' elaborate efforts at concealment, however, prevented Local 126—until late September 1978 when the new evidence became available—from learning the operative facts regarding the closing and reopening of the meat plant.

2. We adopt the judge's finding that Edwin R. O'Neill, as an individual, is the alter ego of all the other Respondents in this case and that he is individually responsible for the unfair labor practices.¹³ Accordingly, we affirm the judge's decision and impose individual liability on Edwin R. O'Neill. We base our affirmation on O'Neill's dominance of the corporate entities, on our finding that the entities are "largely paper arrangements that do not reflect the business realities,"¹⁴ our finding that O'Neill's individual affairs and those of the Respondent corporations were so intermingled that no distinct corporate boundaries existed.

3. In his recommended Order, the judge ordered the Respondents collectively to offer, inter alia, reinstatement with backpay to all employees terminated as a result of the closure of the meat plant in November 1977 and to mail a copy of the attached notice to all such employees.¹⁵ The Respondents excepted, contending that, based on the allegations contained in the complaint and the issues litigated before the judge, only the employees in the units represented by the Charging Parties are entitled to be covered by the remedy.

In his recommended Order, the judge ordered the Respondents to mail a copy of the notice to the employees terminated in November 1977. Local 126 filed exceptions, contending that the Respondents should also be required to mail the notice to all the employees hired when the Respondent corporations opened for business in 1977, in addition

to those employees terminated as a result of the closure of the meat plant in November 1977.

We find merit in both exceptions. We will order the Respondents to offer reinstatement with appropriate backpay only to the employees in the appropriate units represented by the Charging Parties.¹⁶ Consistent with this modification, we will order the Respondents to mail copies of the attached notice to all employees employed in the appropriate units represented by the Charging Parties who were terminated when the meat plant closed in November 1977 and all employees employed in the appropriate units represented by the Charging Parties who were hired when the Respondent corporations opened for business in December 1977.¹⁷

4. In his recommended Order, the judge ordered the Respondents to reimburse Local 126 for the expenses that it incurred in bargaining over the effects of the closure of the meat plant in November 1977. The judge gave this remedy in order to restore the status quo ante. The judge found that the effects bargaining was "conducted in bad faith for the purpose of creating the illusion that O'Neill was terminating his meat processing operations," when, in fact, O'Neill was continuing his operation through the use of "fronts."

The judge found, and we agree, that the effects bargaining was a complete and utter sham from start to finish. The Respondents entered into the bargaining with the knowledge that the O'Neill meat plant was not permanently closed. O'Neill effectively controlled the four new corporations and the lease of Food Equipment Leasing Corporation by Fresno Beef Processors, Inc. had already been executed on December 1, 1977.

On the facts of this case, in a narrow holding, we affirm the judge. In order to perpetuate its unfair labor practices, the Respondents falsely informed Local 126 that it would cease to operate the meat plant. Relying to its detriment on this information, Local 126 entered into and engaged in effects bargaining with the Respondents. In the absence of the Respondents' misrepresentations, there would have been no effects bargaining. The Respondents encouraged Local 126 to waste its re-

ly knew, or by the exercise of due diligence should have known about the alleged unfair labor practice, the statute would not be tolled."

¹³ *Weldment Corp.*, 275 NLRB 1432 (1985); *Workroom for Designers*, 274 NLRB 840 (1985); *Campo Stacks*, 266 NLRB 492 (1983). See also *Market King, Inc.*, 282 NLRB 876 fn. 3 (1987), *Las Villas Produce*, 279 NLRB 883 (1986), and *Cera International Corp.*, 272 NLRB 1360 (1974).

¹⁴ *NLRB v. Deena Artware*, 361 U.S. 398, 403 (1960).

¹⁵ We take judicial notice that in the companion case, *O'Neill, Ltd.*, 288 NLRB 1397 (1988), issued today, Judge Shapiro found, based on the stipulated record, that the meat plant ceased operations on February 18, 1981.

¹⁶ The complaint alleged 8(a)(5), (3), and (1) violations concerning the unit employees represented by Charging Parties Local 126 and Local 431. There were no allegations regarding nonunit employees. Accordingly, the remedy cannot be extended to cover these unnamed employees. *TLI, Inc.*, 271 NLRB 798, 806 (1984); *Consolidated Casinos Corp.*, 266 NLRB 988 (1983); *Iron Workers Local 480 (Building Contractors of N.J.)*, 235 NLRB 1511, 1512 fn. 4 (1978), *Rushton & Mercier Woodworking Co.*, 203 NLRB 123, 126 (1973); and *H. & F. Binch Co.*, 188 NLRB 720, 726 (1971), *enfd.* as modified 456 F.2d 357 (2d Cir. 1972).

¹⁷ We make these modifications because the employees hired in December 1977 were also discriminatees and suffered from the unfair labor practices of the Respondents. Further, the plant legitimately closed on February 18, 1981, so no notice can be posted.

sources by participating in effects bargaining when it knew that it would be resuming operation of the meat plant; and, therefore, the collective-bargaining agreement with Local 126 was still in effect and binding. The economic resources wasted by Local 126 in its needless effects bargaining were the "direct and proximate"¹⁸ result of the Respondents' willful defiance of its statutory obligation. The Respondents' scheme had as one of their objectives the obliteration of its collective-bargaining obligation to Local 126.

5. In his recommended Order, the judge ordered the Respondents to make the Charging Parties whole (with interest) for all initiation fees and dues they would have received but for the Respondents failure to apply the terms of the collective-bargaining agreements.

As we noted above, the Respondents were bound by valid collective-bargaining agreements with Local 126 and Local 431.¹⁹ Both agreements contained valid union-security agreements. Also, we note that Local 126's contract contained a dues-checkoff provision and an initiation fee deduction (if due and owing).

We affirm the judge's Order and shall require the Respondents to remit to the Unions the dues and the initiation fees, if any, for each bargaining unit member who executed a dues-deduction authorization and/or an initiation fee deduction authorization, together with interest.²⁰

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Edwin R. O'Neill, an Individual; O'Neill, Ltd., Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company; and J & E Transport, Fresno, Califor-

nia, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Offer to all employees, employed in the appropriate units represented by the Charging Parties, who were terminated as a result of the closure of the O'Neill Meat Plant on November 18, 1977, immediate and full reinstatement to their former positions of employment dismissing, if necessary, anyone who may have been hired to perform the work that they had been performing prior to the date on which they were terminated or, if their former positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges, and make them whole for all losses suffered as a result of the discrimination against them, in the manner set forth above in the remedy section of the judge's decision."

2. Substitute the following for paragraph 2(h).

"(h) Mail a copy of the attached notice marked 'Appendix' to the last known address of all employees employed in the appropriate bargaining units represented by the Charging Parties, who were terminated as a consequence of the closing of the O'Neill Meat Plant on November 18, 1977, and all employees employed in the units represented by the Charging Parties who were hired when the Respondent corporations opened for business in 1977."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

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

WE WILL NOT refuse to recognize and bargain, on request, with United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, as the exclusive representatives of our employees employed in the units described below. United Food & Commercial Workers Union, Local 126, AFL-CIO represents the following employees:

All slaughterhouse and meatpacking employees employed at the O'Neill Meat Plant in

¹⁸ *Harowe Servo Controls*, 250 NLRB 958, 965 (1980). See also *J. P. Stevens & Co.*, 239 NLRB 738 (1978), modified 623 F.2d 322 (4th Cir. 1980), cert denied 449 U.S. 1077 (1981). See also *Wellman Industries*, 248 NLRB 325 (1980).

¹⁹ Local 126's agreement ran from January 1, 1977, to December 31, 1979; Local 431's agreement ran from October 1, 1976, to September 30, 1979.

²⁰ The requirement of the dues-deduction authorization is a clarification of the judge's recommended Order, as is the requirement of the initiation fee deduction authorization. Although the judge, in his recommended remedy, did not explicitly limit the dues and initiation fee reimbursement to that which would have been received from unit members who executed the appropriate authorizations, this limitation is a standard part of this remedy. See *Timber Products Co.*, 277 NLRB 769 (1985); *Seneca Sheet Metal*, 243 NLRB 624 (1979), affd. 646 F.2d 1170 (6th Cir. 1981); *Stackpole Components Co.*, 232 NLRB 723 (1977). Local 431's agreement does not contain a provision for either dues-checkoff or initiation-fee deduction. Consequently, it may be that this part of the remedy only extends to Local 126 and not to Local 431.

Interest is to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.

Fresno, California, including kill floor, cooker, boning, Cry-O-Vac, loading and maintenance employees; excluding drivers, salesmen, office clerical, guards and supervisors as defined in the Act.

General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO represents the following employees:

All drivers employed at the O'Neill Meat Plant in Fresno, California; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to apply the terms and conditions specified in the collective-bargaining agreements, which O'Neill Meat Company, now known as Amalgamated Meat Company, entered into with United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO in February and April 1977, respectively, absent the written consent of the signatory union.

WE WILL NOT operate the O'Neill meat plant using different corporate entities for the purpose of avoiding our obligations under a collective-bargaining agreement or our legal obligation to recognize and bargain with a labor organization that represents our employees, or terminate and refuse to reinstate employees to achieve this purpose.

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

WE WILL apply the terms and conditions contained in the most recent collective-bargaining agreements, which were in effect with the United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO until a succeeding agreement is reached as a result of collective bargaining or until a bona fide impasse is reached in negotiations for a new agreement.

WE WILL offer immediate and full reinstatement to all employees employed in the appropriate units represented by United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO who were terminated when O'Neill Meat Company, now known as Amalgamated Meat Company, in November 1977, ceased

participation in the operation of the O'Neill meat plant, to their former positions of employment—dismissing, if necessary, anyone who may have been hired or assigned to perform the work they had been performing prior to their termination—or, if their former positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

WE WILL make whole all employees employed in the appropriate units represented by United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO who were terminated when the O'Neill Meat Company, now known as Amalgamated Meat Company, ceased participating in the operation of the O'Neill meat plant, in November 1977, for losses they suffered as the result of our unlawful discrimination against them, together with interest on the backpay, which may be due to such employees.

WE WILL make all employees employed in the appropriate units represented by United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO whole for the losses they suffered as a consequence of our failure to apply the terms and conditions of the collective-bargaining agreements described above after November 23, 1977, together with interest on any backpay that may be due to such employees.

WE WILL reimburse United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO for the initiation fees and dues those organizations lost, if any, as a consequence of our failure to apply the terms and conditions of the collective-bargaining agreements described above together with interest on any such sums.

WE WILL reimburse any trust funds provided for in the above-described collective-bargaining agreements for the losses they may have suffered as a consequence of our failure to apply the terms and conditions of those collective-bargaining agreements.

WE WILL reimburse United Food & Commercial Workers Union, Local 126, AFL-CIO for the ex-

penses they incurred in bargaining over the closure of the meat plant in November 1977.

EDWIN R. O'NEILL, AN INDIVIDUAL;
O'NEILL LTD.; FOOD EQUIPMENT
LEASING COMPANY; AMALGAMATED
MEAT CO., FRESNO BEEF PROCES-
SORS, INC.; DON TURNER CORPORA-
TION, SIERRA PACIFIC MEAT COMPA-
NY, INC.; AND J & E TRANSPORT,
INC.

Charles A. Askin, Esq., for the General Counsel.
George Tichy, II and Michael J. Hogan, Esqs. (Littler, Mendelson, Fastiff & Tichy), of San Francisco and Fresno, California, for Respondents O'Neill, Ltd.
Donald Fischbach, Esq. (Baker, Manock & Jensen), of Fresno, California, for Respondent Fresno Beef Processors, Inc.
William A. Quinlan, Esq. (Doty, Quinlan, Keersha & Fanucchi), of Fresno, California, for Respondent Don Turner Corporation.
R. Frank Butler, Esq., of Fresno, California, for Respondent Sierra Pacific Meat Company, Inc.
Howard A. Sagaser, Esq. (Thomas, Snell, Jamison, Russell, Williamson & Asperger), of Fresno, California, for Respondent J & E Transport, Inc.
David A. Rosenfeld, Esq. (Van Bourg, Allen, Weinberg & Roger), of San Francisco, California, for Charging Party Food & Commercial Workers.
George A. Carter, Esq., of Fresno, California, and *Neil Bodine, Esq. (Beeson, Taylor, Kovach & Silbert)*, of Sacramento, California, for Charging Party Teamsters Local 431.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. This matter was heard by me for 30 hearing days between January 15 and April 11, 1980, at Fresno, California. The case is based on a charge filed in Case 32-CA-848 by United Food & Commercial Workers Union, Local 126, AFL-CIO (Butchers), a charge filed in Case 32-CA-928 by General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Teamsters), and an amended consolidated complaint (complaint) dated April 27, 1979, issued on behalf of the General Counsel of the National Labor Relations Board (the Board) by the Regional Director for Region 32 of the Board. The complaint alleges that the Respondents violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), regarding the closing and subsequent reopening of a meat processing facility (O'Neill meat plant or meat plant) located in Fresno, California, in late 1977. The timely answers filed by the various Respondents deny the commission of the alleged unfair labor practices and assert certain affirmative defenses discussed below.

At the hearing in this matter, all parties were provided with full opportunity to present relevant evidence, to ex-

amine and cross-examine witnesses, to argue orally, and to file posthearing briefs with me. On the record made in the proceedings in this matter, my observation of the witnesses who testified, and my careful consideration of the briefs filed on behalf of the General Counsel, the Respondents, and the Butchers Union, I make the following

FINDINGS OF FACT

I. THE BOARD'S JURISDICTION

The complaint alleges that each of the corporate Respondents is a California corporation that maintains its principal office and place of business in Fresno, California. The parties stipulated, and I find, that in the year prior to November 18, 1977, O'Neill, Ltd., Food Equipment Leasing Company, f/k/a O'Neill Meat Co. (FELC), and Amalgamated Meat Company, f/k/a O'Neill Meat Company (OMC),¹ each sold goods and services valued in excess of \$50,000 to customers within the State of California that met one of the Board's jurisdictional standards other than indirect inflow or indirect outflow. Based on the evidence discussed below, it is also my finding that O'Neill, Ltd., FELC, and OMC constituted, at all material times between January 1 and November 23, 1977, a single employer operating the O'Neill meat plant as a single-integrated enterprise; that Respondents Sierra Pacific Meat Company, Inc. (SPM), Don Turner Corporation (DTC), Fresno Beef Processors, Inc. (FBP), and J & E Transport, Inc. (JET) were, at the material times following November 23, 1977, the alter ego of OMC; that, at all material times after November 23, 1977, Respondents O'Neill, Ltd., FELC, SPM, FBP, DTC, and JET, collectively, constituted the alter ego of the aforementioned single-integrated enterprise operating the O'Neill meat plant, and constituted a single employer within the meaning of Section 2(2) of the Act engaged in commerce, or an industry affecting commerce, within the meaning of Section 2(6) and (7) of the Act.² I further find that it would effectuate the policies of the Act for the Board to exercise its jurisdiction over the instant labor dispute.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and I find, that the Butchers and the Teamsters are each a labor organization within the meaning of Section 2(5) of the Act.

¹ OMC is used as the acronym for Amalgamated Meat Company inasmuch as the corporate entity was known as O'Neill Meat Company at all times when it was operational and was renamed Amalgamated after it ceased business.

² Contrary to the contention of Respondent Edwin R. O'Neill I find it unnecessary for the General Counsel to demonstrate that he is engaged in commerce in his individual capacity. For reasons set forth below, it is my finding that O'Neill is the alter ego of O'Neill, Ltd. and its various subsidiaries. That finding, coupled with the acknowledged service of the charge on O'Neill, Ltd., is adequate to confer jurisdiction regarding O'Neill in his individual capacity. *Certified Building Products v. NLRB*, 528 F.2d 968, 969 (9th Cir. 1976).

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. An Overview

The issues raised by the complaint pertain to the closing of the O'Neill meat plant in Fresno, California, about November 18, 1977, and its subsequent reopening 3 weeks later, on December 12, 1977, as a nonunion entity. As a result of the series of complex transactions involved in this transition, the General Counsel alleges that the Respondents collectively violated Section 8(a)(1), (3), and (5) of the Act. The General Counsel specifically alleges that the Respondents violated the Act by laying off all unit employees at the O'Neill meat plant about November 18, 1977. The General Counsel's principal contention is that the business entities that operated the O'Neill meat plant when it reopened on December 12, 1977, are the alter ego of the business entities that previously operated the plant. The General Counsel alleges that when the plant reopened the Respondents deliberately refused to reinstate a majority of the employees in the bargaining unit represented by the Butchers and conditioned the reemployment of the employees in the bargaining unit represented by the Teamsters, on their agreement to work without union representation, in order to avoid an obligation to bargain as before, and that the Respondents unilaterally reduced the rates of pay, eliminated numerous benefits, repudiated the existing collective-bargaining agreements, and withdrew recognition from the Butchers and Teamsters, which had historically represented appropriate units of employees at the O'Neill meat plant.³

The Respondents claim they are innocent of the allegations of the General Counsel's complaint. The O'Neill Respondents assert that the operation of the meat processing facility had become unprofitable and they were forced to close down the meat plant for that reason. The other Respondents assert, in essence, that they are all independent of the O'Neill entities except for certain arm's-length business transactions typical among business enterprises, and that they merely stepped into a vacuum created by the failure of the previous operator.

³ The complaint alleges the following appropriate units:

[Unit 1]

All slaughterhouse and meatpacking employees employed at the O'Neill Meat Plant in Fresno, California, including kill floor, cooler, boning, Cry-0-Vac, loading and maintenance employees; excluding drivers, salesmen, office clerical, guards and supervisors as defined in the Act.

[Unit 2]

All Drivers employed at the O'Neill Meat Plant in Fresno, California; excluding all other employees, guards and supervisors as defined in the Act.

On the basis of the evidence, which shows that the foregoing units were the historical units represented by the Butchers (Unit 1) and the Teamsters (Unit 2), I find these units to be appropriate for purposes of collective bargaining within the meaning of Sec. 9(b) of the Act. Other evidence shows that the plant maintenance employees were historically represented by Stationary Engineers, Local 39. No charge was filed by that labor organization or any other person on behalf of the employees in the maintenance unit. OMC employed approximately 108 employees in these 3 units.

B. Applicable Legal Principles

As noted, the General Counsel alleges that the business entities that operated the O'Neill meat plant after December 12, 1977, constitute merely the alter ego of the O'Neill related enterprises that operated the plant prior thereto. In *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974), the Supreme Court succinctly described the alter ego concept, its normal context, and the consequences in the following manner at 259 fn. 5:

It is important to emphasize that this is not a case where the successor is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the older employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances, 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. See *Southport Petroleum Co. v. NLRB*, supra; *NLRB v. Herman Bros. Pet Supply*, 325 F.2d 68 (6th Cir. 1963); *NLRB v. Ozark Hardwood Co.*, 282 F.2d 1 (8th Cir. 1960); *NLRB v. Lewis*, 246 F.2d 886 (9th Cir. 1957).

Hence, where there is in reality no real change in the employing entity, there is likewise no change in the required legal obligations regarding labor relations matters. More specifically, this means that an entity found to be an alter ego is not at liberty to unilaterally alter the terms and conditions of employment of employees represented for purposes of collective bargaining under Section 9(b) of the Act, or otherwise act in derogation of the duty to bargain with the exclusive representative of such employees.

From the viewpoint of legal analysis, the Ninth Circuit looks to the same criteria in alter ego cases as it does in cases that require a determination whether two or more business entities constitute a single employer. *NLRB v. Big Bear Super Markets*, 640 F.2d 924 (9th Cir. 1980). Those criteria include: (1) the interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378 (9th Cir. 1979). The absence of any one of the foregoing factors in a given case, however, does not preclude an alter ego or single employer finding. *NLRB v. Big Bear Super Markets*, supra. In this case, there is substantial argument over the alter ego issue, which centers around the undisputed fact that the formal ownership of the business entities that resumed operations at the O'Neill meat plant in December 1977, was not vested in the same individual who owned the enterprises that previously operated the meat plant. Even the absence of common ownership, however, does not preclude an alter ego finding. *NLRB v. Big Bear Supermarkets*, supra; *Royal T Meat*, 238 NLRB 245 (1976). But cf. *Frank Hennigan*, 236 NLRB 1517 (1978). Ultimately cases of this nature involve a factual determina-

tion that turns on all the circumstances of the case and is characterized by the absence of an arm's-length relationship found among unintegrated companies. *NLRB v. Don Burgess Construction Corp.*, supra. Although the Board has stated that it looks to additional factors, it is probably more correct to conclude that any differences that are perceived between the standard applied by the Ninth Circuit and the Board is semantical and not substantive. Nevertheless, in *Crawford Door Sales Co.*, 226 NLRB 1144 (1976), the Board stated that an alter ego finding rested on whether "the two enterprises have 'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership." As has been observed in precisely this same context, however, "labor law is concerned with substance, not form." *Dee Cee Floor Covering*, 232 NLRB 421 (1977).

By contrast, where the new employing entity can be characterized as the "successor" of the old, the legal obligations of the successor regarding labor relations matters are quite different. Typically, a true successor has no obligation to assume the predecessor labor agreements (absent the successor's voluntary agreement to do so) and is at liberty to establish the initial terms and conditions of the work force unilaterally. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). In addition, a successor employer need not recognize or bargain with the collective-bargaining representative of the predecessor's employees unless a majority of the successor's unit employees are hired by the previous employer's work force and other factors pertaining to the nature of the employing entity remain relatively constant. *NLRB v. Burns Security Services*, supra; *Pacific Hide & Fur Depot*, 553 F.2d 609 (9th Cir. 1977). Even a successor employer, however, is not at liberty to discriminate against the predecessor's employees on the basis of their union membership in order to evade an obligation to bargain. *Howard Johnson Co. v. Hotel Employees*, supra. *NLRB v. Houston Distribution Services*, 572 F.2d 260 (5th Cir. 1978); *Crawford Container*, 234 NLRB 851 (1978); *Mason City Dressed Beef*, 231 NLRB 735 (1977).

C. Credibility Resolutions

During the hearing on this matter, 45 witnesses testified—some, unfortunately, testified on several occasions. The record is comprised of approximately 6000 transcript pages of testimony and argument, and a large number of documents, many of which are extremely complex legal and accounting documents. There is a morass of conflicting evidence among the various witnesses and between the testimonial evidence and the documentary evidence. Any effort to treat and dispose of all of such conflicts in this decision would only serve to confuse and obfuscate the principal issues that must be decided.

In making these findings, I have set forth what I believe to be reliable, relevant evidence. As this case progresses through the channels of the judicial system there will no doubt be numerous citations to other conflicting or inconsistent evidence. Suffice it to say that I have carefully reviewed all the evidence but, for the reasons set out here, I have deemed that significant portions of

the evidence are not reliable for purposes for which it was offered.

The factors that have caused me to adopt one version of events over another included: (1) the demeanor of the witness while testifying, including the degree to which the witness was capable of testifying in the absence of leading questions, or testified in a convincing, straightforward manner without being argumentative; (2) the ability of the witness to recall events that a reasonable person would expect the witness to recall after the period of time involved; (3) the circumstances surrounding prior inconsistent statements or actions of witnesses relating to critical matters; (4) the failure to present corroborative evidence when the circumstances indicated the availability of such evidence together with the absence of any explanation for such failure; and (5) the inherent bias of the witness resulting from the witness' close identification with, or extreme hostility toward, one or more of the parties.

The latter factor merits additional explication and disposition because of a very emotional set of circumstances that unfolded at the hearing. In August 1978, Douglas Ladd, the sales manager for SPM, and Edward Jensen, a supervisor for DTC, were arrested and charged with a felony regarding an alleged scheme whereby higher priced cuts of beef were substituted on orders for wholesale customers in exchange for cash kickbacks.⁴ Eventually, Jensen pleaded guilty of a felony and so admitted on the witness stand in this case. In April 1979, Ladd was tried in a criminal proceeding where he was defended by Attorney Carter. Ladd was found not guilty. At the hearing the Respondents vigorously attacked Ladd's credibility. Among other things, the Respondent's sought to prove that Ladd was in fact guilty of the dishonesty with which he was charged in the criminal proceeding. I sustained objections directed at that effort. O'Neill asserts in his brief that those rulings were prejudicial. I find the cases cited in support of that argument to be inapposite. In my judgment, the Respondent's efforts to impeach Ladd in this fashion was clearly predicated on an obviously complex matter collateral to this proceeding and as the criminal proceeding against Ladd had previously consumed 30 days, I did not deem it useful to consume time in this proceeding to essentially rehash the evidence presented in the criminal proceeding solely to resolve the credibility of a single witness, and I remain of that view. Moreover, both Ladd and Jensen testified convincingly that they harbored extreme animosity toward O'Neill because they hold him responsible for vigorously pursuing the criminal charges against them. For this reason, I have chosen not to rely on their testimony insofar as my consideration of the merits of this case are concerned except for matters that are favorable to the Respondents or are uncontroverted. Accordingly, I deem the Respondent's arguments about the rulings concerning their attempts to impeach Ladd to be moot. That criminal proceeding, however, is important here for another reason. Several of the witnesses who appeared

⁴ Prior to November 18, 1977, Ladd and Jensen had been long-term employees of the O'Neill owned enterprises.

also testified in the Ladd criminal proceeding. In numerous instances those witnesses were confronted with significant inconsistencies between their testimony at that earlier proceeding and their testimony in this proceeding. Where relevant, I have noted those inconsistencies and I have accorded substantial weight to the lack of a convincing explanation for those inconsistencies.

Because of the variety of inconsistencies present in the testimony and documentary evidence, I have placed special emphasis on the inherent plausibility of each witness' testimony in light of the overall assertions made by the parties and the circumstances shown to exist. Thus, on the one hand, the General Counsel and the Charging Parties attempted to establish that OMC closed its operations on November 18, 1977, and subsequently, on December 12, 1977, four new entities (SPM, FBP, DTC, and JET) that were financed and controlled by Edwin O'Neill resumed the operation of the O'Neill meat plant. There is no serious dispute about the fact that each of the new entities performed one portion of the function formerly performed by OMC, or that FELC and O'Neill, Ltd. performed many of the same services for the new entities that they had previously performed for OMC, especially in the early stages of the operation. There is likewise no serious dispute about the obvious fact that in operating the meat plant, the four new entities were interdependent on one another for their economic existence. Nevertheless, the Respondents collectively maintain that each of the four new entities were owned and controlled by entrepreneurs who were independent of Edwin O'Neill or the enterprises that he owned and controlled, such as FELC and O'Neill, Ltd. For these reasons, in initially approaching the issues of this case, I deemed the testimony offered by the principals of the four new entities as obviously of vital importance, not only to the bona fide nature of the enterprise with which that individual was connected, but also the bona fide nature of the entire operation at the meat plant after December 12, 1977. In each instance, there are glaring flaws in their testimony which, when considered together, has caused me to discount the entire scenario propounded by the Respondents. At various points throughout this decision I will further address specific credibility resolutions when necessary.

D. *The Relevant Facts*

1. O'Neill Meat Co. and its progeny

O'Neill Meat Co. was formed in 1949 by the father of Respondent Edwin R. O'Neill (O'Neill). In the early 1960s, O'Neill Meat Co. acquired an existing meat processing facility—then known as Sierra Meat Company—located at the site of the present facility in Fresno. In the late 1960s, O'Neill assumed control of O'Neill Meat Co. following his father's death. This corporate entity continued to operate the meat plant until January 1, 1977. Immediately prior to the transition, which occurred in January 1977, O'Neill owned slightly over 91 percent of the stock of O'Neill Meat Co. Its officers were:

O'Neill	President, Director
Erwin Bartel	Executive Vice President, Director

Kristan O'Neill (wife of O'Neill)	Vice President, Director
Lee Schultz	Secretary
Michael Temer	Treasurer
Leo Nelson	Director
Lawrence Boragno	General Manager, Director

The other supervisory employees of O'Neill Meat Co. were Marion Coots, Ronald Cox, Edward Jensen, Arthur Labrie, Douglas Ladd, William LeRoy, James Mitchell, and Edward Watts.

In the 4-year period prior to 1977, the financial records of O'Neill Meat Co. indicate that it was suffering severe financial setbacks. Thus, for the Company's 1974 fiscal year (October 1, 1973, through September 30, 1974) its losses amounted to approximately \$126,000. In the 1975 fiscal year it had earnings of approximately \$50,000. In the 1976 fiscal year, the Company's financial records show that it lost slightly over \$730,000. It appears that these losses were sustainable as a result of the \$1.7 million in accumulated earnings the combined O'Neill entities had as of September 30, 1973.

Although O'Neill Meat Co. had a long-established collective-bargaining relationship with the Butchers, the Teamsters, and the Stationary Engineers prior to the mid-1970s and had never suffered strike action by those labor organizations, other evidence indicates that O'Neill was adopting a tougher stance on collective-bargaining matters. Thus, in 1975, O'Neill Meat Co. retained the services of Alpha Agency, a firm owned by Lee Brewer and engaged in business as a labor consultant. James Mitchell, the plant engineer, testified that O'Neill asked him on one occasion in 1975 how the maintenance employees felt about the Union and whether there were any foreseeable problems with getting out of the Union. In February 1976, both O'Neill and Brewer threatened the supervisors—many of whom had been union members at the plant for a number of years while employed as unit members—with the loss of their jobs if they did not resign their union membership. Following the closure on November 18, 1977, an agent of the Alpha Agency instructed one of the supervisors on hiring practices designed to avoid a bargaining obligation. This latter evidence is treated in more detail below.

In the fall of 1976, O'Neill and Brewer negotiated new collective-bargaining agreements with the Teamsters and the Butchers. These agreements reflect that the management agreed to yearly increases in the wage levels over the term of the new 3-year agreements, notwithstanding the heavy losses that were attributed to the meat plant operation. During the negotiations with the Butchers, there was a discussion concerning a proposal to implement a 4-day, 10-hour-per-day workweek without overtime to replace the contractually guaranteed 40-hour workweek over 5 days. Although the evidence shows that the local Butchers negotiators had received approval from their parent body to enter into an agreement that included such a provision, the local negotiators ultimately refused to agree to such a provision. A year later, a similar proposal would become quite critical.

At approximately the same time that the negotiations for the new collective-bargaining agreements were concluded, O'Neill undertook to reorganize the corporate structure that operated the meat plant. O'Neill asserted that this action grew out of discussions he had had with financial and bank advisors over the previous 2-year period, and that the purpose of the reorganization at this time was to cut the losses that were being incurred from the operation of the meat plant in the face of increased competition from midwestern competitors with more favorable labor agreements. As envisioned by his financial advisors, O'Neill would benefit by the creation of a leasing enterprise because of the favorable tax treatment such entities receive. However, the creation of a new corporate entity to serve as the leasing enterprise was deemed inappropriate because of the detailed documentation that would be necessary to avoid the potential for the occurrence of a taxable event resulting from an intercorporate transfer of the plant facility and equipment. Instead, the decision was made to transform O'Neill Meat Co. into a leasing enterprise as it already held title to the plant facility and substantially all the equipment used in the meat processing business. As a consequence, the corporate entity named O'Neill Meat Co. was renamed Food Equipment Leasing Company (FELC) in early 1977.⁵ In addition the directors of O'Neill Meat Co. authorized a corporate entity established by O'Neill in late 1976 to use the name O'Neill Meat Company (OMC). O'Neill, Ltd., a corporate entity that had been inactive from its inception in 1973, was also activated at approximately the same time. As of January 1, 1977, all the employees of O'Neill Meat Co. were transferred to the payroll of OMC or O'Neill, Ltd.⁶ OMC operated the meat plant, which it leased from FELC with the equipment that it also leased from FELC. OMC's administrative and bookkeeping services were performed for a fee by O'Neill, Ltd. which, as the 1977 calendar year progressed, became a holding company for several other O'Neill owned enterprises. At the time of the transformation of O'Neill Meat Co., a/k/a FELC, into a leasing corporation, O'Neill, Ltd. held over 91 percent of the stock of FELC, and FELC, in turn, owned all of the stock of OMC; O'Neill held 94 percent of O'Neill, Ltd.

As noted above, a substantial portion of the employees of O'Neill Meat Co. were transferred to the payroll of OMC effective January 1, 1977, when it became the lessor-operator of the meat plant. The officers of OMC were:

O'Neill	Chairman of the Board, Director
Lawrence Boragno	President, General Manager, Director
Douglas Ladd	Vice President, Sales Manager
Erwin Bartel	Director

⁵ Bartel and O'Neill testified that the corporate name change occurred in late 1976. The articles of incorporation, however, were not amended to reflect this name change until late March 1977.

⁶ The employees who apparently commenced working for O'Neill, Ltd. about this time were primarily clerical, data processing, and administrative employees.

Apart from the foregoing, the supervisory personnel of OMC were Marion Coots, Ronald Cox, Edward Jensen, Jay Kanawyer, Arthur Labrie, William LeRoy, James Mitchell, and Edward Watts. Boragno testified that as a practical matter around the plant the managerial hierarchy went from himself, to Bartel, to O'Neill.⁷ At the hearing, the only other individual who demonstrated knowledge of the corporate reorganization, which occurred in late 1976 and early 1977, other than O'Neill, was Bartel. By contrast, Boragno testified that it was not until the hearing that he realized there was a difference between O'Neill Meat Company and O'Neill Meat Co. Boragno further testified that the first that he learned that he was president of OMC was when O'Neill introduced him as such to two Butchers representatives in late February 1977 and requested that he sign the collective-bargaining agreements that O'Neill and Brewer had negotiated with that labor organization earlier.⁸ Although the Butchers had become aware the transition had taken place by October 1977, there is no credible evidence that there was a disclosure of the nature of the reorganization to any labor organization at the time that it occurred.⁹ Regardless of the corporate structure, the meat plant was clearly a necessary and vital segment of the total O'Neill operations at the start of 1977. Thus, in addition to the entities involved in the operation of the meat plant in 1977—O'Neill, Ltd., FELC, and OMC—O'Neill was also the sole owner of O'Neill Cattle Feeding Co., Inc. and O'Neill Livestock Company. The former appears to have been an extensive cattle feeding operation and the latter was a farming and livestock raising operation. In addition, several O'Neill entities and O'Neill personally had an interest in a third operation known as the OLM Cattle Venture. At the hearing, O'Neill testified that the trade name "O'Neill Fed Beef" had a degree of acceptance in the industry so as to have an economic value in and of itself. The evidence here warrants the conclusion that the combined O'Neill operations, including the meat plant, constituted an integrated economic unit.

When OMC is isolated out of the integrated economic unit of which it was a part, its financial records demonstrate that the overall corporate restructuring only served to exacerbate the bad financial picture of the meat plant operation. Thus, as reported in the consolidated financial statement of O'Neill, Ltd. for the 1977 fiscal year, the loss attributed to OMC was \$654,152. Any

⁷ Boragno impressed me as a reliable, convincing witness. Overall the evidence here demonstrates that he was a trusted employee who came up through the ranks in his 29 years with the O'Neill enterprises. Notwithstanding the titles of his various positions, his role was almost entirely related to the operational aspects of production. The evidence shows that regarding business and financial policy, O'Neill and Bartel were the sole individuals who exercised responsible authority. In this latter regard, Boragno merely signed and did what he was told to do.

⁸ Boragno signed the Butchers agreement on behalf of OMC in February 1977 and the Teamsters agreement in April 1977. Both agreements had retroactive effect back to their predecessor agreements.

⁹ Regarding this point, an invitation to the December 1976 grand opening of O'Neill, Ltd. was offered in evidence, and O'Neill testified that an invitation was sent to the union representatives. There is no evidence that any of the unions pursued even these indications of a transition.

comparison, however, between this loss and the losses of earlier years that were incurred by O'Neill Meat Co. would be akin to a comparison of apples and oranges as OMC was an entirely different entity than O'Neill Meat Co. For example, the aforementioned statement reflects expenditures by OMC of \$448,772 for lease payments to FELC and \$343,742 for administrative expenses to O'Neill, Ltd. In addition, O'Neill Meat Co.'s financial statement for the year ending September 30, 1976, reflects in footnote 2 an income item of \$345,508 for accounting, data processing, and management fees which, for that year, was treated for accounting purposes as a reduction in general operating expenses, but that had been treated in previous years as other income. There is no indication that OMC had the capacity for such income as this aspect of O'Neill Meat Co. appears to have been spun off to O'Neill, Ltd. Although there does appear to have been a reduction in the accumulated earnings of the total O'Neill enterprises in the period following 1973, the evidence presented is not sufficient to produce any reliable conclusions about the precise cause for the reduced earnings. O'Neill emphasized in his testimony and in his dealings with the Unions that the losses shown by the corporate entities that directly operated the meat plant resulted from its reduced competitive position vis-a-vis midwestern producers with more favorable labor costs.¹⁰

Notwithstanding OMC's role in processing and marketing the cattle raised or fed by other O'Neill enterprises, the decision to close OMC was announced to its employees on October 26, 1977. Boragno, OMC's nominal president, testified that the first he learned of the plan to close OMC occurred on October 26 when he was given the layoff notices to employees to sign. Insofar as this record is concerned, the decision to close OMC appears to have involved only O'Neill and Bartel. Read together their testimony shows that early in 1977 Bartel was making projections of heavy losses for OMC and urged O'Neill to implement certain economies and to renew his effort to obtain an agreement from the Butchers to institute the 4-day workweek. It was not until late July or early August 1977, however, that O'Neill undertook discussions with James Whiting of the Butchers in this respect. The evidence shows that in August 1977, Whiting was able to obtain the consent of the unit employees to modify the agreement to implement the 4-day workweek but refused to do so when he was unable to obtain the approval of officials of the International Union to so modify an existing agreement. Later, in October 1977, O'Neill sought unsuccessfully to have the Teamsters forgo the contractual wage increase that was to go into effect that month.

The corporate minutes of OMC reflect that a special meeting of OMC's board of directors was held on October 25, 1977, at which Bartel reported a \$500,000 deficit and that its working capital had "declined another"

¹⁰ In a couple of letters prepared by O'Neill in this period, however, he alluded to drought conditions as a further contributing factor to the losses. The testimony of Gene Dietz, a Fresno accountant who performed services for the O'Neill entities, suggests that the drought conditions prior to 1978 were a substantial contributing factor to the poor performance of the O'Neill enterprises in this period.

\$160,000.¹¹ The document further states that Bartel reported that in the near future OMC would not be able to meet its payroll obligations and for this reason he recommended that it be closed immediately. O'Neill concurred: The document then recites:

On a motion made, seconded and unanimously passed, the following resolution was adopted:

RESOLVED, that due to economic conditions O'Neill Meat Company will discontinue its slaughter and related activities on November 18, 1977 and that all notices required to be given concerning said closure shall be given at least two weeks prior to said closure date.

FURTHER RESOLVED, that due to said closure the Secretary/Treasurer of the corporation shall proceed to orderly effect said closure with regards to trade accounts payable and collection of accounts receivable.

The following day, October 26, a form notification of layoff was prepared, taken to Boragno for signature, and then distributed to each employee of OMC. The form of the layoff notice was as follows:

NOTIFICATION OF LAYOFF

Name of Employee _____

Layoff Date—*End of shift on November 18, 1977*

Reason—*Economics: Differential between wages paid in Midwest and here*

Supervisor Signature _____

Remarks *Indefinite* _____

The first indication of any notification of the closing to any of the labor organizations representing any of the employees was the following letter over Boragno's signature to Whiting that was dated October 31, 1977. The body of that letter reads as follows:

Dear Mr. Whiting:

Thank you for your concern over the plight of O'Neill Meat Company. As you are aware, substantial differential exists between the Midwest meat labor contracts and here, amounting to approximately \$900,000 per year at O'Neill Meat Company. Unfortunately, it looks like this will turn out to be a case of killing the goose that laid the golden egg in favor of the Midwestern turkey that pays substandard wages.

I sincerely hope that we can work something out with you that will be of assistance in keeping this plant open and its employees still gainfully employed.

Lacking any indication from either the Teamsters or the Butchers on relief from this dilemma leaves

¹¹ The minutes recite Boragno was present Boragno credibly denied this and asserted the only directors' meeting he attended was when he was made vice president of O'Neill Meat Co

no alternative but to lay off our entire work force effective November 18, 1977 at the end of their shifts.

Boragno denied writing this letter; O'Neill candidly acknowledged authoring the "goose that laid the golden egg" phrase. In addition, there is also evidence that O'Neill placed the blame for the closure of OMC squarely on the labor organizations in meetings that he had with individual employees after the announcement. Moreover, in a letter to Whiting following the public announcement of the closure, O'Neill appended an extended analysis of the differential in the wage rates between OMC and Iowa Beef Packers, the midwestern entity whose labor agreements O'Neill found most galling.

Subsequently, on November 8, 1977, O'Neill met with Butchers representative James Whiting and obtained Whiting's agreement to take O'Neill's proposal for an 8-percent wage reduction and the implementation of the 4-day workweek to the Butchers membership. When Whiting represented this proposal to the membership, it was approved. Thereafter, as he had done in August, Whiting sought the approval of the modification from the International Union's vice president Max Ossolo.¹² Ossolo rejected the proposal about November 12, 1977. As a consequence, slaughtering ceased on November 18, 1977. A skeleton crew remained for the purpose of completing the processing of the slaughtered cattle and the closing of the plant. This crew was laid off on November 23. Boragno executed a letter dated November 23, 1977, releasing OMC's Department of Agriculture plant number to FBP. A letter dated November 29 from L. R. Naxey Jr. to the Department of Agriculture requests the issuance of the number to FBP. Both letters bear the typing logo of Shirley Gregory, O'Neill's secretary.

Notwithstanding the appearance that OMC was permanently ceasing its operations, there is other evidence that the closing was not intended to be permanent. Thus, OMC's plant superintendent, Ronald Cox, testified that he was told by Boragno, about a week or 10 days before the actual closing, to tell his supervisors that they would be "taken care of" and that he told the foreman working under him not to go out and look for a job because that would not be necessary. In addition, Butchers Business Representative Lynn White testified that he spoke with Cox about 2 weeks prior to the closure and that Cox complained to him about the militancy of Shop Steward Barry Wooten. According to White, Cox told him at this time that Wooten would not be rehired when the plant reopened. Salesman Albert Wristen testified that the salesmen were instructed to tell the customers that they would not be closed for long. Employee Rudolph Golston testified that about a week before the closure of OMC Cox told him that he did not think the plant would be closed very long. Finally, the evidence shows that in late 1977, the Wells Fargo Bank extended a line of credit of approximately \$2 million to O'Neill-owned

cattle feeding entities for the purpose of purchasing cattle for fattening prior to slaughter. As will be discussed in further detail below, when the plant resumed operation in December 1977, nearly 6000 cattle purchased with these funds sustained the new operation.

2. Bargaining related to OMC's cessation of operations

Following the plant closure on November 18, bargaining sessions were held between representatives of the OMC and the Butchers concerning the closure of the plant. The first of these meetings was held in Attorney Tichy's office in San Francisco on December 8, 1977. Present on behalf of OMC were Tichy, O'Neill, Brewer, and another attorney from Tichy's firm, Rick Harding. Present for the Butchers were Representatives Whiting and White, and the Butchers' attorney Mike Roger. White took extensive notes of the meeting until Tichy requested that he cease doing so. White's notes are in evidence and show that Tichy initiated the discussion by pointing out that OMC had attempted to work out its problems with the Butchers but had not been successful in doing so. Tichy further asserted that because of the wage rate differences at OMC and those that a sister local of the Butchers negotiated in, the Midwest, as well as the drought conditions in the State, OMC was operating at a loss. Under these circumstances Tichy said that the plant closure should be considered as permanent but that OMC was not frozen to that idea. Attorney Roger asked pointedly whether O'Neill was going out of the meatpacking business with no intention of returning to it, and Tichy responded affirmatively. Roger next inquired if the plant was for sale, and O'Neill responded by saying that it was listed in the Wall Street Journal. When Roger next asked whether there was a possibility of leasing the facility, O'Neill responded that there was such a possibility. Roger pursued that inquiry, and Tichy responded that they were trying to work out a lease at that time with an entity called "Fresno Beef Packers."¹³ Roger inquired if Tichy represented that group, and Tichy denied that he did.¹⁴ Tichy also denied that O'Neill had an interest in "Fresno Beef Packers." Thereafter, there was a discussion about the type of terms that would be required in order to keep the plant closure from being permanent. Tichy stated that the Company needed relief on wages of 15 percent and to reduce the 40-hour guarantee to a 32-hour guarantee or four 8-hour days. Next Roger indicated that the more immediate problem dealt with the earned vacation time of the employees and requested that they be paid on request. Tichy indicated that he did not know if money could be allocated for that purpose at this time. When Roger insisted that the vacations be taken care of, O'Neill responded by asking if Roger was aware that OMC had a minus, \$500,000 net worth and called attention to the fact that the Butchers had seen OMC's financial state-

¹² Based on all the circumstances, I find, contrary to the Respondent's contention, that O'Neill knew that any final agreement of this magnitude would not be made by Whiting if his International Union opposed such a modification. Hence, Whiting's testimony to this effect is credited.

¹³ The lease between FELC and FBP shows that it was executed on December 1, 1977.

¹⁴ In fact, both Tichy and Brewer had previously represented another corporation owned by the owner of FBP.

ment.¹⁵ Following a caucus Tichy returned again to reiterate the proposal of a 15-percent wage reduction and a 4-day workweek with a 32-hour guarantee. Whiting indicated that the Butchers would consider this proposal and that, as he had a meeting in Los Angeles the following day, he would call in the evening if something could be arranged.

According to Whiting he met with Butchers' vice president Ossolo and other area Butchers representatives in Los Angeles on the Friday following the December 8 meeting, but he was unable to persuade those at this meeting to authorize a modification of the collective-bargaining agreement in the manner sought by O'Neill. That same evening Whiting telephoned O'Neill in Fresno and informed him of the result.

Following an exchange of letters between counsel, a second meeting was held in Tichy's office on January 19, 1978, regarding the decision to close and the effects on unit employees of the closing. Present for OMC were O'Neill, Brewer, and Tichy. Attorneys Mike Roger and Bill Sokol, and Representatives Whiting and White represented the Butchers. At this time the Butchers asked for an explanation of what was going on inasmuch as the facility appeared to be operating. Tichy informed the union representatives that FBP had leased the facility from FELC. Roger attempted to inquire about the connection between FELC and OMC, but beyond learning that they were all corporations, Roger's pursuit of the interrelationship was cut short when Tichy informed him that he was not going to play "20 questions." The parties next discussed the application of the collective-bargaining agreement to the operations being conducted by FBP. Tichy took the position that the transfer clauses in the collective-bargaining agreement were inapplicable in this case because OMC had not sold, transferred, leased, or maintained an operation following its closing. Tichy also informed the representatives of the Butchers that OMC was in the process of winding up its business affairs and was considering filing bankruptcy because of its financial position. Regarding the accrued vacation and sick leave payments being sought by the union representatives, Tichy offered at this time to settle on the basis of a 25- to 40-percent payment for those accrued benefits. The parties were unable to reach an agreement to adjust the vacation and sick leave payments on the basis at this time or subsequently.¹⁶

¹⁵ Although there is evidence that the Butchers and Teamsters had reviewed certain financial statements, other evidence indicates that the statements disclosed were limited to OMC and, perhaps, FELC. The evidence whether the FELC statements were disclosed, however, is far from clear.

¹⁶ On January 19, 1978, the Butchers filed a grievance over the closing of the facility. There was an exchange of letters among attorneys on February 8 and March 27 during which there was further explication of the willingness of OMC to make reduced vacation and sick leave payments. In a March 27, 1978 letter from Tichy to another Butchers attorney, Victor Van Bourg, Tichy increased the offer concerning payment of accrued vacation pay and sick leave to 60 percent but provided that it was to be "treated as severance pay." Other evidence indicates that the OMC officers and supervisors were paid similar accrued benefits. In both instances, Tichy emphasized that OMC would be forced to file for bankruptcy if pressed concerning the grievance of January 19, 1978. In fact, certain preparations for the filing of bankruptcy by OMC were undertaken, such as the naming of new officers and directors and changing its

Because of these findings, I find that these negotiations were conducted in bad faith for the purpose of creating the illusion that O'Neill was terminating his meat processing operations.

3. The nature of the resumed operation

As noted in the above discussion of applicable legal principles, an alter ego finding is normally characterized by the absence of arm's-length transactions among the accused individuals or enterprises. Therefore, I have carefully examined the detailed evidence offered here for the purpose of ascertaining what conclusion is warranted by a preponderance of the evidence regarding the arm's-length nature of the transactions among the Respondents in this case. A discussion of the more pertinent aspects of that evidence follows.

It is undisputed that the meat plant resumed operating on December 12, 1977. At this time, however, the plant was ostensibly operated by four new corporations, namely, SPM, FBP, DTC, and JET. As explained in greater detail below, two O'Neill owned entities—O'Neill, Ltd. and FELC—were direct participants in the resumed operation and other O'Neill entities, such as O'Neill Cattle Feeding, contributed to the resumed operation. The hearing in this matter devoted considerable time to the bona fide nature of these four entities.

a. Ownership and formation

The evidence shows that O'Neill had no ownership interest in the four corporate entities that resumed the operation of the meat plant on December 12, and was not an officer, director, or employee of any of these corporations. On the contrary, the initial president and sole owner of SPM was Eric Garrett. L. J. Maxey Jr. and his son, James Maxey, each owned 50 percent of the outstanding stock of FBP, and they were its sole officers. Donald Turner and his wife were the sole stockholders and officers of DTC. John Abatti and his wife were the sole stockholders and officers of JET. All four of these entities were incorporated in late November and early December 1977. In three instances—SPM, FBP, and JET—the attorney who handled the legal matters pertaining to the incorporation matters was David St. Louis, a Fresno attorney, who had previously represented O'Neill on some collection matters and who occasionally met socially with O'Neill.¹⁷ Garrett testified that he con-

name OMC to Amalgamated Meat Co. so the O'Neill name would not be associated with the proceeding.

¹⁷ St. Louis initially appeared as the counsel of record for SPM. He subsequently withdrew early in the proceeding after my following ruling on motions to quash certain subpoenas directed to him:

As to subpoena ad testificandum A-539107 and paragraphs 3, 4 and 7 of subpoena duces tecum B-185929, compliance therewith as to matters privileged by the attorney-client relationship is stayed pending presentation by the General Counsel or the Charging Parties of sufficient evidence to show that there is reasonable cause under applicable federal law to believe that the allegations in the complaint herein are true and that they occurred in a fraudulent manner. *Clark v. United States*, 289 U.S. 1 (1933); *United States v. Calvert*, 523 F.2d 895 (C.A. 8, 1975); *United States v. Bob*, 106 F.2d 37 (C.A. 2, 1939); Rule 501, Federal Rules of Evidence; Section 102.31(b), NLRB

Continued

tacted St. Louis on the recommendation of Attorney James Bell who represented the O'Neill corporations on a variety of complex legal matters, including the incorporation of OMC and FELC. L. J. Maxey testified that he went to St. Louis to handle the incorporation of FBP because he wanted to keep the matters pertaining to that corporation separate from his other business enterprises that retained the law firm that represented FBP in these proceedings and that officed in the same building as St. Louis. DTC was capitalized for \$5000, the remainder of the corporations were capitalized for \$2000 (JET) and \$1000 (SPM & FBP). Even these amounts were not paid in the instance of FBP and DTC until May and November 1978, respectively. There is no evidence that any of these corporations obtained a line of credit with any financial institution prior to the commencement of operations on December 12.

The owners of SPM, FBP, DTC, and JET were not strangers to O'Neill and the meat plant. Thus, for a number of years prior to the formation of SPM, Garrett had worked as an independent meat broker in the Sacramento, California area on behalf of O'Neill Meat Co. and its successor. Garrett worked out of his home and called on customers personally. The closing of the meat plant was, therefore, a threat to his livelihood.¹⁸ In addition to FBP, the Maxeys had for a number of years operated a business in the Fresno area known as King-O-Meats. King-O-Meats wholesaled meat products to hospitals and other similar institutions, and the O'Neill plant had for a number of years been a principal source of its meat products. Don Turner was the owner of two firms in the Fresno area, which provided security services to business enterprises, including the O'Neill meat plant. Prior to his ownership of JET, John Abatti was the sole proprietor of a trucking company known as John Abatti Trucking. Approximately 75 percent of the business of John Abatti Trucking had been involved with transporting live cattle to the O'Neill meat plant.

On the surface, the meat plant operated after December 12 as a custom kill facility. In the industry that means that the plant operator slaughters cattle as a service for others on a fixed-fee basis. Ostensibly, FBP leased the plant and equipment from FELC for the purpose of engaging in the custom kill operation, DTC was engaged in business as a labor contractor and was retained by FBP for the purpose of furnishing labor to conduct the custom kill operation. JET engaged in business for the purpose of transporting goods as a common carrier via refrigerated trucks that it leased from FELC. SPM's business purpose was that of a meat broker. Notwithstanding the supposed bona fide nature of the relation-

Rules and Regulations. See also *Schaeffer v. Below*, 278 F.2d 619 (C.A. 3, 1960).

When St. Louis subsequently appeared as a witness, I generally sustained objections to his testimony grounded on the attorney-client privilege. To the extent that those rulings may have been inconsistent with the conclusions ultimately reached, I am satisfied that no prejudicial error occurred.

¹⁸ In explaining the predicament posed for him by the closing of the meat plant, Garrett gave testimony that was curiously contradictory at the heart of the O'Neill thesis about the effect of midwestern competition. Thus, Garrett said that he could not broker meat from midwestern suppliers because midwestern beef was unacceptable to his customers.

ship of O'Neill, Ltd. with the four new entities, the doors to the offices of O'Neill, Ltd. were kept closed and locked. As a consequence a morass of documents that went back and forth daily were passed under the locked doors.

A composite of the testimony by the principals of these four corporations (Garrett, the elder Maxey, Turner, and Abatti) and O'Neill provided the explanation for the rapid re-establishment of the meat plant operation on which the Respondent's rely. Thus, the elder Maxey testified that in early October, O'Neill confirmed to him that there was a possibility of closing the plant, and Maxey was able to see in this potential event the opportunity to go into a custom kill operation, which he had thought of doing for some time. Initially, O'Neill offered to sell the plant to Maxey, but he could not afford the purchase price, so they discussed the possibility of leasing the plant. In effect, O'Neill turned Maxey over to Bartel to work out the details concerning the lease. After some negotiations (which Maxey described in exceedingly vague terms) lease terms were agreed on and a lease was drafted for Maxey's consideration. This lease tracked the form of FELC's lease to OMC. Thereafter, Maxey and Bartel bickered over the lease price, and agreement was finally reached. The lease price was the same as FELC's lease price to OMC, namely, \$479,321 per annum. In the meantime, Maxey had determined that he was not interested in devoting the time necessary to oversee the work force, which would be necessary for such an operation, so he began exploring the possibility of utilizing a labor contractor. Initially, Maxey contacted Brewer of Alpha Agency who had previously represented King-O-Meats.¹⁹ Brewer declined Maxey's invitation to become his labor contractor, citing the fact that such an operation would put him in competition with certain Alpha Agency clients but Brewer recommended Don Turner for this purpose. Although Turner had no experience as a labor contractor in any industry, he undertook to discuss the details of Maxey's proposal. Among other arguments Maxey used to convince Turner of the potential in such an undertaking was the fact that several meat processing plants had closed in the area and, as a consequence, there was an abundance of individuals available with the necessary supervisory skills in the industry who could overcome Turner's lack of direct experience in a slaughtering operation. Eventually, Maxey and Turner arrived at an agreement whereby Turner would act as FBP's labor contractor on a cost-plus-10-percent basis. As it turned out, however, all of Turner's supervisory personnel were former OMC supervisors but, as will be more fully discussed below, only 40 percent of the production employees (31 of 78) initially employed by Turner came from the ranks of the laid-off O'Neill production employees.

John Abatti testified that he first learned of OMC's closing about the time that the layoff notices were issued to the OMC employees. Because approximately 75 percent of his livestock training business involved hauling live cattle from feeders to the meat plant, Abatti said he

¹⁹ Prior to the hearing, Brewer was killed in an automobile accident.

was concerned about this news. That same day he went to see O'Neill, who confirmed that the plant was going to close and that he was probably going to sell or lease the plant. Abatti then asked if he could lease the refrigerated trucks that OMC had been leasing from FELC. O'Neill told him that he would let him know. On the day the plant actually ceased slaughtering (November 18, 1977) Abatti had another conversation with O'Neill in which O'Neill told him if he could lease the plant, Abatti could lease the trucks. If Abatti's version of these events is true, it would appear that he anticipated that eventuality because he had previously contacted Attorney St. Louis (who had been suggested to him by Bartel) in order to commence the formation of JET.²⁰ Approximately a week following their November 18 conversation, O'Neill told Abatti that he could lease the trucks and that Bartel had the leases in order. O'Neill also told him that Boragno would probably be working for SPM and he should contact Boragno to arrange to haul the SPM swinging meat. Abatti then proceeded to obtain the leases from Bartel, take them home overnight, sign them, and return them the following day. The yearly lease price for the equipment leased or subleased by JET from FELC was \$112,015.99, payable in monthly installments beginning in January 1978. No security was required. In addition, JET leased office space from FELC for \$1800 per year. Those payments were to be made in monthly installments beginning in January 1978. On December 12, 1977, Abatti executed a "use" agreement whereby certain services were to be provided to JET by O'Neill Truck Service, which operated a filling station on the premises.²¹ Approximately 2 days after signing the equipment lease, Abatti said he met Boragno outside the plant and asked if he could haul for Sierra Pacific. Boragno sealed JET's economic future by saying yes. In Abatti's view, the arrangement turned out very profitable, but there is no evidence about what that means apart from the \$5000 per month in wages that Abatti and his wife drew from JET because JET never maintained either a monthly or yearly profit and loss record. Unlike the other three entities, JET had no service agreement with O'Neill, Ltd. to perform accounting and administrative services. Abatti's wife, Carol, kept JET's records. Those records will be discussed in more detail below.

Garrett testified that with the closing of OMC, his source of meat to broker was threatened. For this reason, he conceived the idea of forming a meat brokerage company although he did not explain how this would serve to eliminate his immediate problem of having no meat to broker, apart from saying that O'Neill assured him there would be a supply of meat. As Garrett perceived the future, it would be a simple matter of forming a broker-

age corporation, hiring some good people, finding a supply of meat, and going from there. Garrett went on to testify that about a month after the plant closed, he made a couple of trips to Fresno to discuss his idea of a brokerage company. Garrett said that on the first occasion he met with O'Neill, Bartel, and Boragno. Among other things, Garrett said that O'Neill assured him there would be a source of supply. On the second visit to Fresno, Garrett met O'Neill, Bartel, and Boragno at the plant and the three men proceeded to the Hilton Hotel for lunch where they met with Attorney Bell who represented some of the O'Neill entities. They discussed forming a corporation and, according to Garrett, Bell recommended that he obtain a "corporate" lawyer and suggested Attorney St. Louis. Garrett, however, returned to his home in Sacramento without following up on Bell's suggestion. A few days later, Garrett allegedly telephoned St. Louis and arranged to have SPM formed as a California corporation. Garrett supplied the corporate name and the names of Boragno and Ladd as officers. The articles of incorporation were executed on December 7, 1977, by St. Louis' secretary. Although the minutes of the first meeting of the board of directors of SPM is in evidence and recites that the meeting was held in St. Louis' office on December 21, 1977, in fact, Garrett said he never attended such a meeting. Instead, Garrett apparently signed the minutes when St. Louis came to his home in early January 1978. In addition, St. Louis testified that his appointment calendar reflected that he had an appointment with Boragno, Ladd, and Bartel at 4:45 p.m. on January 10, 1977. St. Louis testified that Ladd and Boragno executed some corporate documents at that time, but that Bartel was not present when this business was transacted. By and large, Garrett said that he delegated numerous duties to Boragno. According to Garrett, however, both he and Boragno inspected the offices utilized for a period of time by SPM on P Street in Fresno.

On the basis of the foregoing evidence certain preliminary conclusions are warranted. First, the new entities were owned by individuals who had been economically associated with the prior operation of the meat plant. Second, with the possible exception of Turner, the owners of the new entities were shown to have a substantial dependence on the operation of the meat plant.²² Third, if the testimony of the principals of the new entities is accepted as true, three of the new enterprises, SPM, FBP, and JET, undertook to establish their business without any significant coordination with, or consideration for, the others. Fourth, the plant and equipment used by the new entities were owned entirely by O'Neill-controlled enterprises. Fifth, with only minimal capitalization, no known lines of credit, and no assurance of significant revenues, FBP and JET undertook significant lease obligations to the O'Neill enterprises.²³

²⁰ Abatti identified a \$500 check drawn on John Abatti Trucking's account on November 8, 1977, as the original retainer to St. Louis to form JET. JET's articles of incorporation were executed by St. Louis on November 21, 1977. The minutes of the first meeting of JET's board of directors are dated December 5, 1977. In addition, about November 9, 1977, Abatti undertook to file an application with the Public Utilities Commission of the State of California on behalf of the yet-to-be-formed JET to obtain a common carrier permit.

²¹ The equipment lease is dated December 5, 1977; the office lease December 8, 1977; and the service station use agreement is dated December 12, 1977.

²² Regarding Turner, there is no evidence what portion of the income of his other two enterprises was derived from the security work performed at the meat plant.

²³ There was no showing that ability of the principals of the new entities to amass working capital even remotely approached that of O'Neill.

On August 3, 1978, Garrett sold his interest in SPM to Steven Diebert. It appears that Garrett did so because he did not relish the prospect of being in a position of prosecuting the individuals who were being implicated in the alleged kickback scheme.

Diebert was a CPA who had an office in the same building as St. Louis. He was induced to buy SPM by St. Louis' representations. St. Louis told Diebert that SPM was losing money at that time, but that it had a high sales volume and there was a possibility it could become profitable with new management, and that Diebert would incur no personal liability.²⁴ Diebert agreed to purchase the company, essentially sight unseen, for the asking price of \$1000—the same amount as SPM's original capitalization.²⁵ He had no negotiations with Garrett. Diebert's check for the stock purchase was delivered to Garrett by Bartel.

Shortly after the purchase of the SPM, Diebert had a meeting with O'Neill in which O'Neill discussed the origins of SPM with him. Diebert's testimony about this conversation with O'Neill was as follows:

Q. Other than the issue of thefts, was anything else discussed with Mr. O'Neill?

A. He went over with me the unfair labor practice he was accused of.

Q. What did he tell you, Mr. Diebert?

A. He told me they shut down the plant and that these new companies were formed after the new plant was shut down. Various people owned them, other people than himself, and that he had to pick out one segment of the business to be involved in; he could not be involved in all segments and that he wanted to be in the feed lot business.

Q. Go ahead.

A. He said Sierra Pacific Meat Company was a broker for the cattle, and that all these companies really depended on each other.

In other words, without the brokerage company, he did not have an outlet for his cattle, and without the plant, there was no place to slaughter the cattle. So all the companies did depend on each other, but that he was trying to keep the companies separate.

Q. Did he explain why he was trying to keep them separate? Why he, Ed O'Neill, was trying to keep them separate?

A. Well, those are my words. He did not want to be involved in an unfair labor practice—I mean, that would be my summation of it.

Q. He told you an unfair labor practice charge had been filed against him?

A. Yes.

Q. And during this conversation, he did say he had closed the plant down?

A. Yes.

Q. And that he wanted to remain in one segment of the business?

A. Yes.

Q. And that was the feed lot operation?

A. Yes.

Q. And that he was dependent on the other companies for the sale and slaughter of his beef?

A. Yes.

Q. He also told you he still controlled O'Neill Limited?

A. He could have.

Q. Did he discuss he was also still involved in the accounting function?

A. Probably.

Q. He told you friends of his had set up the other corporations?

MR. BUTLER: Objection.

JUDGE SCHMIDT: Overruled.

THE WITNESS: I would not say he used the word "friends," no.

BY MR. ROSENFELD:

Q. How did he describe the people who set up the other corporations, all of which were dependent upon each other?

A. I don't know if he discussed who the other people were, but I assumed they were business associates and he had known them and trusted them. If that's a definition of "friend"—

JUDGE SCHMIDT: I'm really not interested in what you assume. If he said something that led you to believe that, say what he said.

MR. TICHY: I would move to strike the assumption, Your Honor.

JUDGE SCHMIDT: Sustained.

Q. Mr. Diebert, during the conversation, Mr. O'Neill told you some other companies had been formed at the time he closed the plant; right?

A. Yes.

Q. And he told you he knew the people who had formed the companies?

A. I don't remember him saying that?

Q. He told you, did he not, he was aware of the formation of the other companies?

A. Yes.

Q. Did he tell you how he was aware of the formation of the other companies?

A. I don't recall.

Q. Did he not tell you he was at least partially involved in the formation of the other companies.

MR. QUINLAN: I object as to what counsel means by "partially involved." Does he mean in the actual formation of the corporate structures themselves? Or leasing something to somebody? Or what?

I think the question is so vague the answer would be meaningless.

JUDGE SCHMIDT: Overruled.

THE WITNESS: I knew the companies evolved out of former O'Neill company.

MR. ROSENFELD:

Q. That's not an answer to the question, Mr. Diebert. The question is:

Did Mr. O'Neill tell you that in the conversation?

A. Mr. O'Neill told me that, yes.

JUDGE SCHMIDT: Now, hold on.

²⁴ In fact, the evidence shows that SPM's sales volume in its first year was just short of \$1 million per week.

²⁵ Garrett's only income from SPM's operations came from the meat he personally brokered in the Sacramento area

The question, as I understand, the original question was: Did Mr. O'Neill tell you he was partially involved in setting up the other companies? Did he say that or something similar to that to you?

THE WITNESS: No, sir, I don't recall that.

JUDGE SCHMIDT: All right.

BY MR. ROSENFELD:

Q. He told you the new companies evolved out of the old meat plant and its operations?

A. Yes.

Q. Did he tell you how the new companies evolved out of the operations of the old O'Neill Meat Plant?

A. No.

Q. Did he tell you he had nothing to do with the involvement or evolution of these new companies out of the old O'Neill Meat Company?

A. No, he didn't say anything about that.

Q. But he did discuss briefly, didn't he, how the new companies evolved?

A. I am not sure I understand exactly how they all came about, other than that there was an O'Neill Company. That company shut down and these three or four, however many there are, evolved from that. Exactly how, I don't know. I asked and I don't know that he told me.

Q. Did he tell you why he shut down the company?

A. He was losing so much money he could not afford to continue.

Q. Is that from the thefts?

A. Not at the time, I don't think it was. It was uneconomical, given the labor and I guess the processing. I guess it was an uneconomical operation. He could not compete.

Q. Did you ask him how the other entities made it economical if he was unable to do so?

A. I don't know whether it was at a conversation or later knowledge that I learned this.

Q. Mr. Diebert, I'm interested only right now in what Mr. O'Neill told you.

A. In that particular, no, I don't think he told me.

Q. Was there any general discussion about how the new companies were or were not economical or were able to make a profit?

A. The new companies, Sierra Pacific, did not make a profit, so that I don't know if the other companies were making a profit or not; I'm not quite sure what the other companies do.

Q. At that conversation, did Mr. O'Neill tell you the companies evolving out of O'Neill Meat Company were making a profit or were not making a profit, and the extent to which they were?

A. No, he did not tell me.

Q. You did discuss the fact Sierra Pacific itself at that point was not making a profit?

A. Yes.

Q. Was there any discussion as to the reason for that?

A. It all revolved, in the discussions, as to the theft.

Q. Did you ask him whether he would be of assistance in your continued operation, or operations of Sierra Meat Company?

A. What type of assistance?

Q. Any kind of assistance, advice.

A. I did not ask him to play a role in management. I did not ask him for any kind of financial backing at that point.

As I became aware of it later, where we were getting our funding, if you will, our liability is that we owed him a substantial sum of money for all the cattle bought from him, sold, and we were unable to repay.

Q. After this meeting, how many more meetings did you have before the end of 1978 with Mr. O'Neill?

As best you can remember.

A. Probably one more.

Q. Did Mr. O'Neill give you any idea how much money was owed him at that time by Sierra Pacific?

A. I don't know if it was at that time. It was \$2 million.

O'Neill did not testify about this conversation. Apart from his presence to give testimony, I never observed Diebert in the hearing room.

b. *The service and lease agreements*

After December 12, 1977, the O'Neill entities were ostensibly connected with the four new entities that allegedly operated the meat plant by the lease agreements that existed with FELC and the service agreements that existed with O'Neill, Ltd. Certain aspects of these arrangements are not indicative of an arm's-length business relationship.

Regarding the service agreements, a comparison of the "computer service agreement" between O'Neill, Ltd. and an affiliated company, FELC, with those that it entered into with SPM, FBP, and DTC demonstrates that the FELC agreement is substantially more indicative of an arm's-length relationship. The FELC agreement is a three-page document bearing the logo of the law firm that represented the O'Neill entities. It specifically listed the eight different services that were to be provided under the agreement and the hourly charge for each of these services.²⁶ The agreement then goes on with sepa-

²⁶ Specifically, sec. 2 of the O'Neill, Ltd.—FELC computer service agreement provided:

Services Provided: The Service Company will provide the following computer services to Customer:

	<i>Per Hour</i>
C. P. U Time	\$50.00
Data Entry	10.00
Operations	17.50
Programming	20 00
Clerical	10.00
Accounting	12.50
Accounting Supervision	17.50
Administrative	20 00

rate provisions dealing with completion times, defining the property that will be considered that of the customer, the allocation of risk in the storage of materials, the confidentiality of materials, the standard of care that must be exercised by the service company, the manner of billing and payments, the allocation of attorney's fees and costs in the event of an action for enforcement, and a savings clause. Having maintained such an agreement with a subsidiary, one would reasonably expect that at least a similar agreement would have been maintained with unrelated companies such as SPM, FBP, and DTC. Quite the opposite was true. The substantive provisions of the SPM-O'Neill, Ltd. service agreement were as follows:

On Sierra Pacific's request therefore O'Neill agrees to provide *certain record keeping and processing services* for Sierra Pacific subject to the following terms and conditions to wit:

1. O'Neill agrees and understands that they shall perform said services to the best of their abilities, however it is agreed and understood by and between the parties hereto, and Sierra Pacific expressly agrees that O'Neill shall not be responsible nor liable to Sierra Pacific for said services and that *O'Neill shall not be considered the accountants for, nor the representatives of, Sierra Pacific.*

2. The term of this agreement shall extend for a period of 90 days, commencing December 21, 1977. Either party may cancel this agreement at any time by giving the other party 5 days notice in writing of such cancellation. Such Notice shall be deemed given when mailed by certified mail, postage prepaid, to the address appearing below:

Sierra Pacific Meat Company, Inc.
659 "P" Street
Fresno, California 93721
O'Neill, Ltd.
P.O. Box 12226
Fresno, California 93777

3. Sierra Pacific shall, upon presentation of statement, pay to O'Neill a fee for said services. Said fee shall be the costs of O'Neill plus a profit of 10%.

In witness whereof, the parties hereto have executed this agreement this 21st day of December, 1977.

Sierra Pacific Meat
Company, Inc.
/s/ Eric Garrett

O'Neill Ltd.
Lee R. Schultz
Secretary

[Emphasis added.]

The service agreements that O'Neill, Ltd. maintained with FBP and with DTC were equally vague about the nature of the services to be provided and the charges. Moreover, the testimony of Eric Garrett regarding the manner in which SPM's service agreement came into ex-

istence casts further doubt on its legitimacy. Purportedly, Garrett requested the service by a letter dated December 16, 1977. According to Garrett's testimony, that letter arrived at his home in the mail already prepared. He merely signed and returned it. The identity of the preparer was never established. Contrary to the recitation in the letter, Garrett testified that he had never met Lee Schultz.²⁷ Pursuant to that agreement, SPM was charged in some months in excess of \$20,000 for the services performed under the agreement. FBP and DTC terminated the service agreements that they had with O'Neill, Ltd. in approximately April 1978. However, the service performed for those two entities appeared to be limited primarily to the preparation of the payrolls and the daily kill reports. At the time FBP terminated its service agreement, Char Rosenthal, who handled the FBP payroll work while she was an O'Neill, Ltd. employee, started to work for FBP to handle the payroll work. There is no evidence as to where Rosenthal performed these duties after she became an FBP employee. Moreover, the evidence indicated that the daily kill reports continued to be submitted to O'Neill, Ltd. after the DTC and FBP service agreements were terminated.

Other evidence shows that, although the service agreement specifically provided that O'Neill, Ltd. was not to serve the accountant or representative for SPM representative, all the considerable financial affairs of SPM were handled in the offices of O'Neill, Ltd. Thus, Bartel acknowledged that he directed the opening of the SPM bank account, which was opened on December 5, 1977, even before the existence of the service agreement or, for that matter, even before the SPM's articles of incorporation had been executed. SPM's mail was funneled through O'Neill, Ltd. and the checks submitted in payment of accounts receivable were routinely removed and banked by O'Neill, Ltd. employees. In February 1978, O'Neill made application to the Wells Fargo Bank on behalf of SPM for a line of credit of approximately \$2 million. The negotiations over this matter continued into the fall of 1978 without any participation by any official of SPM. On August 11, 1978, immediately preceding the arrests in the kickback scheme, O'Neill personally handled a transaction with Fred Polessi designed to obtain a deed of trust on certain real property of Polessi to secure the Polessi's account receivable of approximately \$90,000 with SPM.²⁸ Although Boragno's name or initials ap-

²⁷ Schultz, a former officer of O'Neill, Ltd. did not testify in this proceeding. Although it was represented at the hearing that Schultz was no longer employed by O'Neill, there was no indication that he was unavailable as a witness or that he left O'Neill, Ltd. under circumstances that would make him predisposed to color his testimony about his own activities. Accordingly, it is reasonable to infer that Schultz would not rebut this and other testimony adverse to the Respondents concerning his official activities had he been called to testify.

²⁸ Polessi was implicated in the kickback scheme. O'Neill apparently anticipated that Polessi was about to be arrested along with Ladd and Jensen. Because of the other evidence in this matter concerning the degree of involvement by O'Neill in SPM's routine business affairs, I do not credit O'Neill and St. Louis' testimony that O'Neill secured the deed of trust at St. Louis' request after Boragno and Ladd had failed to act on his request that they do so. Indeed, all witnesses to this incident testified that Boragno accompanied O'Neill to Polessi's place of business, but that O'Neill did all the talking.

pears on numerous SPM checks and vouchers, he testified that as a practical matter, all of these documents were prepared in the offices of O'Neill, Ltd. and presented to him solely for his signature.

Similarly, the history of the plant lease fails to support a finding that an arm's-length relationship existed between FELC and FBP with respect thereto. Thus, following the cessation of slaughtering operations, O'Neill executed an exclusive listing agreement with a commercial real estate broker in Fresno—Charles Tingey & Associates—wherein the plant was offered for sale or lease. The agreement specified that the broker was to receive a commission in the event the plant was sold or leased but no reservation was made in the listing agreement to cover the contingency posed by the negotiations allegedly already in progress at that time between FELC and FBP for the lease of the plant. Notwithstanding that a lease was finally executed by FBP for the plant and the equipment utilized in the slaughtering operation on December 1—a week after O'Neill executed the listing agreement—no lease commission was paid to Tingey, and Tingey testified that he made no claim for a commission. Other aspects of the lease arrangement indicate that normal business prudence appeared to be lacking. Thus, the lease provided for no security to assure performance and was terminable on the sale of the plant. Likewise, there is no evidence that the lease was ever recorded.

According to the testimony of O'Neill and Bartel, the lease price for the plant and the equipment used in the slaughtering operation to both OMC and FBP was a factor of an appraisal made in 1976 by a professional appraisal firm. Thus, the lease between FELC and OMC was designed to provide a 10-percent annual return on the appraised value of the property. Subsequently, when negotiations were allegedly underway between FELC and FBP, there was supposedly an initial effort by FELC to obtain a 12-percent return on the plant and equipment, but Maxey allegedly negotiated the lease price down to the same price that OMC paid. Although Maxey claims to have carefully considered the initial FELC proposal to him for a few days and to have consulted with his son, an accountant and a real estate consultant, before he made a counteroffer, his initial testimony concerning the basis for the lease price at the hearing appeared to be purposefully vague. Additionally, Maxey's testimony discloses a lack of familiarity with the basic concepts involved in setting the lease price. Thus, Maxey testified:

Q. And it was Mr. O'Neill who informed you of the figures, verbally; is that correct?

A. He told me what he would like to have.

Q. You don't particularly [recall] whether it was by telephone or in person, but you remember it was Mr. O'Neill who told you those figures?

A. It was in a conversation.

Q. You now remember it was in a conversation?

A. I remember that from the start, either in person or on the phone, like I told you.

Q. It was a conversation, but you don't remember whether it was on the telephone or in person; is that right?

A. Right.

.....

Q. You went to your real estate person and your accountant after you got these figures and then to your son; is that right?

A. Oh, yes. My son does a lot of that for me.

Q. Do you remember what the figures were that Mr. O'Neill gave you?

A. Yes. Roughly. Not exactly. The appraised valuation, I think he wanted twelve times and I think that is the way we came at it—that is the way we came up with the original talking.

Q. I'm not sure what or if I understand what you just said. Would you be a little more specific of what you recall the amount was.

A. That was not the amount we settled on.

Q. I'm not asking that.

A. As best I remember right now, he was asking for twelve times.

Q. The assessed evaluation?

A. Yes.

Q. When you are talking about the assessed evaluation, are you referring to what the tax assessor—

A. (Interrupting) Appraised.

Q. Pardon?

A. Appraised.

Q. What the appraised valuation was?

A. Appraised valuation; yes.

Q. Do—

JUDGE SCHMIDT: You mean the appraised valuation of the tax assessor?

THE WITNESS: Of the land.

JUDGE SCHMIDT: Do you know who appraised it?

THE WITNESS: No. Not at this time.

JUDGE SCHMIDT: But, at least there was a figure presented as an appraisal figure?

THE WITNESS: There was an appraisal figure; yes.

JUDGE SCHMIDT: All right. Proceed.

Q. Did you submit a counter proposal to Mr. O'Neill or anyone else in Mr. O'Neill's facility after you discussed it with your accountant? with your real estate person? and with your son?

A. Yes.

Q. What was the amount of your counter offer?

A. Ten.

Q. Ten what?

A. Ten times instead of twelve.

Q. Ten times the assessed valuation of the property?

MR. FISCHBACH: I think it is appraised value, is the term used previously.

BY MR. ASKIN:

Q. Ten times the appraised value of the property?

A. Right.

Q. Who did you communicate that counter offer to?

A. Either Mr. O'Neill or Mr. Bartel. One or the other of them.

Q. You don't recall which one?

A. Not really.

Q. Had you dealt with Mr. Bartel prior to that in terms of these figures, to your knowledge?

A. I talked to him.

Q. So, prior to the time you gave the counter offer, you had talked to Mr. Bartel about the subject of the lease?

A. Of the money.

Q. About the possibility of leasing the property.

A. Had I talked to Mr. Bartel?

Q. Yes. On this subject?

A. He knew about it.

Q. That's not what I'm asking. Did you talk to Mr. Bartel regarding these negotiations prior to the time you made your counter offer.

A. No; I had not talked to Mr. Bartel prior to making the counter offer.

Q. But, when you made the counter offer, do you remember whether you gave it to Mr. Bartel or Mr. O'Neill?

A. No; I don't recall which one.

Later, when the plant facility was sold to Indio Properties, a San Francisco investment firm, and leased back to O'Neill, Ltd. and FEB in April 1979, special arrangements were required as an inducement for the sale. O'Neill testified that he negotiated the sale and the lease-back arrangement as a part of a package deal and that package deal included O'Neill's personal guarantee of the lease payments for the slaughterhouse facility that Indio leased to FBP. O'Neill's testimony and the documents reflecting that this "package" arrangement was executed on April 3, 1979, directly contradicts the testimony of L. J. Maxey Jr., who asserted in vague, general testimony that he negotiated the lease from Indio and that at the time he did so he was unaware that O'Neill had guaranteed the lease payments. I cannot credit Maxey's testimony in this regard. If this record demonstrates anything, it demonstrates that O'Neill was far too astute a businessman to sign a "blank check" guarantee for Maxey or anyone else. This conclusion has further led me to discount the testimony of Maxey concerning the initial FBP lease with FELC, which is dated December 1. Although in other circumstances it would be reasonable to treat Maxey's testimony about the basis for the lease price as a mere mistake, I do not believe that such a conclusion is warranted here when other evidence shows that, regarding the lease with Indio, Maxey was a mere functionary. When this factor is considered, together with Mitchell's testimony that he only dealt with either of the Maxeys on one occasion about a minor matter and the record as a whole, it is my conclusion that Maxey was at all times a mere functionary insofar as the operation of the meat plant was concerned.

The circumstances surrounding the selection of office space for SPM when it initially commenced operation is not indicative of its independence of O'Neill influence. That office was located some distance from the meat plant at 659 P Street in Fresno. Garrett testified that he did not make arrangements to rent the offices at this location and that generally he delegated the day-to-day operation of SPM to Boragno. Although Garrett asserted

that he had been at the SPM offices on P Street on a number of occasions, he demonstrated his thorough unfamiliarity with the facility when he testified that he had no recollection whether the building in which the offices were located was a wooden or brick building. The evidence does not establish that either Boragno or Ladd—SPM's other officers—had anything to do with securing the P Street space for SPM.²⁹ Gary Smith, a relative of the deceased owner of the P Street location, testified regarding the manner in which arrangements were made for the rental of the facility.³⁰ According to Smith, he received a telephone call from Bartel in late November 1977 for the purpose of arranging a meeting with O'Neill on December 4 at a country club in Fresno. Smith further testified that at the December 4 meeting O'Neill informed him that he had an acquaintance from "up north" who had a pork business and who wished to lease the P Street location. According to Smith, he advised O'Neill that if his acquaintance was interested, arrangements for the rental of the facility should be made with their attorney, Richard Andrews. Subsequently, the offices at the P Street location were rented pursuant to negotiations between Attorneys St. Louis and Andrews. Boragno testified that after a few weeks of operation, it became apparent that it was inconvenient for Ladd and himself to be located away from the plant, and that Bartel arranged for them to have office space in the plant building. There is no evidence that this space was provided pursuant to any lease arrangement as was the case with the office space provided for FBP, DTC, and JET when the operations initially resumed.

c. The personnel and labor relations aspects of the new entities

The details of the personnel matters pertaining to the new entities shows evidence of: (1) substantial influence by O'Neill and officials of O'Neill-owned enterprises in staffing the new entities, and (2) discriminatory practices designed to ensure that the new entities were nonunion. The significant aspects of that evidence is as follows:

SPM—Within the first month after SPM commenced operations its staff consisted of Boragno, Ladd, all the former salesmen of OMC, Edward Watts, and Daniel Reese. Boragno was SPM's general manager. Ladd was the sales manager, as he had been with OMC. Watts worked in the coolers tagging beef pursuant to the sales orders, as he had done with OMC. Reese was a cattle buyer who, until January 1, 1978, was on the O'Neill, Ltd. payroll.³¹ Although some of the duties of the indi-

²⁹ To the contrary, it appears that Ladd was hospitalized for surgery about the time that the office space arrangements were made for SPM and did not become actively employed until after his recuperation.

³⁰ Smith's testimony is fully credited. His demeanor was convincing and there is no evidence that he had any prior or subsequent relationship with any of the parties after the SPM office space rental and was otherwise totally independent of all parties to this case.

³¹ Reese did not testify. John Abatti's testimony merits the inference that Reese's duties, following his employment with SPM, did not change and that although employed by SPM Reese was buying cattle on the O'Neill cattle feeding account. Abatti was transporting these cattle directly to the meat plant for slaughter. According to Abatti, in late January 1978, he was instructed by Reese to show the live cattle he transported as being consigned to SPM.

vidual salesmen changed after they commenced working for SPM, there were no significant changes in the duties of Boragno, Ladd, Watts, and Reese. Likewise, Garrett also found that his ownership of the SPM did not alter his day-to-day activities—he still continued to call on customers in the Sacramento area and phone in his orders to the plant each day. There is no evidence that Garrett played any role in the staffing of the corporation that he founded. By contrast, Boragno credibly testified that Bartel instructed him on his duties with SMP and directed him to hire the former OMC salesmen. Boragno also testified that Bartel established the rates of pay for the SPM staff. Boragno also recalled one instance when salesman Joe Stanford asked for a pay increase and he referred that individual to Bartel. Even Garrett felt compelled to request an increase in his commissions from his supposed subordinates in Fresno. Shortly after the meat plant reopened, Boragno received a written instruction from O'Neill directing him to contact a labor lawyer to pressure the Butchers to cease picketing activity at Nob Hill Meats, a customer of OMC and SPM. In August 1978, when the criminal investigation reached its zenith at the plant, the two senior managers of SPM were removed. Ladd, of course, was arrested on August 14. Boragno testified that on August 14, O'Neill came to his office and introduced him to Al Buratto and informed him that Buratto would be replacing him as SPM's general manager. Boragno further testified that O'Neill told him that he would put him to work with Turner. O'Neill and Buratto dispute Boragno's testimony by asserting that Buratto did not replace Boragno until after Boragno was disabled a week later with a heart condition and could not return to work. I do not credit their version of this event where, as here, the directors' minutes of SPM, which are dated August 17, 1978, reflect that both Ladd and Boragno were discharged on August 14, 1978.³² Moreover, the evidence showing that O'Neill recruited Buratto prior to hiring him is not seriously disputed. O'Neill asserted, however, that he engaged in this activity at the request of Garrett's successor, Stephen Diebert, but Diebert did not corroborate O'Neill's testimony in this regard. Tami Fowler testified that she was hired as a clerical employee by Burratto in December 1978, and worked until late October 1979, when she was fired by Bartel. In addition, Fowler's testimony paints a graphic picture of the day-to-day operations at the SPM office in the meat plant. According to Fowler, Bartel was frequently in the office area and she often overheard him loudly reprimanding Buratto for SPM's subpar performance. O'Neill, according to Fowler, was a less frequent visitor to SPM's office area, but she recalled one occasion when he passed through and admonished her about the shoddy filing system in the SPM offices. Boragno testified that he was present on one occasion when O'Neill severely reprimanded Reese for cattle purchases Reese had made following Reese's employment by SPM.

³² Because of the numerous other clearly manufactured corporate documents in this case, especially regarding SPM, my reliance on this document is merely as a prior inconsistent written record pertaining to Boragno's discharge. I find that the assertions in this document about the date of Boragno's discharge would not likely comport to Boragno's version of the events if that version were inaccurate.

FBP—The evidence related to the initial staffing of FBP centers around the hiring of Ronald Cox. Ronald Cox, who had worked as the plant superintendent for OMC and, as such, was the principal overseer of the production employees in the Butcher's unit, acknowledged that he was called into Bartel's office and into the presence of O'Neill, Boragno, and Bartel, he was informed that he would be working for FBP.³³ Subsequently, Cox was told in the course of a meeting with a similar group that he would be working for Turner. It appears that in the meantime, Cox obtained an application for Mitchell, the former plant engineer for OMC and the principal supervisor of the maintenance employees. Mitchell testified that Cox told him that he would be working for FBP and that he could hire whomever he wanted, but that the maintenance employees had to work on a nonunion basis. Mitchell was successful in recruiting all the former OMC maintenance employees with the exception of one individual who refused to work on a nonunion basis. In the meantime, by December 1, 1977, Cox was busy at the offices of the Alpha Agency screening applicants for production jobs on behalf of DTC, a fact that should have made it clear to Cox that he worked for DTC. Nevertheless, other evidence indicates that, to Cox, the new entities had no particular meaning. Thus, the evidence shows that Cox's name appeared on the signature card for FBP's bank account and there is in evidence an FBP check to DTC dated December 21, 1977, for an amount in excess of \$12,000, which is signed by Cox.

Having arranged for the former OMC maintenance crew to return to work for FBP, Mitchell said that he next approached Schultz and inquired whom he should speak to about the wage levels for the returning maintenance employees. According to Mitchell, Schultz told him that he would take care of the matter. Mitchell testified that thereafter he acted as an intermediary between Schultz and the maintenance crew, carrying proposals back and forth until an agreement was reached. I do not credit Turner's contrary testimony.

Mitchell also testified that he received instructions from a variety of individuals after the plant reopened. A memorandum from the elder Maxey to Mitchell recites that Mitchell was to "coordinate" his activities with Turner because Maxey was not able to be at the plant as much as he would like to. Indeed, Mitchell testified that the sole contact he had with either of the Maxeys was one occasion when he spoke to the younger Maxey concerning the purchase of some oil. Mitchell further testified that he and the maintenance crew engaged in the repair of the office building areas in the same manner as they had done with OMC. Immediately prior to the December 1977 opening of the plant, Mitchell said there was an unusual conversation that took place on the steps

³³ This acknowledgement occurred in a telephone conversation with Attorney Carter shortly before the hearing. Carter recorded the conversation with Cox's consent and that recording was received over the vigorous objections of all Respondents. Following its receipt during the General Counsel's case, Cox was not called by any of the Respondents to impugn the integrity of the recording. Although Turner and the elder Maxey both testified about the hiring of Cox, no contradictory detail was elicited.

leading to the main office at the O'Neill facility that involved Turner, O'Neill, and himself. According to Mitchell, O'Neill called to him and he approached the two other gentlemen. At that time a conversation ensued between Mitchell and Turner, but according to Mitchell, O'Neill stood by and fed Turner questions to ask Mitchell. Turner then repeated the questions in a parrot-like manner. Although O'Neill and Turner recalled this conversation, they denied that it occurred as described by Mitchell.³⁴ Moreover, in November 1978, Mitchell advised Turner that he was quitting his employment with FBP. The following day O'Neill approached Mitchell to discuss why he was quitting his employment and at one point in the extended conversation O'Neill accused him of attempting to hurt "the company."

DTC—Under DTC's agreement with FBP, DTC agreed to provide employees to FBP to perform the services of slaughtering, boning, cutting, and storing of beef and other meat products, which was essentially the work performed by employees who had been employed in the Butchers unit at OMC. FBP agreed to pay DTC an amount not to exceed 10 percent of each gross payroll during the life of the agreement. According to Turner and Maxey, there was also an oral side agreement whereby the labor costs of DTC were not to exceed \$100,000 per month. As a consequence, DTC directly employed the production labor in the slaughtering operation that began on December 12, 1977.

Following the hiring of Cox by DTC, as described above, Cox hired former OMC Slaughterhouse Supervisors Jansen, Coots, and Kanawyer. Another former OMC employee, Bolt, was hired by Cox as the boning supervisor because the former OMC boning supervisor, Labrie, retired at the time OMC closed. In addition, on November 28, 1977, Turner entered into an agreement authorizing Brewer's Alpha agency to represent DTC regarding all matters relating to wages, hours, and working conditions. According to Cox, he was informed that he should go to Alpha agency to take applications from prospective employees. Cox appears to have begun interviewing employees on approximately December 1 to hire DTC's production crew. He was assisted by Jansen. In the Ladd criminal proceeding, Cox testified that he was informed that he should not hire more than 40 percent of the employees who had previously worked for OMC. According to Cox's testimony in that proceeding, he was told to do this by Kenneth Huggins of the Alpha agency so that the employees would not vote the Union back in. Turner likewise testified in the Ladd criminal proceeding that he hired approximately 38 to 40 percent union employees for DTC. In addition, former OMC employees Mike Aguilar and Joe Toste testified that Cox alluded to the 40-percent limitation on the employment of former OMC employees by DTC when they were seeking employment with DTC. The DTC payroll records reflect that when the plant reopened on December 12, only 40 percent of its nonsupervisory employees were former

OMC employees. At the instant hearing, Cox, Turner, and Maxey denied that there was any numerical limitation on the hiring of former OMC employees, but that an attempt was made to maintain a 60-40 ratio between unskilled and skilled employees to control labor costs within the \$100,000 limitation. I do not credit this explanation. The skilled-unskilled explanation fails to explain away Cox's testimony at the Ladd trial that the object of the 60-40 ratio was really to avoid unionization. As such, testimony in the Ladd proceeding was not central to the issues there, I find Cox's testimony there to be a truthful explanation of the 60-40 ratio. Moreover, that explanation conforms to other efforts to ensure that the new entities were nonunion. Accordingly, I do not credit Huggins' denial at this hearing that he gave Cox such an instruction.

Cox also testified that on one occasion during the period he was engaged in obtaining applications for DTC employees, O'Neill telephoned him and told him that he was doing a good job. Moreover, Cox testified concerning another occasion when Huggins and he went to a nearby law office and met with an attorney (whose name he could not recall) who placed a telephone call to Erwin Bartel. Although O'Neill claimed he was unaware of the location where the Don Turner Corporation was hiring employees, neither O'Neill nor Bartel specifically denied the foregoing assertions made by Cox. There is evidence that Gregory, O'Neill's secretary, was instructed to refer prospective applicants to Alpha agency.

In approximately February 1978, Bartel concluded that there were too many employees being utilized in the kill floor operation. Notwithstanding that those employees were supposedly DTC's employees, Bartel directed Boragno to lay off some of the employees, and Boragno in turn passed this instruction along to Cox. As a consequence, it appears that some DTC employees were laid off. At a joint meeting that occurred shortly thereafter, Turner angrily asserted that Boragno was unjustified in laying off "his employees." Boragno informed Turner that he was merely passing along an instruction he received from Bartel and he was not responsible for the layoff. A heated argument ensued between Bartel and Turner over who had authority to lay off the slaughterhouse employees, with Turner asserting that Bartel had no right to lay off "his employees." It appears that O'Neill interjected himself in this dispute to inform Bartel that from that point on he was to let Turner handle the laying off of employees. Considerable testimony was elicited by the Respondents over this confrontation between Bartel and Turner on the premise that this testimony demonstrates that Turner was really operating an independent business. I find that this incident shows quite to the contrary. The fact that Bartel gave the layoff instruction in the first instance strongly supports the conclusion that, in his mind, the meat plant remained an O'Neill operation. The fact that the instruction was passed down the chain of command as it had existed at OMC (Boragno ostensibly was employed by SPM at the time) is also indicative that in essential respects, the meat plant operation was continuing as before.

³⁴ This is not the only evidence of surreptitious conduct designed to create an impression of separateness between O'Neill and the new entities. As I found Mitchell to be a generally reliable witness, I credit his version of this event.

JET—Apart from the Abattis, the key JET supervisor was William LeRoy, who had formerly been the OMC dispatcher. It is undisputed that when the new operations commenced LeRoy made all the job assignments for the JET drivers, handled reimbursements to the drivers, and processed the payroll information for the drivers. Initially, all of JET's drivers were former drivers of OMC, who were laid off when the plant closed in November. As to the hiring of these individuals, the evidence shows that LeRoy arranged a breakfast meeting with several of the drivers by telephoning them in the interim period while the plant was closed. According to driver Jim Laisne, LeRoy telephoned him at his home and asked if he was ready to go to work. After Laisne indicated that he was, LeRoy informed him that the plant was going to open again but things were going to be different; that the trucking would be separate; that John Abatti would be in charge; that the Company operating the trucks would be completely separate; that a few of the drivers—but not everyone—was being asked to return and that there would be a meeting at a Tiny's restaurant in Fresno on the morning of December 3 to go into some of the details.

Laisne testified that LeRoy opened the Tiny's restaurant meeting by telling those present that they had been asked to come because the plant was going to open again. One of the drivers present asked if the trucking company, would be Union or nonunion and LeRoy informed the group that it would be nonunion. LeRoy went on to explain that the employees at the new Company would be paid on a mileage basis rather than an hourly basis as they had been previously. In response to a question, Abatti informed those present that he was seeking to obtain an insurance policy comparable to that which OMC had with the Teamsters but that he would not be able to afford eye and dental care.³⁵ Those present were also told that they would be doing basically the same kind of work as they had previously done at OMC but that JET would not be able to take everybody back at once. Abatti told the group that once the operation was underway it might be possible to haul produce and some other materials for other individuals but their first obligation was to haul for the meat plant. Thereafter, there was a discussion regarding the order in which employees would return to work, and the meeting ended with an understanding about the callback order.

d. The financial aspects of the resumed operation

The preponderance of the evidence shows that in the absence of the financial backing of O'Neill and O'Neill-owned entities, the new entities would have been financially incapable of opening the doors of the meat plant on December 12, 1977. Thus, together the new entities were capitalized for a total of \$9000, and the payments for the capital stock of FBP and DTC were not made until May and November 1978, respectively.

Although O'Neill and Bartel testified that the continued existence of OMC looked bleak in the fall of 1977, the same does not appear to be the case regarding other O'Neill entities. As previously noted, while preparations were being made to close the meat plant on November 18, other arrangements for the extensive financing of O'Neill Cattle Feeding, Inc., were being made with the Wells Fargo Bank. In this respect, the evidence shows that the bank extended a line of credit in the amount of approximately \$1,800,000 to O'Neill Cattle Feeding in late 1977, secured by a lien on O'Neill Cattle Feeding accounts receivables and inventory.

The evidence is undisputed that in the first month of SPM's operation it existed solely on the income it generated from the sale of cattle provided by O'Neill Cattle Feeding, which did not demand immediate payment for cattle consigned to SPM for sale. Thus, SPM's records for the period between December 12, 1977, and January 12, 1978, shows that O'Neill Cattle Feeding provided SPM 6160 head of cattle for a "guaranteed" price of \$2,666,916.27. The first evidence of payment by SPM to O'Neill Cattle Feeding is a voucher reflecting a \$50,000 payment on December 29, 1977. These same records show that by the time this first payment was made SPM had received cattle valued at \$1,809,797.50 for sale. These cattle were being regularly slaughtered in the former O'Neill facility by FBP using DTC labor, and the processed meat was transported to SPM's customers by JET.³⁶ The financial records show that between December 30, 1977, and January 18, 1978, SPM made payments to O'Neill Cattle Feeding in the amount of \$1,307,277.82. Based on these records, by January 18, 1978, SPM owed O'Neill Cattle Feeding at least \$1,359,638.45. By deferring demand for payments from SPM, substantially all the working capital for the resumed operation was being supplied by O'Neill operations. Because there was a 2-to-4-week lag time between the furnishing of cattle by O'Neill Cattle Feeding and SPM's receipt of payments from customers, O'Neill Cattle Feeding appears to have encountered difficulties in keeping its payments to Wells Fargo Bank current.

As a consequence, in February 1978, O'Neill made an application at the Wells Fargo Bank on behalf of SPM for a line of credit in the amount of approximately \$2 million so SPM could be put on a pay-as-you-go basis with O'Neill Cattle Feeding. There is no evidence that any of the officers of SPM authorized O'Neill to undertake such action or that they even knew such action was being undertaken.³⁷ Regarding SPM's application, the Wells Fargo Bank assigned an accounts receivable financing credit officer, Doug Anderson, to conduct an investigation of SPM. A significant part of Anderson's report reads in haec verba:

Subject: Feasibility of Accounts Receivable Financing for:

³⁵ In fact, JET did provide its employees with a health care plan arranged through the Western Meat Packers Association. Abatti testified that he arranged this coverage through Schultz even though he (Abatti) was not a member of the Association.

³⁶ Because of the finite cooler space to store the processed meat, SPM's role in the operation was critical from the further standpoint of disposing of the perishable product to the customers.

³⁷ It would be absurd to conclude that O'Neill, Ltd.-SPM service agreement authorized such action.

Sierra Pacific Meat Co., Inc.
2336 So. Fruit Ave.
Fresno, Ca.

Telephone: (209) 486-4611

Person Contacted: Erwen Bartel, Exec. Vice President

Type of Business: Dealer of Beef—Distributor of pork products under Wilson Brands.

Background: A California corporation chartered in 1977, commencing operations on 12/12/77. *Although ownership of Sierra Pacific Meat Co., Inc. and Fresno Beef Processors Inc., Slaughterhouse operation is not directly linked to O'Neill's operation, the purpose of re-organizing O'Neill Meat Co., was to separate the sales and Slaughterhouse functions. O'Neill Meat Company until it was discontinued in September 1977 had been under pressure by the union for larger wage demands and increased taxation by various public agencies.*

Scope of operation: Sierra Pacific Meat Co., Inc. was created to sell beef and distribute Wilson Pork Products, formerly operated by O'Neill Meat Company, Slaughterhouse operations formerly run by O'Neill Meat Co. are now leased to Fresno Beef Processors Inc. Fresno Beef Processors Inc., custom kills the cattle purchased from various feed lots on a fixed fee basis. At the present time all of the cattle appear to be purchased for O'Neill by Sierra Pacific and Comingled in O'Neills feed lots to be Slaughtered by Fresno beef processors and sold by Sierra Pacific. Marketing of the beef and pork products is done by the former employees of O'Neill Meat Co., on a commission basis, with sales extending to large chain stores, Independent and other Wholesalers, Terms of Sierra Pacific are Net seven days, however, larger customers are allowed up to twenty eight days without being pressured for payments.

Accounts Receivable Performance Summary: Average turnover days 13; Average percent Credit Memo's (Sierra Pacific) 0.1; Average EOM Accounts Accounts Receivable \$1,833,494.

Sierra Pacific Meat Company's records are handled by O'Neill on a system three computer. The records are in good condition and adequate for Accounts Receivable financing and Auditing. [Emphasis added.]

Anderson's investigation raised an unexpected problem for other bank officials because it disclosed that the bank's collateral for loans to O'Neill Cattle Feeding was being disposed of without payment. As explained by Randy Shell of Wells Fargo, the object of the line of credit, extended to O'Neill Cattle Feeding in late 1977, was to permit O'Neill Cattle Feeding to purchase cattle from a variety of sources for fattening at the O'Neill feeding pens located near Five Points, California. Using funds from the line of credit, O'Neill Cattle Feeding paid cattlemen from whom it purchased the cattle within 24 to 48 hours after delivery in accord with the usual custom in the industry. These cattle, however, were being shipped to the meat plant to be slaughtered and

were then being sold by SPM. Although the sale by SPM created an SPM account receivable from the customer, until SPM received payment it had no resources to pay to O'Neill Cattle Feeding. In this interim period between the time the fabricated beef was sold and delivered to SPM's customers and O'Neill Cattle Feeding was paid by SPM, the cattle could not be identified with a sufficient degree of specificity to permit Wells Fargo to enforce a security interest. These circumstances caused the bank to act to protect its position and it did so by placing the O'Neill accounts in its loan adjustment department in April 1978, for the purpose of either liquidating the O'Neill Cattle Feeding loan or arranging some alternative security.

There followed a protracted series of negotiations between Shell on behalf of Wells Fargo, and O'Neill on behalf of SPM and other O'Neill enterprises. Shell specifically denied participation in these negotiations by any officer or representative of SPM until the very end when he contacted Diebert essentially for the purpose of executing loan documents on behalf of SPM. The end result of the negotiations was that Wells Fargo agreed to provide SPM with a \$2.1 million line of credit for its use in making immediate payment to the O'Neill entities when it undertook to broker O'Neill Cattle. In turn, the bank received a security interest in SPM's receivables. The bank demanded, in addition, that O'Neill personally guarantee the line of credit to SPM, which O'Neill agreed to do in return for SPM's guarantee of the O'Neill Cattle Feeding loan with Wells Fargo. One other portion of the arrangement agreed on is reflected in a letter from Shell to O'Neill dated October 17, 1978, which bears O'Neill's signature in acknowledgement. It follows a paragraph dealing with the requirement that O'Neill personally guarantee SPM's line of credit and reads:

9. You agree not to create any new entities, change the method or scope of operation of any existing entities, or transfer any assets between related entities except [sic] for full market value payable in cash, without prior bank approval.

Aside from the issues presented herein as to SPM, FBP, DTC, and JET, there is no evidence that O'Neill had created new entities or changed the method or scope of operations after OMC was established in January 1977. There is no evidence that Wells Fargo was at all concerned about the transition, which occurred in January 1977. There is no corroborated evidence that Garrett, Diebert, Boragno, Ladd, or anyone else connected with SPM approved this arrangement in advance. According to Shell, SPM's line of credit at the bank was a part of a package deal. Subsequently, however, the O'Neill accounts were transferred to the Bank of America and a similar arrangement was entered into concerning SPM with the Bank of America. Notwithstanding, other evidence indicates that in 1979 O'Neill, Ltd. made large cash advances to SPM.

Although the evidence shows that separate bank accounts were maintained by the new entities, the evidence concerning the control, use, and certain transactions

shown by those accounts is not indicative of an arm's-length relationship. As already noted above, SPM's bank account was opened at Bartel's direction at a time when SPM had no business relationship with O'Neill, Ltd. or any of the affiliated O'Neill entities. There is also evidence that Cox, ostensibly employed by DTC, signed a check in the amount of \$12,288.77 to DTC, which was drawn on FBP's account on December 22, 1977, at a time when it should have been abundantly clear that he was not employed by FBP.³⁸ In addition, Mitchell testified that shortly after the plant opened, he asked Char Rosenthal, in Bartel's presence, when the checks for the maintenance crew could be distributed. Rosenthal passed the question along to Bartel and—according to Mitchell—Bartel responded that he would have to transfer money into that account first. Similar testimony was provided by Boragno. He testified that he complained about the cost of JET's services in June or July 1978, and was told by O'Neill that some of JET's money would be funneled to SPM. Later, after returning from Polles's place of business on August 11, 1978, with O'Neill, O'Neill told Boragno that he had not forgotten Boragno's request to transfer some money from JET to SPM and that he would see that it was taken care of.³⁹ Although O'Neill and Bartel denied the testimony of Mitchell and Boragno, no effort was made to rebut testimony of this nature with records of the various accounts. Thus, it would have been a simple matter to show that FBP's payroll disbursements came from an account in which regular deposits were made from receipts received for services performed. Various records of SPM and JET were offered in evidence and when the banking transactions of these two entities are compared for comparable periods of time, there is significant evidence that the transactions between these two entities were not regular. Thus, General Counsel's Exhibit 108 is Carol Abbatti's running record of the deposits to, and disbursements from, the JET account that was maintained at the United California Bank in Fresno. Among other things, this record shows the bank deposits, the specific checks drawn on the account, and her running balance in the account. It shows that the account was opened with a \$1500 deposit on or before December 19, 1977. On December 19, 1977, six checks—numbered 102-107—were drawn against the account and the running tabulation shows a balance of \$393.04 after those checks were deducted from the original \$1500. The following line on Carol Abatti's record shows a deposit to the account in the amount of \$15,894.84 and check 108 to Carol Abatti for petty cash in the amount of \$322.05 on December 22, 1977. The balance shown after deducting check 108 is \$15,965.83, which indicates that the deposit of \$15,894.84

occurred after check 107 was issued on December 19, 1977, and at least contemporaneous with the issuance of check 108 on December 22, 1977. There is no evidence that JET had any source of income in this period other than that earned hauling for SPM. SPM's bank statement for December 1977 is in evidence as General Counsel's Exhibit 31. An examination of SPM's bank statement fails to show that a check for the amount of \$15,894.83 cleared SPM's account by December 30, the close of the statement period.⁴⁰ Other evidence in the form of certain SPM payment vouchers shows that on December 27, 1977, SPM check 025 for \$2,892.22 was issued to JET. (G.C. Exh. 76.) Attached to that voucher is a summary showing that the payment was for freight bills 001-008 dated December 14 and 15, 1977. A similar voucher (G.C. Exh. 77) shows SPM check 020 was issued to JET on December 29, 1977, in the amount of \$13,002.62, for freight bills 009-036 dated at various times in the period from December 15 through 21, 1977. SPM's bank statement shows that a check in the amount of \$2,892.22 cleared that account on December 29, 1977, which indicates that SPM's payments to JET were drawn on that account. There is no evidence that the check, in the amount of \$13,002.62 cleared the account before the close of the statement period. SPM's two payment vouchers for freight bills numbered 001-036 dated between December 14 and 21, 1977, however, amounted to \$15,894.84. Based on the foregoing, it would appear that JET deposited that amount in its account approximately 1 week before SPM paid those freight bills and it is fair to infer that JET's money came from some source other than SPM. The source of that money is not explained. Moreover, SPM's bank account shows that it did not have over \$6000 in its account until December 23.

Finally, other evidence shows that Bartel and Michael Temer ordered SPM's supplies, and Mitchell testified that Bartel supplied credit references for FBP when Mitchell ordered FBP supplies. SPM did not employ a credit manager. Instead, Foy Foster, an O'Neill, Ltd. employee supplied credit advice to SPM and it appears SPM was charged for this service pursuant to the vague service agreement.⁴¹

4. Conclusions concerning the alter ego issue

Based on the foregoing evidence, it is my judgment that the record in this case preponderates heavily in favor of the conclusion that SPM, FBP, DTC, and JET constitute the alter ego of OMC and, further, that those four entities together with O'Neill, Ltd. and FELC constitute the alter ego of the entities that operated the meat plant prior to November 18, 1977.

Although it may be true that the formal ownership of the new entities was vested in individuals other than O'Neill, the foregoing evidence demonstrates that

³⁸ The elder Maxey sought to explain this occurrence away as a by-product of the earlier mixup between Turner and himself regarding who would employ Cox. I find Maxey's explanation to be a fabrication especially where, as here, Cox did not corroborate any portion of this testimony.

³⁹ In fact, in late June 1978, the lease agreement between FELC and JET was voluntarily "renegotiated" to increase the lease price for the equipment leased by JET. Abatu testified, in effect, that he was motivated to agree to such a midterm modification in order to maintain the goodwill of FELC. Commencing August 15, 1978, JET's lease payments to FELC increased by slightly less than \$3600 per month.

⁴⁰ In his testimony, Bartel mentioned another SPM bank account that he alluded to as a "collateral" account. The evidence detailed here, however, makes it clear that SPM's payments to JET were not drawn on that account.

⁴¹ Although some of OMC's customers were lost in the transition to the new entities, it appears that many of the major accounts were eventually recovered.

O'Neill's equitable interest in the operation, which was conducted at the meat plant after December 12, 1977, is so overwhelmingly dominant as to warrant the conclusion that O'Neill's interest was nearly tantamount to ownership. By comparison, the evidence shows that O'Neill effectively contributed the plant and equipment as well as \$2 million worth of cattle to establish operations in December 1977, whereas Garrett, the Maxeys, the Turners, and the Abattis pledged \$9000 (some of which was not paid until much later) and contributed some of their time. In an isolated context, the evidence regarding JET's legitimacy is, comparatively speaking, by far the most compelling. Thus, in addition to the ownership aspect, there is evidence that Abatti had previously been engaged in the trucking business albeit not on the scale achieved by JET; that Abatti and his wife drew substantial salaries from JET's income; that JET was licensed as a common carrier by the California Public Utilities Commission (PUC) and charged rates specified by PUC; that unlike OMC, which operated as an inhouse carrier, JET employed an independent rater for billing purposes; that JET eventually hauled for other unrelated entities; that JET maintained its bank account at an institution other than that used by the O'Neill entities; and that a substantial portion of JET's insurance business was placed with an agent who had served Abatti's other insurance needs. In addition, there is no evidence that O'Neill, or any official of an O'Neill entity, played a direct role in the hiring or discharge of JET's employees or the setting of their wages and benefits. On the other hand, Abatti's own testimony shows that although he was purportedly concerned about the impact the closing of OMC would have on his livestock hauling operation, he did nothing to secure that business from the new entities until after he had made all the arrangements to lease the refrigerated units formerly used by OMC and to obtain the processed meat hauling. Although it might be argued that this evidence simply shows that Abatti was seizing a new business opportunity, the fact of the matter is that Abatti's own testimony shows that he leased the refrigerated units before he ever knew whether there would be any processed meat hauling business available to a common carrier from the meat plant. Moreover, the fact that Abatti leased all the refrigerated units at once, even though it is evident that there was no use for all the units at the time the meat plant reopened and there is no evidence that he was soliciting independent business until much later, as well as the fact that he informed his drivers that their first priority was the meat plant products, warrants the inference that Abatti's unusual business risks were of substantial benefit to O'Neill and the other new entities.⁴² When these circumstances are considered, together with the vague use agreement and unsecured leases that JET maintained with FELC, the fact that there is evidence that JET's receipts do not coincide with the disbursements of SPM—its only customer at the time—Abatti's predisposition to modify the lease prices upward in midterm, and the record as a whole, I am satisfied that a preponderance of

the evidence establishes that, notwithstanding the evidence of its alleged independence, even JET existed at O'Neill's sufferance and for the purpose of achieving the labor relations aims of O'Neill.

In sum, the circumstances shown here merit the inference that the owners of the new entities were nothing more than fronts for O'Neill—a practice which was not the least bit foreign within O'Neill's organizations as evidenced by the manner in which corporate officers of O'Neill organizations were appointed and removed. It is also clear that the new entities were treated as such by the Wells Fargo Bank and by Indio properties. The conclusion that the new entities were mere fronts, used by O'Neill and his enterprises to conduct the meat plant operation, is the only explanation provided by this record for the wide variety of circumstances, shown by the evidence discussed above, including:

1. The bizarre lack of interest or activity by Eric Garrett in the affairs of SPM whose income was vital to the existence of the other three entities;
2. The lack of any credible explanation for the degree of involvement by O'Neill, Bartel and other officials of the O'Neill owned enterprises in the day-to-day affairs and policy making decisions of the new entities including significant labor relations matters;
3. The failure of any of the new entities to provide by way of rebuttal to the General Counsel's *prima facie* case convincing evidence of a financial capacity to even undertake an operation such as was conducted at the meat plant after December 12, 1977, or any evidence other than their own self-serving statements that they were truly independent enterprises;
4. The charades practiced to create an impression of separateness even within the Respondents' own house;
5. The unconvincing nature of the Respondents' explanation that the four new entities developed into such a highly integrated operation within such a short time span and with only an insignificant amount of prior planning and coordination;
6. The lack of any managerial or supervisory staff developed independent of the former OMC management and supervision while at the same time disregarding a significant portion of the former OMC production employees;
7. The significant indicia present even before OMC ceased operating the plant that the meat plant would continue operating after the announced closing date to serve OMC's customers.

Apart from the foregoing, there is substantial evidence that O'Neill had become increasingly preoccupied with reducing the financial losses suffered by his business enterprises and that immediately prior to the cessation of operations by OMC, he applied considerable pressure on the labor organizations that represented the meat plant employees to modify the labor agreements that were less than a year old. When this fact is considered together with Cox's testimony at Ladd's criminal trial that effort

⁴² In fact, there is no evidence that Abatti even attempted to lease only the units that he would require when JET commenced operating

was made to prevent the reemergence of the labor organizations in the operation conducted after December 12, 1977, and the further evidence that both JET and FBP employed a quasi "yellow dog" policy regarding the re-employment of the drivers and maintenance employees, the inference is inescapable that the business organizations that operated the meat plant after OMC were primarily an elaborate device designed to avoid the obligations of the labor agreements and the Act. This finding is further supported by the bad-faith nature of the bargaining over the effects of the closing of OMC.

For the foregoing reasons, I find that SPM, FBP, DTC, and JET are simply the alter ego of OMC and, as these four alter ego entities were related to O'Neill, Ltd. and FELC in a manner almost identical to OMC, I further find that O'Neill, Ltd., FELC, and the four alter ego entities have been a single employer at all times since the meat plant resumed operating December 1977. *NLRB v. Big Bear Super Markets*, supra; *Circle T Corp.*, supra; *Crawford Door Sales Co.*, supra.

5. The procedural defense

The Respondents believe that the complaint should be dismissed for procedural reasons on the ground that the General Counsel had no basis for issuing the amended consolidated complaint after having formally refused to do so. In effect, the Respondents assert that under the circumstances shown here, the General Counsel lacked authority to revive the charges, *sua sponte*, after having once dismissed them. In response to this argument, the General Counsel asserts that he properly acted within the scope of the authority vested in him in Section 3(d) of the Act.

Concerning the procedural issue thus raised; the evidence shows that the charge in Case 32-CA-828 was initially filed by the Butchers on April 12, 1978. It alleged that "O'Neill Meat Co. and/or O'Neill, Ltd. and/or Food Equipment Leasing Co." violated Section 8(a)(1), (3), and (5) of the Act in the previous 6 months by changing "the name and style under which business was conducted in order to avoid the negotiated agreement [with the Butchers]" and "engaged in a series of devices or subterfuges to claim separate entity status in order to avoid the [Butchers] agreement."

The charge in Case 32-CA-928 was initially filed by the Teamsters on May 11, 1978, against the same Respondents as were named in the Butchers' charge of April 12, 1978. In addition the basis for the Teamsters charge was precisely the same as that alleged in Case 32-CA-828. Both of the aforesaid charges were duly served on the Respondents at the Fruit Street address of the O'Neill entities in Fresno, California.

By separate letters dated June 28, 1978, the Regional Director for Region 32 notified the Teamsters and the Butchers (with copies to the charged Respondents) that he was refusing to issue a complaint on either of the charges. The Regional Director's stated reasons were as follows:

The investigation disclosed that in November of 1977, O'Neill Meat Co. ceased operations and laid off all of its employees. Thereafter several new

companies, including Turner Corporation, Fresno Beef Processors, Inc., Sierra Pacific Meat Co., and J&E Transport, Inc., assumed a function of the former O'Neill Meat Co. and began operations at the plant of O'Neill Meat Co. However, there is no evidence that Ed O'Neill, owner of O'Neill Meat Co., has any ownership in the aforementioned companies, nor is there evidence that Ed O'Neill maintains any control of the four new companies. Under these circumstances it cannot be concluded that O'Neill Meat Co. has engaged in a series of devices and subterfuges to claim separate identity in order to avoid bargaining with the union and being bound to the collective bargaining agreement with the union.⁴³

Following the dismissal of the charges, the Butchers filed a timely appeal of the Regional Director's action in refusing to issue a complaint regarding Case 32-CA-848. No appeal was filed by the Teamsters with respect to Case 32-CA-928. By letter dated August 24, 1978, the General Counsel sustained the Regional Director's action in refusing to issue a complaint in Case 32-CA-848. Hence, by the end of August 1978, the proceedings on both charges had been effectively terminated by the General Counsel.

Notwithstanding the foregoing action, the General Counsel by letter dated November 15, 1978, notified the Butchers and the named Respondents that his office was in receipt of "newly discovered evidence" not previously available prior to the August 24, 1978 decision denying the appeal in Case 32-CA-848. The nature of that evidence was not specified. Accordingly, the General Counsel revoked his decision of August 24 and remanded the case to the Regional Director for further processing. By letter dated November 21, 1978, the acting Regional Director notified all the parties in Case 32-CA-848 that he was rescinding the June 28, 1978 letter refusing to issue a complaint and was reinstating the charge for further processing on the basis of "newly discovered" evidence. The Regional Director took similar action regarding the charge in Case 32-CA-928 on January 18, 1979.

Following the reinstatement of the charge in Case 32-CA-848, the Butchers amended that charge on January 3, 1979, to allege additional Respondents as parties, namely, SPM, FBP, DTC, and JET. This was the first occasion any of these four entities had been named in any charge. Subsequently, on January 22, 1979, the Butchers again amended the charge in Case 32-CA-848 for the purpose of alleging Edwin R. O'Neill as a Respondent in his individual capacity and for the further purpose of deleting JET as a Respondent.⁴⁴

On February 8, 1978, the Teamsters amended the reinstated charge in Case 32-CA-928 to allege Edwin R.

⁴³ The quoted language is from the dismissal letter in Case 32-CA-848. The dismissal letter in Case 32-CA-928 is practically identical.

⁴⁴ It is reasonable to infer on the basis of the record that the reason for the deletion of JET as a Respondent under the charge filed by the Butchers resulted from the fact that JET never performed any functions that required it to employ individuals in work categories previously represented by the Butchers

O'Neill, in his individual capacity, JET, and DTC as Respondents in addition to those it had originally charged.

On January 30, 1979, the Regional Director issued a complaint in Case 32-CA-848 alleging that Edwin R. O'Neill, an individual, O'Neill, Ltd., FELC, Amalgamated Meat Company, f/k/a OMC, FBP, DTC, and SPM violated Section 8(a)(1), (3), and (5) of the Act. Subsequently, separate answers were filed on behalf of each of the Respondents.

On April 27, 1979, the Regional Director issued an order consolidating cases, amended consolidated complaint, and notice of hearing in Cases 32-CA-848 and 32-CA-928. In terms of the named parties, the Teamsters, of course, were added to the proceedings as the charging party in Case 32-CA-928 and JET was added to the list of Respondents. The amended consolidated complaint alleged that the Respondents had collectively violated Section 8(a)(1), (3), and (5) of the Act. Again separate answers were timely filed by each of the named Respondents denying the alleged unfair labor practices and asserting certain affirmative defenses.

Regarding the affirmative defenses, the answers uniformly alleged that the action of the General Counsel in issuing the instant complaint was precluded by Section 10(b) of the Act. All the Respondents, except FBP, also alleged the following as an affirmative defense:

AS A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE, the Board is precluded by application of its own Regulations, the Administrative Procedures Act and general equitable principles from taking further action in this matter.

Additionally, JET alleged that it had not been served with a copy of the charge and Edwin R. O'Neill alleged that the action against him was barred by the principle of laches. The remaining affirmative defenses relate to the sufficiency of the complaint to state a cause of action; a failure in JET's instance of the Teamsters or the Butchers to demand recognition or bargaining, as well as a lack of majority by either Union among the JET employees; and an allegation by DTC and the O'Neill Respondents that the relief sought by the Board would violate the Section 7 rights of affected employees, all of which I find lack merit.

The amended consolidated complaint alleges that the named Respondents constitute a single employer, or a joint employer, and that all are alter egos of one another. The service of a charge on anyone of a group of employers that legally constituted a single employer or an alter ego constitutes adequate service of the charge as to all in that group. *Sturdevant Sheet Metal & Roofing Co.*, 238 NLRB 186 (1978). The evidence here shows that the original charge in both cases was properly served on O'Neill Meat Company, O'Neill, Ltd. and Food Equipment Leasing Company within the 6-month period provided by Section 10(b). As it is my conclusion that the employing entity comprised of O'Neill, Ltd., FELC, FBP, DTC, SPM, and JET constitute an alter ego of the employing entity comprised of O'Neill, Ltd., FELC, and OMC regarding the operation of the meat plant, I find that the charges were timely served on all of the named

Respondents and that this proceeding is not barred by Section 10(b) of the Act concerning any of the Respondents.

Regarding the affirmative defense that the General Counsel and the Regional Director lacked authority to revoke the original dismissal of the charges and to reinstate them, it is argued that they lacked a basis for such action as no formal motion for reconsideration was filed pursuant to Section 102.19(c) of the Board's Rules and Regulations.⁴⁵

On the basis of the Supreme Court's holding in *Arizona Grocery Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 284 U.S. 370 (1932), the Respondents contend that the General Counsel, the Regional Director, and all parties to the cases were obliged to strictly follow Section 102.19(c). As the Butchers and the Teamsters failed to show: (1) that they filed a motion for reconsideration under Section 102.19(c) of the Board's Rules and Regulations; (2) that there was any newly discovered evidence following the dismissal of the charges; or (3) that any newly discovered evidence was unavailable prior to the General Counsel's decision on appeal in Case 32-CA-848 and the Regional Director's action in Case 32-CA-928, no basis existed for reopening either case. Under these circumstances it was argued that it was inappropriate to reinstate the charges because the 6-month limitation period had expired. In support of this argument, the Respondents also relied on *NLRB v. Lane Aviation Corp.*, 615 F.2d 399 (6th Cir. 1980); *Heat Research Corp.*, 243 NLRB 206 (1979); *Eltra Corp.*, 225 NLRB 1 (1976); *Douglas Aircraft Co.*, 202 NLRB 305 (1973); and *Forrest Industries*, 168 NLRB 732 (1967). In addition, certain of the Respondent's called attention to *California Pacific Signs*, 233 NLRB 450 (1977), which holds contrary to the general proposition they advanced here but argues that the holding in that case is inconsistent with Section 10(b) of the Act—the 6-month statute of limitations provision.

It is obvious from the circumstances of this case that the General Counsel concluded shortly after the denial of the Butchers' appeal that that determination was mistaken. Following this conclusion, the Regional Director followed suit regarding the Teamsters charge. The timing of those conclusions are not surprising inasmuch as it was shown that the Butchers did communicate with the General Counsel after the Butchers' appeal was denied, and that Ladd had been arrested and had com-

⁴⁵ Sec. 102.19(c) of the Board's Rules and Regulations provides as follows:

(c) The General Counsel may sustain the Regional Director's refusal to issue or reissue a complaint, stating the grounds of his affirmation, or may direct that the Regional Director take further action; the General Counsel's decision shall be served on all the parties. A motion for reconsideration of the decision must be filed within 10 days of service of the decision, except as hereinafter provided, and shall state with particularity the error requiring reconsideration. A motion for reconsideration based upon newly discovered evidence which has become available only since the decision on appeal shall be filed promptly on discovery of such evidence. Motions for reconsideration of a decision previously reconsidered will not be entertained, except in unusual situations where the moving party can establish that new evidence has been discovered which could not have been discovered by diligent inquiry prior to the first reconsideration

menced providing information to representatives of the Butchers. Considering the nature of Ladd's testimony at the hearing and the fact that the Respondents did not attempt to impeach Ladd by showing that his hearing testimony was a recent fabrication not contained in his pre-hearing statements, it is fair to infer in these circumstances that the information provided by Ladd came to the attention of the General Counsel and caused concern about the validity of his determination. The action by the General Counsel regarding the Butchers' charge, and the Regional Director regarding the Teamsters' charge, was initially for the purpose of conducting additional investigation. The first complaint did not issue until much later. Hence, even assuming that the "new evidence" that the General Counsel alluded to in reopening the Butchers' charge was grounded on the disclosures of Ladd, it would be difficult to conclude that the General Counsel and the Regional Director arbitrarily seized on such information in order to issue a complaint against the Respondents.

In *California Pacific Signs*, supra, the General Counsel reinstated a timely filed charge some 10 months after the alleged unfair labor practice, notwithstanding that he had denied the charging party's appeal and the charging party made no formal motion for reconsideration. In refusing to dismiss the complaint ultimately issued by the General Counsel on the ground that the reinstatement of the charge was barred by Section 10(b) of the Act, the Board reasoned:

Section 10(b) of the Act provides that no complaint shall issue based on any unfair labor practice occurring more than 6 months prior to the filing of a charge with the Board. This section, however, relates only to the actual filing of charges and, once a charge has been timely filed, the control over, and disposition of, that charge is vested exclusively with the General Counsel pursuant to Section 3(d) of the Act. The General Counsel thus has virtually unlimited discretion to proceed on such timely filed charges as he deems fit and, in the absence of a showing of abuse of discretion, the Board will not interfere with General Counsel's exercise thereof. This is not to suggest that a charging party may file a charge, voluntarily withdraw it, and subsequently reinstate it more than six months later.

[T]he charge here was neither voluntarily withdrawn by the Charging Party or reinstated at the Charging Party's request. Rather, the General Counsel, relying on newly discovered evidence, exercised the discretionary authority given to him by Section 3(d) of the Act and reinstated the charge. As previously stated, the Board will not interfere with the General Counsel's exercise of his discretionary authority unless it can be shown that such authority was abused. Respondent here has not alleged, much less proved, that the General Counsel, in reinstating the charge, abused his authority. In the absence of such proof, we find the reinstatement of [the] charge was proper and not time barred by

Section 10(b) of the Act. Accordingly, we shall dismiss the Respondent's exception.

The circumstances shown here require a careful balancing of the strictures of Section 10(b) of the Act with interests of justice. On the one hand, after rectifying his initial mistake in dismissing the instant charges, the General Counsel went forward to prove—in my judgment—a massive and deliberate violation of the Act. On the other hand, parties in proceedings before the Board are entitled to rest assured at some point that the proceeding is over and further action on such conduct is time barred. In *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960), the Supreme Court observed that the policies underlying Section 10(b) of the Act were:

... to bar litigation over past events after records have been destroyed, witnesses have gone elsewhere, and recollections of events in question have become dim and confused

Nevertheless, it also is a well-established proposition that public officials are typically vested with the discretion to reconsider prior mistaken administrative actions to serve the interests of justice. *NLRB v. Baltimore Transit Co.*, 140 F.2d 51, 55 (4th Cir. 1944), cert. denied 321 U.S. 795 (1944), and cases cited therein.

Contrary to the contention of the Respondents that *California Pacific Signs*, supra, represents, in effect, a subterfuge employed by the Board to avoid the effects of Section 10(b), it is my conclusion that the Board's decision there represents a reasoned effort to accommodate the foregoing legal policies. This judgment is borne out by other similar cases. Thus, in *Forrest Industries*, supra, and *Douglas Aircraft*, supra, the Board specifically acknowledged that the General Counsel was vested with discretion in discharging his responsibility under Section 3(d) of the Act, but it declined to treat those cases on their merits because it felt the circumstances did not warrant disregarding the limitations period. On a petition for review in *Douglas Aircraft*, the court of appeals promptly disagreed and remanded the case to the Board for further proceedings on the merits. See *Mourning v. NLRB*, 505 F.2d 421 (D.C. Cir. 1974). In other circumstances, the courts have enforced the Board's orders that approved the General Counsel's actions in reinstating a dismissed charge long after the expiration of the statute of limitations period when it was shown that such action was consistent with the overall purposes of the Act. *NLRB v. Iron Workers Local 272*, 427 F.2d 211 (5th Cir. 1970). Even less compelling is *NLRB v. Central Power & Light Co.*, 425 F.2d 1318 (5th Cir. 1970).

Moreover, the Board was careful in its *California Pacific Signs* decision to emphasize the distinction presented by a dismissed charge and a withdrawn charge. In the past, the courts have been critical of the Board for permitting, on occasion, the reinstatement of a withdrawn charge. *NLRB v. Silver Bakery of Newton*, 351 F.2d 37 (1st Cir. 1965); *NLRB v. Electric Furnace Co.*, 327 F.2d 373 (6th Cir. 1964). The difference between the nature of a dismissed charge and a withdrawn charge is not without significance. A withdrawn charge is disposed of

without an official determination on the merits and is often the result of a totally voluntary act by the charging party. By contrast, the dismissal of a charge by the General Counsel represents the exercise of his authority pursuant to Section 3(d) of the Act, which is widely regarded as unreviewable. See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Hence, the situation posed by the dismissed charge always presents the potential for the eternal perpetuation of error by the General Counsel in the exercise of his official duties unless the General Counsel is vested with the inherent discretion to reinstate a dismissed charge for further consideration.

From the foregoing, I cannot impugn to the Board the ulterior motives that the Respondents seem to see in the *California Pacific Signs* decision. On the contrary, it would appear that the Board's careful balancing of the various policies involved in these situations warrant judicial approval. Compare *Bill Johnson's Restaurants v. NLRB*, 660 F.2d 1335 (9th Cir. 1981). Applying *California Pacific Signs* to the facts here, I find that the General Counsel was justified in reinstating these cases. The Respondents here have failed to show how the General Counsel abused his discretion, and make no claim that they were prejudiced in the presentation of their defense by the destruction of records, the unavailability of witnesses, or the inability of witnesses to recall events. On the contrary, several of the defense principals here testified in the Ladd case concerning many of the events and circumstances that are highly pertinent in this case. Hence, I find it difficult to see how the 2-1/2-month lapse between the General Counsel's action on the Butchers' appeal on August 24, 1978, and the reinstatement of the charge for further processing on November 15, 1978, can be said rationally to be a sufficient period to cause materials and memories significant to the defense to vanish. I am likewise satisfied that the Respondents' technical argument concerning Section 102.19(c) of the Board's Rules and Regulations lacks merit. A careful reading of the Supreme Court's opinion in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway*, supra, discloses that the court there was dealing with what has come to be known in administrative law as a "substantive" rule, i.e., a maximum rate, as opposed to an agency procedural rule similar to Section 102.19(c). See *Chrysler Corp. v. Harold Brown, Secretary of Defense*, 441 U.S. 281, 301 (1979). Although it is true that procedural rules may and do occasionally affect substantive rights, an agency has discretion to apply its procedural rules to achieve a just and legitimate purpose. *Ranger v. F.C.C.*, 294 F.2d 240 (D.C. Cir. 1961). As it is my conclusion that the General Counsel acted to reopen the dismissed charges in this case to reform his earlier mistake in dismissing them, I find that it was unnecessary for him to await the filing of a 102.19(c) motion for reconsideration before doing so. For the foregoing reasons, I find that the charges in Cases 32-CA-848 and 32-CA-928 were timely filed and that the complaint is not barred by Sec-

tion 10(b) of the Act or by operation of the Board's Rules and Regulations, as claimed.⁴⁶

6. Concluding findings

Having concluded that the employing entity consisting of O'Neill, Ltd., FELC, SPM, FBP, DTC, and JET constituted an alter ego of the employing entity previously comprised of O'Neill, Ltd., FELC, and OMC when the meat plant resumed operations in December 1977, and that the Respondent's procedural defenses lack merit, other conclusions follow logically. See *Circle T Corp.*, supra at 249-250.

As noted, the object of supplanting OMC with SPM, FBP, DTC, and JET in the makeup of the employing entity was designed primarily to avoid the existing labor agreements and the obligation to deal with the designated employee representatives. Accordingly, any actions against employees adversely affecting their hire or tenure or term and condition of employment to achieve this purpose are, ipso facto, motivated by a discriminatory purpose. Hence, the Respondents' actions in terminating any employee regardless of whether the employee was a member of the bargaining units represented by the Butchers or the Teamsters for the object of implementing this discriminatory object or plan violates Section 8(a)(3) of the Act. Accordingly, I find that all employees who were terminated in November 1977, in furtherance of the Respondents discriminatorily motivated plan were discriminated against within the meaning of Section 8(a)(3) of the Act. I further find that refusing to reinstate all such employees to their former positions, when the Respondents resumed the operation of the meat plant on December 12, 1977, was motivated by the same discriminatory purpose and also violated Section 8(a)(3) of the Act.

It is my conclusion that O'Neill, Ltd., FELC, and OMC constituted a single employer of the meat plant employees at all times between January 1, 1977, and November 23, 1977. This conclusion leads to the further conclusion that the collective-bargaining agreements executed by OMC with the Butchers and Teamsters in February and April 1977, respectively, were binding on all the business enterprises comprising the single employer. It follows that when that employing entity was supplanted in late 1977 with an alter ego consisting of O'Neill, Ltd., FELC, SPM, FBP, DTC, and JET, the alter ego employing entity was likewise bound to the aforementioned collective-bargaining agreements. In addition, by resuming operations in December 1977 without applying the terms and conditions contained in those collective agreements it is reasonable to conclude, as I have, that the alter ego employing entity effectively repudiated the collective agreements. Such conduct violates Section 8(a)(5) of the Act. Similarly, there is no dispute about the fact that the alter ego employing entity engaged in no bargaining with either the Butchers or the Teamsters in establishing either the initial or any subsequent wages,

⁴⁶ To the extent that the defense of laches has been proffered, I similarly find that defense lacks merit. *W. C. Nabors*, 134 NLRB 1078 (1961), affd. 323 F.2d 686 (5th Cir. 1964).

hours, or other terms and conditions of employment as it was obliged to do. Accordingly, I find that the Respondents violated Section 8(a)(5) of the Act by unilaterally altering the wages, hours, benefits and other terms and conditions of employment when the operations resumed in December 1977. Finally, the evidence here merits the inference that the Respondents declined to otherwise recognize and deal with both the Butchers and the Teamsters as the representative of the employees in the units found appropriate. I find that such conduct also violated Section 8(a)(5) of the Act.

7. Edwin R. O'Neill's individual liability

Heretofore, the conclusions have treated the liability of the various business enterprises that are named as the Respondents. The complaint also names Edwin R. O'Neill as a Respondent in his individual capacity. At the conclusion of the General Counsel's case, Respondent O'Neill moved for dismissal of the complaint insofar as it alleged him individually as a Respondent and I deferred ruling on that motion until this decision.

The General Counsel argues that the facts here warrant the conclusion that O'Neill's control over the other Respondents here and his individual conduct in the commission of the unfair labor practices warrants "piercing the corporate veil" to impose liability on O'Neill individually in order to prevent inequity and the frustration of the policies of the Act. Relying on *NLRB v. Deena Artware*, 361 U.S. 398 (1960), and its progeny, Respondent O'Neill argues that he should not be held personally liable when, as here, there is no evidence that he diverted any of the assets of any of the corporations for his own personal gain. O'Neill also asserts that any conclusion that the corporate entities involved here were mere shells used to hide O'Neill's personal assets would not be warranted and, therefore, piercing the corporate veil grounded on such a theory would not be justified.

The findings made above show that O'Neill owned substantially all the stock of O'Neill, Ltd. and that the other O'Neill enterprises were subsidiaries of that corporate entity. Even the insignificant remaining portion of the O'Neill, Ltd. stock held by the employee stock ownership trust is subject to O'Neill's domination where, as here, there exists a requirement that the trustees of that trust be an employee of the O'Neill entities. The previous findings also show that O'Neill completely dominated the various corporate entities; that he changed the character of some entities; that he activated and deactivated corporate entities at will; and that he changed the officers of his corporate entities (none of whom held any stock whatsoever) at will. O'Neill himself testified in this case that the object in changing the name of OMC after it dropped out of the picture in the meat plant operation was due to the anticipated bankruptcy of that corporation and his personal desire that the O'Neill name not be publicly stigmatized in this fashion. In addition, regarding the four new entities that came into being in November and December 1977, the findings made show that the formal owners of these corporate entities were all former business associates, of one kind or another, and their wives. Those corporations literally owed their economic life to O'Neill's willingness to risk the assets of the enti-

ties that he owned. The evidence is overwhelming that SPM, which was the financial keystone of the four new entities, was simply abandoned—lock, stock, and barrel—by Eric Garrett and Stephen Diebert to the control and use of O'Neill owned enterprises. Additionally, O'Neill risked substantial amounts of his own personal assets by guaranteeing the loans of SPM and the lease of FBP to assure their continued presence and to avoid a financial calamity for the corporate entities that he owned. The overall objective of this conduct was designed to repudiate burdensome labor agreements and the obligation to deal with the employee representatives.

The foregoing findings demonstrate conclusively that O'Neill personally was the dominant figure in the plan of evasion that I have described above and that he committed substantial personal assets to achieving this goal. The findings also demonstrate a proclivity to abuse the corporate form on O'Neill's part to aid and abet his unlawful objectives. Accordingly, I find that in the absence of imposing personal liability on O'Neill for the unfair labor practices that have been found, it is most likely that the remedy provided and the purposes of the Act will be totally frustrated. Based on the entire record, I find O'Neill is the alter ego of O'Neill, Ltd. and its subsidiaries and is individually responsible for the unfair labor practices. *Carpet City Mechanical Co.*, 244 NLRB 1031, 1034 (1979); *Certified Building Products*, 208 NLRB 515 (1974); *Ogle Protection Service*, 147 NLRB 545, 546 fn. 1 (1964); *Industrial Fabricating*, 119 NLRB 162 (1957).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Edwin R. O'Neill, an Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc., set forth above, occurring in connection with their operations, described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to cause, and have caused, labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Edwin R. O'Neill, an Individual; O'Neill, Ltd.; Food Equipment Leasing Company; and Amalgamated Meat Co., f/k/a O'Neill Meat Company, constituted a single employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act at all times between January 1 and November 23, 1977.

2. At all material times after November 23, 1977, Edwin R. O'Neill, an Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc. have been the alter ego of O'Neill, Ltd.; Food Equipment Leasing Company; and Amalgamated Meat Co., f/k/a O'Neill Meat Company, and have been a single employer within the meaning of Section 2(2) of the Act, engaged in com-

merce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America are each a labor organization within the meaning of Section 2(5) of the Act.

4. At all times material, United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America have been the exclusive collective-bargaining representatives of the employees in the appropriate units described below within the meaning of Section 9(a) of the Act:

United Food & Commercial Workers Union, Local 126, AFL-CIO: All slaughterhouse and meat-packing employees employed at the O'Neill Meat Plant in Fresno, California, including kill floor, cooler, boning, Cry-0-Vac, loading and maintenance employees; excluding drivers, salesmen, office clericals, guards and supervisors as defined in the Act.

General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America: All Drivers employed at the O'Neill Meat Plant in Fresno, California; excluding all other employees, guards and supervisors as defined in the Act.

5. By terminating the employees of the O'Neill meat plant in Fresno, California, on or about November 18 and 23, 1977, for the purpose of avoiding the terms and conditions of labor agreements then in effect and to avoid certain obligations under the Act, Edwin R. O'Neill, an Individual; Food Equipment Leasing Company; and Amalgamated Meat Co., f/k/a O'Neill Meat Company violated Section 8(a)(1) and (3) of the Act.

6. By refusing to reinstate the employees employed at the meat processing facility described above in paragraph 5, Edwin R. O'Neill, an Individual; O'Neill Ltd.; Food Equipment Leasing Company; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company; and J & E Transport, Inc., violated Section 8(a)(1) and (3) of the Act.

7. At all times after November 18, 1977, Edwin R. O'Neill, an Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co., f/k/a O'Neill Meat Company; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc., violated Section 8(a)(1) and (5) of the Act by repudiating, or causing to be repudiated, the collective agreements then in effect and applicable to the employees in the units described above in paragraph 4; by unilaterally altering the wages, hours, benefits, and other terms and conditions of employment of the employees in the units described above in paragraph 4 of the Act; and by refusing to recognize and bargain in good faith with the exclusive representatives of the employees employed in the units described above in paragraph 4.

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

THE REMEDY

Having found that Edwin R. O'Neill, an Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc. (the Respondents) engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and that they take certain affirmative action to effectuate the policies of the Act.

The Respondents shall be required to offer immediate reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to all employees terminated as a result of the November 1977 closure of the O'Neill meat plant—including those employees who were subsequently hired on and after November 23, 1977, since, as discriminatees, they are entitled to offers of reinstatement and not simply offers of employment. *D.R.C., Inc.*, 233 NLRB 1409, 1421 (1977); *Colorflo Decorator Products*, 228 NLRB 408, 420 (1977). The Respondents shall dismiss, if necessary, anyone who may have been assigned or hired to perform the work that they had been performing prior to their termination in November 1977. The Respondents shall be required to make these employees whole for all losses they suffered by reason of their unlawful terminations.⁴⁷ Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Additionally, the Respondents shall be required to make whole all employees for any losses sustained by the failure to apply the terms and conditions of the above-described collective-bargaining agreements to employees working for them on and after November 23, 1977. Backpay due pursuant to this latter requirement shall be computed in a manner consistent with the Board's policy in *Ogle Protection Service*, supra. Interest on all backpay is to be paid on the amounts owing and shall be computed in the manner prescribed in *F. W. Woolworth*, supra, and *Florida Steel Corp.*, 231 NLRB 651 (1977). Also generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). To the extent that it is necessary to reimburse any trust funds provided under the aforesaid collective-bargaining agreements in order to ensure that employees are fully made whole, such payments, together with any interest thereon, shall be computed in the manner provided in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and *Pullman Building Co.*, 251 NLRB 1048 fn. 3 (1980). The Respondents shall also make the Butchers and the Teamsters whole for all initiation fees and dues they would have received but for the Respondents' failure to apply the terms of the aforesaid agreements to the appropriate employees on and after November 23, 1977, together with interest thereon. *Ogle Protection Service*,

⁴⁷ As used "make . . . whole for all losses" includes backpay, benefits, and all other forms of reimbursement cognizable under existing Board policy.

supra. The Respondents shall also commence immediately to give effect to the 1977 collective-bargaining agreements with the Butchers and the Teamsters and maintain the terms and conditions of employment contained in those agreements in effect until agreement is reached through collective bargaining on new terms and conditions of employment of the unit employees or a bona fide impasse is reached in such negotiations. The Respondents shall also bargain, on request, with the Butchers and the Teamsters regarding the employees in the units represented by those labor organizations.

In addition the Butchers asserts that there should be additional, special remedies to restore the status quo ante. As I have found that the bargaining that was conducted over the effects of the closure on November 23, 1977, were a part of the overall plan to implement the alter ego scheme here, and that they were otherwise conducted in a manner inconsistent with the requirement of good faith, the Butchers requests that its representatives be reimbursed for the expenses incurred to engage in such negotiations is granted. However, the Butchers further requests that a remedial order for reimbursement of litigation expenses is denied. In my judgment the procedural defenses discussed above cannot be deemed "frivolous." Accordingly, the litigation expense remedy would be unwarranted. *Heck's, Inc.*, 215 NLRB 765 (1974); *Tiidee Products*, 194 NLRB 1234 (1972). The Butchers' requests for a broad remedial order is granted where, as here, the nature of the violations of the Act demonstrates a general disregard for its employees' fundamental statutory rights, which caused the employees to suffer severe repercussions. *Hickmott Foods*, 242 NLRB 1357 (1979). The Butchers further requests that the remedial order require the dissolution of Sierra Pacific Meat Company, Inc., Fresno Beef Processors, Inc., Don Turner Corporation, and J & E Transport, Inc. as corporate entities; that the assets of O'Neill Meat Co. be restored; that a constructive trust be placed on any dividends and owners salaries of Sierra Pacific Meat Company, Inc., Fresno Beef Processors, Inc., Don Turner Corporation, and J & E Transport, Inc.; that liability extend to Eric Garrett, Steven Diebert, Louis James Maxey Jr., James Maxey, Donald and Jacqueline Turner, John and Carol Abatti, and Kristan O'Neill in their individual capacities; that all applicants for reemployment screened at the Alpha Agency be treated as discriminatees; that mileage allowed as an interim expense in determining backpay be computed at 30 cents per mile; that the wage and benefit levels (including fund contributions) be periodically increased over the backpay period commensurate with the increase in the Consumer Price Index; that I recommend the disbarment of the Alpha Agency from practice before the Board; that the attached notices be required to be prominently posted in certain of the Respondents' attorneys offices and the offices of Alpha Agency; and that O'Neill should be required to read the attached notice to employees, are denied as punitive, unwarranted, or unnecessary in view of the other remedies described above. The Respondents shall be required to post copies of the notice to employees attached as Appendix A in the meat plant and to mail a copy of such

notice to the last known address to all employees terminated on or about November 18 and 23, 1977.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁸

ORDER

The Respondents, Edwin R. O'Neill, an Individual, O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co., f/k/a O'Neill Meat Company; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc., Fresno, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and to bargain collectively with United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America in the contractual bargaining units found appropriate in Conclusion of Law 4, above.

(b) Deciding to close, closing, and reopening facilities under a different name, in an effort to terminate existing bargaining relationships and to escape the obligations imposed by collective-bargaining agreements.

(c) Failing and refusing to apply to all their employees in the aforesaid contractual bargaining units all terms and conditions of employment contained in the collective-bargaining agreements executed by O'Neill Meat Company in February and April 1977, absent the express written consent of United Food & Commercial Workers Union, Local 126, AFL-CIO or General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

(d) Terminating operations, replacing, discharging, refusing to reinstate, or otherwise discriminating against employees regarding hire or tenure of employment or any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in activity protected by Section 7 of the Act.

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

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

(a) On request, recognize and bargain collectively with United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of their employees employed in the bar-

⁴⁸ 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. All outstanding motions inconsistent with this recommended Order are denied. The General Counsel's unopposed motion to correct the record (Appendix B, omitted from publication) is granted except as to item (4) G C Exh. 119 and DTC Exh. 14 are rejected as not adequately authenticated.

gaining unit heretofore found appropriate in Conclusion of Law 4, above.

(b) Apply the terms and conditions of the aforesaid collective-bargaining agreements with United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America to the employees employed in appropriate bargaining units.

(c) Make all employees, United Food & Commercial Workers Union, Local 126, AFL-CIO, and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and any appropriate trust fund whole for all losses suffered as a result of the failure to apply the terms and conditions of the aforesaid collective-bargaining agreements to employees employed in the aforesaid bargaining units as set forth in the remedy section of this decision.

(d) Offer to all employees terminated as a result of the closure of the O'Neill meat plant on November 18, 1977, immediate and full reinstatement to their former positions of employment dismissing, if necessary, anyone who may have been hired to perform the work that they had been performing prior to the date on which they were terminated or, if their former positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for all losses suffered as a result of the discrimination against them, in the manner set forth above in the remedy section of this decision.

(e) Reimburse United Food & Commercial Workers Union, Local 126, AFL-CIO for the expenses that labor organization incurred to engage in bargaining over the effects of the closure of the meat plant on November 18, 1977.

(f) Preserve and, on request, make available to the Board or its agents all payroll and other records necessary to compute the backpay, other reimbursements and reinstatement rights set forth in the remedy section of this decision.

(g) Post at the Fresno, California facility copies of the attached notice marked "Appendix."⁴⁹ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Mail copies of attached notice marked "Appendix A"—signed in the same manner as specified in (g), above—to the last known address of all employees terminated as a consequence of the closing of the meat plant on November 18, 1977.

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

Daniel F. Altemus, Esq., for the General Counsel.

George J. Tichy, II and Michael J. Hogan, Esqs. (Littler, Mendelson, Fastiff & Tichy), of San Francisco, California, for Respondent O'Neill, Ltd.

William A. Quinlin, Esq. (Quinlan, Kershaw, Fanucchi & Hoffman), of Fresno, California, for Respondent Don Turner Corporation.

Howard A. Sagaser, Esq. (Jory, Peterson & Sagasen), of Fresno, California, for Respondent J & E Transport, Inc.

David A. Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of San Francisco, California, for Charging Party Food and Commercial Workers.

Barry J. Bennett, Esq., of Fresno, California, for General Teamsters Local 431, the Charging Party.

SUPPLEMENTAL DECISION

I. THE BOARD'S REMAND

WILLIAM L. SCHMIDT, Administrative Law Judge. On 1 August 1985 the Board issued an order remanding this matter for further consideration of the 10(b) issues. I again conclude that the charges in this case are timely. Set forth below are my findings and conclusions—factual and legal—regarding the issues on remand.

A. *The Prior Proceedings*

I issued a Decision and Order in this case on 30 March 1982 (JD-(SF)-46-82). Evidence in the original proceeding showed that the General Counsel reinstated the charges—previously dismissed—more than 6 months after the closing and reopening of the meat processing plant operated by the Respondents—the subject matter of the General Counsel's complaint.¹ The Respondents each filed answers alleging that the General Counsel lacked authority to reinstate the charges under Section 10(b) of the Act and Section 102.19(c) of the Board's Rules and Regulations as an affirmative defense.

My original decision rejected those affirmative defenses and concluded that the General Counsel was justified in reinstating the charges more than 6 months after the closing and reopening of the plant even without a formal motion for reconsideration pursuant to Section 102.19(c). See 288 NLRB at 1380-1383. At that time, my conclusion was supported by *California Pacific Signs*, 233 NLRB 450 (1977), which held that the General Counsel had virtually unlimited discretion under Section 3(d) of the Act to reinstate a previously dismissed charge even outside the 6-month limitation period in Section 10(b)

¹ For separate references to Respondents, O'Neill includes collectively Edwin R. O'Neill, an Individual, O'Neill, Ltd., Food Equipment Leasing Company, and Amalgamated Meat Co., f/k/a O'Neill Meat Company. The following acronyms are used for remaining Respondents: FBP—Fresno Beef Processors, Inc.; DTC—Don Turner Corporation, SPM—Sierra Pacific Meat Co.; and JET—J & E Transport, Inc. The Charging Parties are referred to separately by their local numerical designations and jointly as the Locals.

⁴⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

absent a showing that the General Counsel abused his discretion. In my judgment, no abuse had been shown.

Respondents filed timely exceptions in which they asserted, inter alia, that my decision concerning their time-bar affirmative defenses was erroneous.

On 11 January 1985 the Board issued its decision in *Ducane Heating Corp.*, 273 NLRB 1389 (1985), holding that:

[A] dismissed charge may not be reinstated outside the 6-month limitation period of Section 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation. Where there is a fraudulent concealment, the limitation period begins to run from the time the charging party knows or should have known the concealed facts.

In so holding, the Board specifically overruled *California Pacific Signs* to the extent that it was inconsistent.

Subsequently, on 25 March 1985, the Board issued a Notice to Show Cause in this matter why—in view of its *Ducane* decision—it should not dismiss this complaint in its entirety. Timely responses were filed that led to the instant remand.

In its 1 August 1985 remand order, the Board specifically noted argument by the General Counsel and the Charging Parties that I had denied them an opportunity to present evidence “on the Respondent’s alleged fraudulent concealment of the operative facts establishing the violations because [I] was satisfied that under existing law the charge was not time barred by Section 10(b) of the Act.” For this reason, they argued that the case should be remanded “so that evidence may be presented on this issue.” Accordingly, the 1 August remand order provided “that in light of *Ducane Heating*,” I should “take whatever appropriate action that is necessary to resolve [the Sec. 10(b)] issues including reopening the hearing for the taking of additional evidence” and, thereafter, issue an appropriate supplemental decision. On 19 September 1985 the Respondents filed a motion requesting reconsideration of the Board’s remand order, which the Board denied 31 October 1985.

In the meantime, on 21 August 1985, I issued an Order to Show Cause—returnable 12 September 1985—why the hearing should be reopened. At the General Counsel’s request, the time for answering my Order to Show Cause was extended to 20 September 1985. O’Neill’s request that the order be held in abeyance, pending the Board’s ruling on O’Neill’s planned motion for reconsideration of the Board’s 1 August remand order, was denied on 5 September 1985 pursuant to Section 102.48(d)(3) of the Board’s Rules and Regulations. The General Counsel, Local 126, and O’Neill then filed timely responses. DTC and JET each filed general responses adopting “any moving papers, responses, or other pleadings” filed by any of the other Respondents.

The General Counsel’s response asserted that the existing record was adequate to support a finding of “fraudulent concealment” within the meaning of *Ducane Heating*, but asked that the hearing be reopened to supplement the record with evidence of “the specific circum-

stances which resulted in the General Counsel’s reinstatement of the underlying unfair labor practice charges in November 1978.”

Local 126 also argued that the record was sufficient to support a *Ducane Heating* “fraudulent concealment” finding. Local 126, however, argued that if it were permitted to pierce the attorney-client privilege asserted in the original proceeding, it would further prove that particular attorneys representing O’Neill “were well aware of the facts underlying the fraud . . . [and were] part of the fraudulent scheme.” Notwithstanding, Local 126 stated that it was “arguably unnecessary” to adduce such additional evidence and urged the issuance of a supplemental decision “quickly” without reopening the record.

O’Neill asserted only that no action should be taken as its motion for reconsideration of the Board’s 1 August remand was then pending and that further proceedings should be stayed until the Board ruled on its motion for reconsideration. DTC and JET were deemed to have joined in O’Neill’s position.

Having rejected O’Neill’s earlier request to stay proceedings pending the Board’s ruling on its motion for reconsideration on 5 September, and having considered the remaining responses, notice was given on 9 October 1985 that the hearing would be reopened for the limited purpose of supplementing the record concerning the events following the dismissal of the charges that led to the reinstatement of the charges by the General Counsel. In sum, only the General Counsel had stated a desire to proffer additional evidence.

Thereafter, the reopening of the hearing was twice postponed based on representations made administratively that the parties were engaged in negotiations looking toward the execution of a stipulation encompassing those matters that the General Counsel intended to offer at the reopened hearing. By letter dated 29 November 1985, the General Counsel transmitted that stipulation executed by all relevant parties. Among other things, the stipulation requested that I issue an order “closing the hearing and set a date for the submission of briefs . . . with respect to those issues raised by the Board’s 1 August 1985 order.”²

On 17 December 1985 I issued an order withdrawing the notice of hearing and setting a date for the filing of briefs. The General Counsel, Local 126, O’Neill, and JET each filed timely briefs. DTC filed a brief adopting, in essence, the O’Neill and JET briefs.

B. *The Original Charges and Their Disposition*

The charge in Case 32-CA-848 was filed by Local 126 on 12 April 1978. It alleged that “O’Neill Meat Co. and/or O’Neill Ltd. and/or Food Equipment Leasing Co.” violated Section 8(a)(1), (3), and (5) of the Act in

² The stipulation was executed by all parties except FBP and SPM. It further provided that I issue an order to show cause why the facts recited therein should not be deemed true regarding those Respondents who did not execute the stipulation. Having previously found FBP and SPM were alter egos of O’Neill and that reconsideration of that finding was not within the scope of the remand, I deemed FBP and SPM bound by O’Neill’s stipulation. That stipulation is approved and it, along with all orders, rulings, and responses (listed in Appendix A), are made a part of the record.

the previous 6 months by changing "the name and style of which business was conducted in order to avoid the negotiated agreement [with 126]" and "engaged in the series of devices or subterfuges to claim separate entity status in order to avoid the [Local 126] agreement." The charge in Case 32-CA-928—alleging similar conduct regarding Local 431—was filed by Local 431 on 11 May 1978. There is no claim by any party that, as originally filed, either charge was untimely regarding the plant closing on 18 November 1977 and its reopening on 12 December 1977 insofar as the O'Neill corporate Respondents are concerned.

Following an investigation, the Regional Director for Region 32 dismissed both charges by separate letters dated 28 June 1978. The pertinent portion of the practically identical dismissal letters is quoted in my original decision. *O'Neill, Ltd.*, 288 NLRB at 1380 (1988).

Local 126 timely appealed the dismissal in Case 32-CA-848 to the General Counsel. On 24 August 1978 the General Counsel sustained the dismissal of Case 32-CA-848. Local 431 never appealed the dismissal of Case 32-CA-928.

C. The Postdismissal Events³

By letter dated 5 October 1978, Victor Van Bourg, Local 126 counsel, submitted five statements to the Regional Director for Region 32 in support of reopening Case 32-CA-848 "preserving both its number and filing date." In that letter Van Bourg argued that the statements demonstrated that Respondents had not been "candid" during the investigation and that the statements supported the allegations of Local 126's charge. The statements were those of Edward J. Jansen and Douglas Ladd, former supervisors or officials of Respondents; Lynn White and James Whiting, Local 126 officials; and Tom Diamond, a salesman for Midwest Meat Co., f/k/a Kerman Wholesale Meat Co., a longtime customer of the Respondents.

In his eight-page handwritten statement dated 5 October 1978, Jansen described preclosing remarks by Edwin O'Neill and his labor relations consultant, Lee Brewer, about a plan to get rid of the Union; assurances he received from O'Neill officials of future employment as the plant closing approached; assignments he was given in the interim period before the plant reopened by O'Neill officials; instructions by Edwin O'Neill to supervisory personnel concerning operational details after the plant reopened without regard for their ostensible employers; and the involvement of officials and employees of O'Neill Companies in the preparation and operation of the plant after it reopened.

Ladd, a vice president and sales manager for O'Neill Meat Co. for a number of years, provided a nine-page typed statement dated 22 September 1978. He recounted 1976 remarks by Edwin O'Neill about getting rid of the Union; outlined the involvement of O'Neill officials to establish SPM, in which he was made the secretary-treasurer; described the complete lack of involvement by Eric Garrett—ostensibly the owner of SPM—in the man-

agement of SPM; described the preparation of sham corporate papers for SPM; described several meetings involving supervisors and officials of SPM, DTC, FBP, and JET after the plant reopened, during which Edwin O'Neill gave detailed operating instructions about the plant; described O'Neill's control of the finances of the resumed operation and his own lack of control over SPM's financial records; described SPM's lack of capital and credit; and asserted that "Ed O'Neill has continued to run the whole show."

Lynn White's statement described a conversation related to him by DTC Supervisor Ron Cox wherein Edwin O'Neill convinced Cox not to quit his job at the reopened plant.

Tom Diamond's six-page handwritten statement of 21 September 1978 recounted an incident he witnessed with Edwin O'Neill in August 1978. As described by Diamond, Edwin O'Neill came to Midwest demanding collateral for accounts receivable owed to SPM. Although accompanied by Lawrence Boragno, an SPM official, Edwin O'Neill did all the talking. Midwest's owner, Fred Pallesi, eventually agreed to the collateral demand and executed the papers tendered by Edwin O'Neill after receiving Edwin O'Neill's personal guarantee that the collateral would be returned when Midwest's bill was paid. Diamond also asserted that in the dealings between Midwest and the reopened operation, Edwin O'Neill always held himself out as the executive in charge of SPM, among others. Finally, Diamond asserted that on another occasion Edwin O'Neill stated that he would someday disclose to Diamond the "slick way" he got out from under the union contract by setting up new paper entities.

White's statement—which is unsigned—essentially relates hearsay information concerning the August 1978 incident described by Diamond.

The information provided by Diamond, Jansen, and Ladd was an embryo at odds with the stated conclusion in the Regional Director's dismissal—and the General Counsel's subsequent concurrence—that there was "no evidence that Ed O'Neill . . . has any ownership in . . . [nor] maintains any control of [FBP, DTC, SPM, or JET]."

Shortly thereafter, the Regional Office transmitted Van Bourg's information to the General Counsel. By letter dated 6 November 1978, the General Counsel notified Van Bourg—with a copy to O'Neill's attorney—that his letter of 5 October 1978 and the "newly discovered" evidence submitted therewith, was being treated as a motion for reconsideration and that all parties would be notified of his future decision.

By letter dated 15 November 1978, the General Counsel notified Local 126 and O'Neill that "newly discovered evidence," not previously available prior to the 24 August 1978 decision denying the appeal in Case 32-CA-848, had been received. Without elaborating on the nature of the newly discovered evidence, the General Counsel revoked his decision of 24 August and remanded the case to the Regional Director for further processing.

³ In the main, the events described below are based on the parties' stipulation submitted by the General Counsel's 28 November 1985 letter.

By letter dated 21 November 1978, the Regional Director notified all parties that he was rescinding the 28 June 1978 dismissal letter and was reinstating the charge for further processing on the basis of newly discovered evidence.

Following the reinstatement of Case 32-CA-848, Local 126 amended the charge on 3 January 1979 to list additional Respondents, namely, SPM, FBP, DTC, and JET. This was the first occasion that these four entities were named in any charge. On 22 January 1979, Local 126 again amended Case 32-CA-848 to allege Edwin R. O'Neill as a Respondent in his individual capacity and to delete JET as a Respondent.⁴

In the meantime, Local 431 requested, by a letter dated 15 January 1979, that the Regional Director rescind the dismissal of Case 32-CA-928. That request was granted on 18 January 1979. On 8 February 1979, Local 431 amended its reinstated charge to allege Edwin R. O'Neill as a respondent in his individual capacity and to add JET and DTC as Respondents.

As a result of the foregoing, the Regional Director issued a complaint in Case 32-CA-848 on 30 January 1979 alleging that Edwin R. O'Neill, an Individual, O'Neill, Ltd., FELC, Amalgamated Meat Company, f/k/a OMC, FBP, DTC, and SPM had violated Section 8(a)(1) and (5) of the Act. Later, on 27 April 1979, the Regional Director issued an order consolidating Case 32-CA-848 with Case 32-CA-928. In terms of the named parties, Local 431 was added to the proceedings as a Charging Party in Case 32-CA-928 and JET was added to the list of Respondents in the consolidated complaint, which alleged numerous violations of Section 8(a)(1), (3), and (5) of the Act.

The Respondents timely filed answers denying the alleged unfair labor practices and alleging affirmatively that the Board was precluded by Section 10(b) of the Act and its own rules and regulations from pursuing this matter.

D. Contentions

The General Counsel asserts that the statements of Ladd and Jansen provided both Local 126 and the General Counsel with "the first tangible piece of evidence concerning what had actually occurred and what the relationship was between [O'Neill, SPM, FBP, DTC, and JET]."

The General Counsel vigorously argues that the complaint should not be dismissed on the *Ducane* rationale. He argues first that *Duncan* should not be applied retroactively in this case because of the peculiar and egregious circumstances present. Second, the General Counsel believes Respondent fraudulently concealed operative facts and, accordingly, this case fits the exception in the *Ducane* case. Alternatively, the General Counsel contends that even if there were no fraudulent concealment, the charges here were, in fact, reinstated within the 10(b) period because the existing collective-bargaining

agreements between O'Neill and the Locals had not expired. In this circumstance, the General Counsel asserts that because O'Neill abrogated the existing collective-bargaining agreements, there was a continuing violation for which the 10(b) limitation period had not expired.

Local 126 also argues that *Ducane* should not be applied retroactively, albeit for reasons other than those advanced by the General Counsel. In any event, Local 126 claims this case fits the *Ducane* fraudulent concealment exception.

O'Neill argues on the following grounds that the complaint should be dismissed on the basis of *Ducane*. First, neither of the Charging Parties met the burden of Section 102.19(c) of the Board's Rules and Regulations by: (1) filing a motion for reconsideration promptly; (2) proving that there was "newly discovered evidence" within the meaning of Section 102.19(c); or (3) showing that any alleged newly discovered evidence was not discoverable by diligent inquiry prior to the General Counsel's decision on appeal. O'Neill also notes that Local 431 never appealed the Regional Director's decision; hence no basis ever existed for reinstating the Local 431 charge. Second, the Charging Parties are precluded by Section 102.46(h) of the Board's Rules and Regulations from now asserting fraudulent concealment because that matter was not previously raised in any exception or cross-exception. Third, the complaint contained no fraudulent concealment allegation and hence it is inappropriate to consider testimony or evidence or to make findings on that subject at this time. Fourth, the *Ducane* rule requires that this case be promptly dismissed as the charges were indisputably reinstated outside the 10(b) period and there is no evidence of fraudulent concealment as everyone knew of the existence of SPM, FBP, DTC, and JET. Fifth, the General Counsel's retroactivity argument lacks merit.

In addition to adopting the arguments made by O'Neill, JET argues separately that because it employed only truckdrivers when the plant reopened in December 1977, Local 431 was the only labor organization that had standing to file a charge against JET. Furthermore, JET asserts that Local 431's charge was untimely without regard to the *Ducane* issue. JET also argues that the charge in Case 32-CA-848 (filed by Local 126) cannot be utilized to support the complaint that eventually issued against JET.⁵

Everyone recognizes that Section 10(b) of the Act is a statute of limitation that bars the prosecution of a complaint based on a charge filed with the Board more than 6 months following the conduct alleged to constitute the unfair labor practice.

If a charge is filed after the 6-month period, however, the General Counsel may still prosecute a complaint if the respondent has fraudulently concealed its unlawful conduct. See *Burgess Construction*, 227 NLRB 765, 766

⁴ As found in my original decision, it is reasonable to infer that Local 126 deleted JET from its charge because JET never performed functions that required it to employ individuals in work categories previously represented by Local 126. *O'Neill, Ltd.*, supra at 1380 fn 44.

⁵ At the original hearing, JET made arguments that are fundamentally the same as those noted. Because I found JET was an alter ego of the O'Neill Respondents, I rejected those arguments then and adhere to those conclusions now. Entirely aside from that rationale, I further find that JET's efforts to renew those claims are beyond the scope of the remand. Hence, they will not be addressed further in this decision.

(1977), enfd. 596 F.2d 278 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979). As the Board observed in *Burgess*, the tolling principle based on fraudulent concealment—so far as Section 10(b) is concerned—has its roots specifically in *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960). In that case, the Supreme Court called attention, at footnote 19, to the fact that the 10(b) limitation period did not apply in situations involving fraudulent concealment of unlawful conduct.⁶

As noted when these cases were reinstated, the General Counsel had “virtually unlimited” discretion to reopen dismissed charges provided they were timely filed originally. *California Pacific Signs*, 233 NLRB 450 (1977). As the charges here were timely filed regarding the closing and reopening of the meat plant, no need existed to examine whether the 10(b) period may have commenced at some other time. *Ducane* changed that governing principle. The Board held in *Ducane* that the General Counsel cannot reinstitute even timely filed charges outside the 10(b) period absent evidence of fraudulent concealment of “operative facts,” and when there is fraudulent concealment, the Board held “the limitations period begins to run when the charging party knows or should have known of the concealed facts.”

In *Ducane*, the Board did not elaborate on the basis for the fraudulent concealment exception or the precise set of circumstances that would exist in the event fraudulent concealment was shown. In another portion of the *Ducane* case, however, the Board held that the General Counsel had discretion “to accept reconsideration motions submitted with the 10(b) time limit, but beyond the 10-day period provided by Section 102.19(c) itself or any extension given by the General Counsel.” (Emphasis added.) The Board continued by saying that the “General Counsel need only act within the 10(b) period” to merely accept an untimely motion for reconsideration.

The Supreme Court has long held that the fraudulent concealment of facts essential to the cause of action serves to toll the limitations period and that this equitable doctrine is read into every Federal statute of limitations. *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946). The historical roots of this fraudulent concealment doctrine and its refinements over the years were recently reviewed in *Hobson v. Wilson*, 737 F.2d 1, 33 (D.C. Cir. 1984). Judge Edwards’ discussion in *Hobson* at pages 33–36 is worthy of lengthy quotation here:

The keystone of federal fraudulent concealment doctrine is *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 33 L.Ed. 636 (1874), in which the Court wrote that where a party injured by another’s fraudulent conduct

remains in ignorance . . . without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

Id. 88 U.S. (21 Wall.) at 348. The Court also held that, absent laches or negligence on plaintiff’s part, the limitations period does not begin to run until plaintiff discovers his cause of action when “the fraud has been concealed or is of such character as to conceal itself.” *Id.* 88 U.S. (21 Wall.) at 349–50 (emphasis added). Shortly thereafter, in *Wood v. Carpenters*, 101 U.S. 135, 25 L.Ed. 807 (1879), the Court gave some indication of the meaning of the phrase “of such character as to conceal itself,” when it wrote, “Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.” *Id.* 101 U.S. at 143. Read together, *Wood* and *Bailey* establish first, that equitable tolling generally has two elements, (successful) concealment by defendant and diligence by plaintiff, and second, that a defendant who contrives to commit a wrong in such a manner as to conceal the very existence of a cause of action, and who misleads plaintiff in the course of committing the wrong, may be found to have concealed the wrong. This second principle distinguishes between acts that are self-concealing (such as frauds) and acts where, absent a subsequent act of concealment, only the perpetrator, but not the fact that a cause of action might exist, would be unknown (such as a burglary). In the former case, concealment is established by the nature of the act; in the latter case, additional acts of concealment are required to trigger the tolling doctrine.

Although the foregoing principles generally have been accepted by the courts, the case law reflects a variety of formulations to apply the concealment doctrine. In each instance, however, before a defendant’s “exposure to liability is given a potentially infinite duration, there [is] some minimum of culpability—if not affirmative concealment, then at least the construction of a scheme which is by its nature unknowable.”

. . . Bearing in mind *Wood*’s requirement of “some trick or contrivance intended to exclude suspicion,” 101 U.S. at 143, we conclude that defendants must engage in some misleading, deceptive or otherwise contrived action or scheme, in the course of committing the wrong, that is designed to mask the existence of a cause of action. The deception may be as simple as a single lie or as complex as that which we confront here, so long as the defendants conceal “not only their involvement, but the very conduct itself.” *Richards v. Mileski*, 662 F.2d 65, 70 (D.C. Cir. 1981).

This Circuit has recently refined its approach to cases involving self-concealing wrongs and placed on the defendant the burden of proving that the plain-

⁶ It is also noteworthy that a party who obtains a final judgment by perpetrating a “fraud upon the court” should not expect the benefits of finality. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944); *Toscano v. C.I.R.*, 441 F.2d 930 (9th Cir. 1971). And see FRCP 60(b). Because the General Counsel has unreviewable authority to refuse to issue complaints in unfair labor practice cases—as originally occurred here—and thereby can preclude parties from even having a day in court, a compelling argument could be made that a respondent who fraudulently procures the dismissal of a charge is committing a “fraud upon the court.”

tiff did not exercise due diligence. Thus, in *Richards v. Mileski*, the court held “[w]hen tolling is proper because the defendants have concealed the very cause of action . . . they have the burden of coming forward with any facts showing that the plaintiff could have discovered . . . the cause of action if he had exercised due diligence.” 662 F.2d at 71. . . .

Before turning to apply these principles to defendants’ principal assertions about the sufficiency of the evidence on fraudulent concealment, we pause to note an obvious, albeit often overlooked, proposition. The doctrine of fraudulent concealment does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim. . . . By “notice,” we refer to an awareness of sufficient facts to identify a particular cause of action, be it a tort, a constitutional violation or a claim of fraud. We do not mean the kind of notice—based on hints, suspicions, hunches or rumors—that requires a plaintiff to make inquiries in the exercise of due diligence, but not to file suit.

In sum, the Federal doctrine of fraudulent concealment serves to postpone the start of the period of limitation until evidence of a cause of action is discovered or should have been discovered with the exercise of reasonable diligence. Once facts essential to establishing a cause of action are known or should be known, the limitation period begins to run even though it may be long after the injury has occurred. This is best illustrated by the *Richards* case referred to by Judge Edwards. There, the plaintiff discovered the facts essential to his tort claim nearly 23 years after they occurred. The limitation period for some of the torts *Richards* alleged was 1 year. *Richards*’ action was commenced 11 months and 25 days after he discovered the critical facts—or nearly 24 years after they occurred. His action was held to be timely as the limitation period only commenced when he discovered the essential facts—or after 23 years.

The *Burgess* case presents an analogous—albeit much less extreme—set of circumstances. There the Board and the Ninth Circuit held that the filing of an unfair labor practice, just short of 6 months after the charging union discovered previously concealed pertinent facts, was timely filed regarding the 6-month limitation period in Section 10(b) of the Act even though the unfair labor practice originally occurred 10 or more months before the charge was filed.

F. Concluding Findings

In my original decision, I concluded “that SPM, FBP, DTC, and JET constitute the alter ego of [O’Neill Meat Company] OMC [a/k/a Amalgamated Meat Company] and, further, that those four entities together with O’Neill Ltd. and FELC constitute the alter ego of the entities that operated the meat plant prior to November 18, 1977.” *O’Neill, Ltd.* supra at 1378. In my judgment, the evidence warranted the finding “that the owners of the new entities were nothing more than fronts for [Edwin] O’Neill.” Id. at 1379. I further found that the

object of this corporate scheming “was designed primarily to avoid the existing labor agreements and the obligation to deal with the designated employee representatives” and that “any actions against the employees . . . [were] motivated by a discriminatory purpose.” Id. at 1383. Moreover, I found that Edwin O’Neill “personally was the dominant figure in the plan of evasion [represented by the post-November 1978 operation of the plant with *alter ego* entities] . . .” Id. at 1384. In addition to the foregoing conclusions concerning the true nature of the post-November 1977 operation, I also concluded that the December 1977–March 1978 effects bargaining was “conducted in bad faith for the purpose of creating the illusion that [Edwin] O’Neill was terminating his meat processing operations.” Id. at 1366.

By definition, an alter ego is the “disguised continuance” of an older employer involving “a mere technical change in the structure or identify of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management.” *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974). Although it can be forcefully argued that every alter ego is tantamount to fraudulent concealment, it is certainly safe to say that every employer who dabbles in the alter ego game treads at the very edge of the fraudulent concealment abyss.

I now conclude that Edwin O’Neill’s scheme of closing the meat plant and resuming its operation utilizing FBP, DTC, SPM, and JET as fronts for his dominant involvement in the continuation of this meat processing operation, when coupled with the misrepresentations concerning the nature of the resumed operation during the effects bargaining—all for the object of evading a lawful contract obligation with the employee bargaining representatives and the duty to bargain under the Act—constituted a fraudulent plot of the self-concealing variety within the meaning of Federal law concerning the tolling of statutes of limitation. *Holmberg v. Armbrrecht*, supra; *Hobson v. Wilson*, supra; *NLRB v. Burgess construction*, supra. For this reason, I find that the 10(b) period was tolled until the Locals acquired evidence of the plot or, put another way, the 10(b) period did not commence with the closing and the reopening of the plant in 1977. To hold otherwise would credit O’Neill, the wrongdoer, with the benefit of his elaborate shield and would ignore his attempts during effects bargaining to convince the Locals that he was no longer in the meat processing business.

Having concluded that Edwin O’Neill and his business associates fraudulently concealed the true nature of the 1977 closing and reopening of the plant sufficient to toll the 10(b) period, the next step is to identify as precisely as possible the date when the 10(b) period began to run. The two most obvious dates are: (1) 12 April 1978, when Local 126 filed its original charge alleging, in effect, that the new operation was the alter ego of the old;⁷ or (2) in

⁷ Local 431 may appropriately be charged with knowledge equivalent to Local 126 at various times. It is evident, however, that Local 126 took the lead throughout in pursuing legal claims against O’Neill.

late September 1978, when Diamond and Ladd provided evidence that O'Neill was personally conducting the affairs of SPM, the financial keystone of the resumed operation.

By the filing of the charge on 12 April 1978, Local 126 certainly indicated that it had ceased to rely on the surface appearance that new and independent firms were operating the plant and Edwin O'Neill's claims that he and his companies were no longer in the meat processing business. The fact that Local 126 ceased believing O'Neill's assurances, however, is not sufficient to support a finding that the elaborate coverup had been exposed or that the Locals had based their charges on anything beyond suspicion and conjecture. *Hobson v. Wilson*, supra. Indeed, the Regional Director's conclusion, following the investigation of the charges, suggests that the scope of the concealment had not only continued, it had been extended to concealing Edwin O'Neill's true role from the General Counsel. When, as here, the clear object of the elaborate alter ego scheme was to avoid the effect of Federal labor laws, I perceive no valid policy that is served by according it any finality simply because the Locals filed premature charges. For these reasons, it is my conclusion that the 10(b) period remained tolled even though Locals 126 and 431 filed unfair labor practice charges based on unsupported conjecture that Edwin O'Neill was still engaged in the meat processing business.

On the other hand, the fact that the Locals filed the charges merits the conclusion that they were diligently engaged in an effort to uncover the true nature of the plant closing and resumption. The record in this case makes one thing evident above all else, the Locals faced a very formidable task in cutting through O'Neill's elaborately concealed involvement to learn the true facts. Because the forum procedures provided no basis for compulsory process, the Locals were essentially left with supporting their charge with volunteered information.

Obviously, the arrest of Ladd and Jansen provided Local 126 with the fortuitous circumstance of individuals who were willing to talk and who had participated on the inside of the O'Neill-controlled operation. As that information began coming forward on 21 September 1978 in the form of Diamond's statement and continued over the next 2-1/2 weeks with more detailed and significant statements by Ladd and Jansen, I find that date to be the earliest occasion on which "operative facts" in this case

were disclosed, i.e., Edwin O'Neill's actual control and economic dominance of the resumed operation. This evidence—from all that is known—was the first to expose the alter ego fraud that was ongoing. Accordingly, I find that the Locals were obliged from that point forward by Section 10(b) of the Act to pursue their claims in a timely fashion. In short, the tolling of the limitation period had ceased, and the Act's 6-month period of limitation began to run.

Having concluded under the Federal fraudulent concealment doctrine that the 10(b) period did not commence until 21 September 1978, it follows that all action taken to reinstate the charges here occurred within the 10(b) period. In this circumstance, the Board's holding in *Ducane* relating to the Robinson charge, applies. See *Ducane Heating*, supra. Contrary to Respondent's contentions concerning the Board's failure to follow its rules, that holding provides that the General Counsel has discretion to entertain a motion for reconsideration beyond the 10-day period specified in Section 102.19(c) of the Board's Rules and Regulations. Accordingly, because there is no evidence that the General Counsel acted arbitrarily or capriciously, or abused his discretion in treating Van Bourg's 5 October 1978 letter and Bodine's 15 January 1979 letter as motions for reconsideration and, thereafter, granting those motions, I find Respondents' claims that the Board failed to follow its own rules to be without merit. Finally, I further find that the General Counsel acted to reinstate both charges within the 10(b) period and, hence, the charges are not time barred.⁸

CONCLUSIONS OF LAW

1. The statute of limitation in Section 10(b) of the Act commenced in this proceeding on 21 September 1978.
2. The General Counsel reinstated the charges in Cases 32-CA-848 and 32-CA-928 within the 10(b) period.⁹

⁸ In light of this conclusion, I find it unnecessary to address the other contentions of all parties beyond noting that they, in my judgment, lack merit.

⁹ 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.