

**Regional Import and Export Trucking Co, Inc, Regional Distribution & Warehousing Service, Inc, Newport Transportation Co, Inc and Fernando Sanches**

**Truckdrivers Local Union No 807 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and Fernando Sanches and Local No 819, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Party in Interest Cases 22-CA-14582 and 22-CB-5544**

December 30, 1988

### DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
JOHANSEN AND CRACRAFT

On February 29, 1988, Administrative Law Judge Robert T Snyder issued the attached decision Respondents Regional, Newport, and Truck Drivers Local Union No 807 each filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the General Counsel filed a reply brief

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and

<sup>1</sup> Respondents Regional Newport and Truck Drivers Local Union No 807 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 sec II C par 1 of his decision the judge found that Newport commenced operations on February 7 1987 Newport actually commenced operations on February 7 1986 In sec II C par 3 the judge also found that the motor vehicle lease agreement required Newport to insure the leased vehicles. The agreement indicates however that Regional was obligated to provide the insurance. In sec II F par 12 the judge found that on the morning of May 13 1986 employees Sanches and Marino were standing at the Regional gate waiting for the shop steward. In fact employee Van Dyke was waiting at the gate with Marino. In sec B 1 par 11 of the analysis and conclusions section the judge noted that Newport's supervisory staff transferred from Newport as the accounts transferred. In fact the staff transferred to Newport from Regional. These inadvertent errors do not affect the outcome of the case.

<sup>2</sup> The judge concluded that even assuming Newport was created for legitimate business purposes the layoff of represented Regional employees in favor of unrepresented employees was inherently destructive of important employee statutory rights. Because we adopt the judge's finding that those Regional employees were laid off pursuant to the unlawfully motivated creation of the alter ego we find it unnecessary to rely on this alternative rationale. In adopting the judge's conclusion that deferral to arbitration was inappropriate we find it unnecessary to rely on one of his reasons namely that it was uncertain whether the Master Freight agreement was the underlying contract between Regional and Truck Drivers Local Union No 807 and if so whether the agreement's arbitral provisions encompassed the resolution of alter ego disputes.

conclusions<sup>2</sup> and to adopt the recommended Order as modified<sup>3</sup>

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that Respondent Regional Import and Export Trucking Co, Inc, Regional Distribution & Warehousing Service, Inc, Newport Transportation Co, Inc, its officers, agents, successors, and assigns, and Respondent Truck Drivers Local Union No 807 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, its officers, agents, and representatives shall take the action set forth in the Order as modified

1 Substitute the following for paragraph B,1

' 1 Cease and desist from

"(a) Failing and refusing to fairly represent employees by arbitrarily and not in good faith refusing to accept and process their grievances

"(b) In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act"

2 Substitute the attached Appendix C for that of the administrative law judge

The judge recommended that Respondent Truck Drivers Local Union No 807 be held jointly and severally liable with the Respondent Employer to make whole the unlawfully discharged employees and the judge cited *inter alia Pacific Coast Utilities Service* 238 NLRB 599 fn 4 (1978). We note that the Board's decision in that case was enforced by the Ninth Circuit *NLRB v Pacific Coast Utilities Service* 638 F.2d 73 (9th Cir. 1980) (given the determination that discharge was wrongful it follows that the failure of the union to represent the employee was damaging to him and a contributing factor to his loss of pay.)

<sup>3</sup> We modify the judge's recommended Order against Local 807 to include broad cease and desist language and substitute a new notice to members to reflect the modification.

### APPENDIX C

#### NOTICE TO MEMBERS

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 fail or refuse to fairly represent the employees named in Appendix A or any other employees by arbitrarily and not in good faith refusing to accept and process their grievances

WE WILL NOT in any other manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act

WE WILL jointly and severally with Regional Import and Export Trucking Co, Inc, Regional Distribution & Warehousing Service, Inc, Newport Transportation Co, Inc, make whole the employees named in Appendix A and all other employees who were similarly situated for any loss of earnings they may have suffered as a result of their unlawful discharges, with interest

**TRUCK DRIVERS LOCAL UNION NO 807 A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO**

*William F Grant Esq*, for the General Counsel  
*James J Dean Esq* and *James E McGrath III Esq*  
*(Putney Twombly Hall & Hirson Esqs)*, for the Respondents Regional and Newport  
*J Warren Mangan Esq (O Connor & Mangan PC)*, for the Respondent Union  
*Martin Garfinkel Esq (Gladstein Reif & Meginniss Esqs)*, for the Charging Party

**DECISION**

**STATEMENT OF THE CASE**

ROBERT T SNYDER, Administrative Law Judge These consolidated cases were heard by me on 12 and 13 November and 1 2, 4 and 11 December 1986 in Newark New Jersey The complaints, which were consolidated and amended by order which issued on 20 October 1986 allege that Regional Import and Export Trucking Co Inc and Regional Distribution & Warehousing Service, Inc (Regional I and E and Regional D and W) (collectively Regional) first established Newport Transportation Co, Inc (Newport), as its alter ego and then, as a direct consequence, Regional and Newport as a single employer (collectively Respondent), discharged 27 named employees because they joined or assisted Truck Drivers Local Union No 807 a/w International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers of America AFL-CIO<sup>1</sup> (the Union or Local 807) and engaged in concerted activities for the purpose of collective bargaining and in order to discourage employees from engaging in such activities, in violation of Section 8(a)(1) and (3) of the Act

In addition, the complaint also alleges that Newport granted recognition to Local 819, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America AFL-CIO (Local 819), as exclusive bargaining representative of its truckdrivers and warehouse employees and entered into a collective bargaining agreement with Local 819 covering such employees at a time when Local 819 did not represent a majority of them The complaint also alleges, alternative

ly that Newport then granted the same recognition and entered into a collective bargaining agreement with Local 807 covering the same unit of employees also at a time when Local 807 did not represent a majority of these employees Both recognitions and entry into collective bargaining agreements and the continued enforcement of the Local 807 agreement are alleged as violative by Newport of Section 8(a)(1) and (2) of the Act

Finally, the complaint alleges that Local 807, as the exclusive collective bargaining representative of Regional's local cartage truckdrivers, hi lo operators and platform employees, and party with it, to a collective bargaining agreement covering said employees, refused between certain dates to accept and process a grievance concerning the creation of Newport and its resultant consequences including the discharge of the 27 named employees, in violation of Section 8(b)(1)(A) of the Act

Regional and Newport in a common pleading,<sup>2</sup> and Local 807, each filed an answer denying the commission of any of the unfair labor practices alleged Respondents Regional, Newport, and Local 807 also interposed an affirmative defense that the subject matter of the complaint is subject to binding arbitration warranting the deferral of further processing of the case until such time as arbitration is held Respondents Regional and Newport withdrew this defense during the hearing for reasons to be discussed infra<sup>3</sup> but reassert this defense in their brief Shortly after hearing opened Regional and Newport amended their answer to admit that Newport and Local 807 had entered into and maintained a collective bargaining agreement covering Newport drivers and warehouse employees despite the fact that at the time Local 807 did not represent a majority of these employees and to further admit that by such conduct Newport has rendered unlawful assistance and support to a labor organization in violation of Section 8(a)(1) and (2) of the Act

Besides Regional and Newport, each of the other parties was also represented by counsel at the hearing and all were provided full opportunity to introduce relevant evidence to examine and cross examine witnesses to make opening and closing statements, and to file briefs with me Local 819, alleged as party in interest, neither filed answer nor appeared or participated in the hearing Each of the parties have filed timely posthearing briefs<sup>4</sup> which have been carefully considered

<sup>2</sup> James J Dean Esq of the law firm of Putney Twombly Hall & Hirson after entering an appearance on behalf of Regional and Newport explained that in view of the possibility of a conflict of interest between the two alleged alter egos he had consulted both entities they acknowledged their awareness of the issues in the case and both had consented to his firm representing both of them in this case

<sup>3</sup> Local 807 in asserting its position with respect to deferral since the hearing opened has brought a proceeding to compel arbitration in the U S District Court for the Eastern District of New York (Case CV 86-3987) naming both Regional and Newport as defendants which Respondents Regional and Newport have opposed

<sup>4</sup> By ruling dated 19 April 1987 issued subsequent to the close of hearing and the extended time for filing briefs I rejected Local 807's submission of a supplemental or reply brief in the form of a letter dated 10 April 1987 and returned the document to union counsel That ruling and union counsel's letter of exception to me dated 23 April 1987 are received in evidence as ALJ Exhs 1 and 2 respectively

<sup>1</sup> Effective 1 November 1987 The International Brotherhood of Teamsters Chauffeurs Warehousemen and Helpers of America affiliated with the AFL-CIO Accordingly the names of the Respondent Union and Party in Interest have been modified to show this affiliation

On the entire record<sup>5</sup> including my observation of the demeanor of the witnesses I make the following

### FINDINGS OF FACT

#### I JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, Regional, a corporation with an office and place of business at 55 Van Keuren Avenue Jersey City New Jersey (Respondent's Jersey City facility) has been engaged in the interstate and intrastate transportation of freight. At all material times, since 7 February 1986, Newport, a corporation with an office and place of business at 1200 Newark Turnpike Kearny New Jersey (Respondent's Kearny facility), has been engaged in the interstate and intrastate transportation of freight. During the past year, Regional in the course and conduct of its business operations performed services valued in excess of \$50,000 in States other than the State of New Jersey. During the past year, Newport, in the course and conduct of its business operations performed services valued in excess of \$50,000 in States other than the State of New Jersey. Respondent admitted these allegations. Accordingly I find that Regional and Newport are employers engaged in commerce within the meaning of Section 2(2) (6), and (7) of the Act.

Although pleading that it denied knowledge or information sufficient to form the basis for a belief that Local 819 is and has been at all material times a labor organization under the Act, Local 807 adduced evidence and proffered an exhibit showing that Local 819 had entered a collective bargaining agreement with Newport in which it was recognized as sole collective bargaining agent for drivers, warehousemen and helpers and on whose behalf it had bargained and obtained contract provisions with respect to rates of pay, wages, hours of employment and other terms and conditions of employment. Given this evidence and noting that Respondent concedes the status of both Local 819 and Local 807 I find that at all times material Locals 819 and 807 have been labor organizations within the meaning of Section 2(5) of the Act.

#### II THE ALLEGED UNFAIR LABOR PRACTICES

##### A Background

##### 1 History business and management of Regional

Regional I & E was founded as a trucking company in or about 1965 primarily engaged in the local pickup and delivery of freight to and from piers in the greater New York metropolitan area and the consolidation of freight for export and import. In this work it has been one of the pioneers in the utilization of containerized cargoes which it picks up, strips, consolidates and reloads for shipment by trailer. Regional D & W was established as

a separate corporation in 1974 to perform warehousing and distribution services in the trucking business. Where as Regional I & E engaged in freight consolidation work by means of a cross dock platform operation with a container or trailer unloaded on one side of a dock and the freight then reloaded, at times with other freight on the other side, Regional D & W operated a receiving station and conveyor system where a different type of cargo was held for later reshipment.

Initially each corporation operated out of different facilities. Regional I & E in Hoboken and Regional D & W in Secaucus New Jersey. Then in 1978 or 1979 when Regional I & E went into export trucking on a large scale receiving less than trailer load (LTL) shipments from major carriers, which Regional would consolidate and deliver to the pier for export, the operations of Regional I & E and Regional D & W were combined in one location at the Jersey City facility. Thus, the consolidation, warehousing, distribution, container trucking, and export and import trucking work were all operated together but the companies continued to retain their separate corporate identities.

Since 1978, when Joseph Nastro, Patrick Nastro's father and major stockholder, passed away the stockholders and the percentage of their stock holdings of both Regional corporations have been Patrick Nastro 10 percent, his sister 15 percent and his mother 75 percent. At all times material Patrick Nastro (Nastro) has been president. Patrick Nastro testified that his cousin, Timothy Nastro, is also an officer of Regional, but no documentation was produced establishing his office. Tim Nastro had administrative responsibilities over such matters as safety and insurance and his name appeared on letters in evidence as secretary and treasurer of Regional D & W. Nastro also testified without contradiction that he considered Andrew Ferrara, who was hired by Regional in approximately June 1984 as vice president of Regional although he had no title. Among other duties Ferrara handled labor relations for Regional particularly in negotiating collective bargaining agreements with Local 807 as exclusive agent for Regional's drivers, platform and warehouse employees in the summer of 1985. Other executives for Regional as of February 1986 were Kenneth Burrowes executive vice president who was primarily responsible for dealing with Regional's customers,<sup>6</sup> John Heffer controller and James Elia terminal manager. At the same period of time Regional's dispatchers were Anthony Ponzio and Greg Lenhardt and the dock supervisors were Orlando Cruz and Oswaldo Curcio.

Aside from Regional I & E and Regional D & W a third corporation closely held by the Nastro family, Regional Transportation was established in 1978 or 1979 to perform over the road long distance trucking since 1986 out of a yard maintained by Respondent in North Arlington New Jersey. This entity whose employees are not organized is not involved in the instant proceeding. Certain employees assigned by Regional D & W to perform platform and driving services for Reisch Trucking

<sup>5</sup> Local 807's posthearing motion to open the record to receive certain exhibits relating to its Federal proceeding to compel arbitration is granted. The exhibit numbered R U Exh 29 and 29A attachments A-Q is received in evidence. In ALJ Exh 1 I provided a schedule for the filing of the formal court papers in the suit to compel arbitration and for responses to the Union's motion and noted my preliminary view that these documents were relevant and should be received.

<sup>6</sup> Burrowes died in July 1986 and was not replaced.

Company, covered under a separate rider to general collective bargaining agreement with Local 807 are also not involved in this proceeding. However, the facts of Regional's relationship with Reisch do enter into the analysis regarding a central issue in the case to be discussed, *infra*. Regional also permanently assigns employees to work at Sun Chemical. They are also represented by Local 807 under a separate contract and are not affected by this proceeding.

## 2 Collective bargaining history of Regional

Local 807 has been exclusive collective bargaining representative of Regional I & E's drivers, helpers, platform men, checkers, and warehousemen since the late 1960s. Local 807 also became exclusive representative of Regional D & W's drivers, hi-lo operators, and platform men sometime in the 1970s after this company came into existence. A contract introduced into evidence between Local 807 and Regional D & W and apparently entered into when the company was still located in Secaucus was a term running from 1 July 1979 to 30 June 1982.

Earlier contracts entered into between Regional I & E and Local 807 apparently adopted the National Master Freight Agreement and New Jersey-New York Area General Trucking Supplemental Agreement covering over the road and local cartage employees of private, common contract and local cartage carriers called Master Freight Agreement, with a rider added covering local conditions.

The rates paid the employees under the Regional I & E agreements were considerably higher for each job classification than those paid the employees performing the same jobs under the Regional D & W agreements. When the operations of the two Respondent companies were consolidated at the one Jersey City facility in the late 1970s, the separate contracts including separate seniority rosters, continued to prevail and apply until approximately 1981. At the same time in the late 1970s the Regional I & E seniority list was frozen in the sense that Regional stopped hiring any new employees on the Regional I & E payroll and all new hiring was done under the Regional D & W payroll. This duality in seniority and benefits led to considerable animosity on the part of the employees adversely affected, particularly because, according to Regional D & W employee Fernando Sanches whose testimony on this matter among others was not controverted, there were no differences in work assignments between the employees on the two lists.

In or about 1981 the seniority lists were combined but under Respondent's proposal agreed to by the Union, the more senior Regional I & E employees retained their higher rates of pay and only as a senior man was terminated, died or retired, was a Regional D & W employee moved up to the higher rated list.

In separate Rider[s] to General Collective Bargaining Agreement entered into between Regional I & E and Regional D & W with Local 807 covering the period 1 July 1982 to 30 June 1985,<sup>7</sup> an identical seniority provi-

sion appears providing that: When a vacancy occurs for any reason in the Regional Import & Export Trucking Co., Inc. list, the senior qualified Regional Distribution & Warehousing Service, Inc. man will be used to fill the opening created. These riders also show the continued disparity in wage rates with e.g. Regional I & E straight truckdrivers receiving \$11.77 an hour effective 1 April 1982, and Regional D & W drivers starting at \$8.80 per hour on 1 July 1982 and increasing to \$9.80 by 4 July 1984.

The 1982-1985 agreement between Regional D & W and Local 807 contains an arbitration article providing that any unresolved grievance concerning the application or interpretation of any provisions of the agreement shall, within 2 days after the request of either party, be submitted for final and binding arbitration to the joint local committee in accordance with the grievance procedure set forth in the current Master Freight Agreement, except where a dispute concerns a matter of health and/or pension contributions, discharge, or voluntary or involuntary quit in which case the dispute shall be submitted to the New York City Trucking Authority.

With respect to any grievance arbitration provision incorporated in the earlier Regional I & E, Local 807 agreements, the facts appearing of record are tenuous and inconclusive. As earlier noted, the 1982-1985 rider is headed, Rider to General Collective Bargaining Agreement. There is some indication but no definite proof that the general agreement was the Master Freight Agreement. The only Master Freight Agreement in evidence covers the period 1 April 1985 to 31 March 1988. It contains an article 7 entitled Local and Area Grievance Machinery which provides that the provisions relating to local, state, and area grievance machinery are set forth in the applicable supplements to the agreement. The New Jersey-New York Area General Trucking Supplemental Agreement provides that where a dispute involving Local 807 concerns a matter of discharge the Employer and the Union shall submit the matter to final and binding arbitration through the procedures of the New York City Trucking Arbitration Authority. The supplemental agreement further provides that all disputes involving work preservation including operation, work or services subcontracted, transferred, leased, diverted, assigned, or conveyed in full or in part (covered by art. 32 sec. 1 of the Master Freight Agreement) shall be deemed arbitrable before the joint local committees, subject to such appeals as are otherwise provided for. All decisions of joint local committees on matters pertaining to interpretation of the agreement shall automatically be reviewed by the joint area committee. If the joint area committee made up of an equal number of members and alternates from each side, but not less than three each is unable to agree or come to a decision, either party may request an appeal to the eastern conference joint area committee for a final and binding decision.

The facts show neither arbitration procedure outlined was utilized when a dispute was submitted to arbitration in 1984 or 1985. As explained by Nastro, Local 807 brought on an arbitration proceeding in either 1984 or 1985 claiming that certain unit employees who were

<sup>7</sup> Unaccountably they each list Respondent's address in Secaucus rather than the facility in Jersey City to which the joint operations had been transferred.

about to retire were owed moneys representing salary increases which they had agreed to forgo in a contract negotiated in 1972 because of a Regional I & E claim of adverse economic conditions. By agreement the arbitration was submitted for decision under the procedures of the New York State Mediation Board. The Union lost before the arbitrator and then was unsuccessful in having the award set aside in New York State Supreme Court.

### 3 Ferrara's association with Regional

Andrew Ferrara was hired by P. Nastro in approximately June 1984 with responsibilities to oversee the Regional operation. With Burrowes having the responsibility for customer contact and dealing with the different accounts, Ferrara was in charge of the day to day operations. Once Ferrara was in charge, Nastro did not go to the facility every day. By 1985, in Nastro's own words, Ferrara was working the company for me (Tr 583A). By November 1985, Nastro ceased going to the facility at all and from that time until February 1986 Ferrara ran the Company.

### 4 The 1985 collective bargaining negotiations

As noted, the Regional I & E and Regional D & W contracts with the Union expired on 30 June 1985. In the summer of 1985 a single renewal contract was negotiated to replace the prior separate agreements but at the same time retaining the separate higher rates of pay and seniority for Regional I & E employees with the proviso that on a vacancy among them the senior qualified Regional D & W driver/warehouseman was to be advanced onto the Import seniority list.

Ferrara led off the negotiations for Regional. It was Nastro's intent to seek relief from the Union for economic troubles that were afflicting Regional. Regional's consolidated 1984 U.S. Corporate Income Tax Return for its fiscal year ending 31 March 1985 shows a taxable income from all operations of only \$9235 despite gross receipts exceeding \$8 million for the same period. Nastro testified to losses for fiscal year 1985 totaling \$264,000. He also noted elsewhere that he was personally liable on approximately \$400,000 in loans made to Regional I & E in 1985 or 1986 by Banco Popular.

According to Nastro, he discussed with Ferrara cutting down people and obtaining give backs from the employees. Also starting in the spring of 1985 Burrowes as executive vice president, wrote certain Regional accounts assessing 7 percent increases in rates they would be charged based in part on Regional insurance premium increases which were more than doubling payroll tax increases and increases in the present union contract.

Ferrara reported back to Nastro he was not having success in obtaining union agreement to the employer proposals in negotiations. Nastro then arranged a meeting at his office in Jersey City attended by himself and Ferrara for Regional and Boris Kovocic (Boris) shop steward<sup>8</sup> and Jack Lenihan, business agent for Local

807. Nastro proposed certain reductions in benefits for the succeeding contract. In response Boris and Lenihan outlined what they wanted in the way of increases.

Fernando Sanches testified that sometime in July 1985 Boris called a meeting of Regional employees. He told them that the Company had presented a contract proposal including a 15 percent giveback (reduction in salary) and only 3 sick days.<sup>9</sup> The proposal was rejected by every employee. Boris came back with a second proposal calling for a wage freeze, 3 sick days and a contract term of 3 years. The employees again turned it down.

Apparently after these rejections Nastro called a meeting of the employees. It was held in the drivers room at the Jersey City facility late in the afternoon as the shifts were changing and drivers were coming in. A majority of the Regional employees attended. Nastro testified that he read numbers from the most recent profit and loss statement, he read numbers regarding productivity, he read numbers to the men as far as claims and he read numbers as far as how the Company was running in the red. He referred to how the insurance numbers hurt the Company because there were insurance increases and he told the men that he did not know how to control this anymore. There was just no way to go. He continued that if they insisted on their increases it is like putting the Company out of business that the Company would have to take a strong look at each individual account.

Nothing was said by the men at the meeting but Nastro learned a short time afterward through either Ferrara or Boris that the men wanted their increases.

Sanches corroborated the tenor of this meeting which was held sometime in early August 1985. Sanches reported Nastro saying at this meeting to assembled employees that the company was losing money for a long time and could not afford to pay any raise to his employees and he could not promise them any bright future if they forced him to give them a raise. He said, "Do not listen to your union officials because they do not give you a job. I do. I give it to you and I can take it away from you." These remarks attributed to Nastro and consistent with Nastro's own testimony, and not contradicted, are credited.

Following this meeting Boris reported back to the men that the best he could negotiate was a 50 cent raise across the board in each of 3 years for those on both seniority rosters. The employees agreed and a single memorandum agreement was entered between Regional and Local 807 for a 3 year term, running from 1 July 1985 to 30 June 1988. It was signed by Burrowes for Regional and Lenihan and President Joseph Mangan for Local 807 whose signature is dated January 28, 1986. The memorandum itself and the other signatures are undated. In all likelihood it was executed sometime in late August or early September 1985. For the first time the parties entered into a single successor agreement cover

<sup>8</sup> Boris had been steward for the senior men employed by Regional I & E. Now that the lists were combined he was steward for Regional D & W employees as well but the less senior Regional D & W men continued

to rely on Nelson Morales as their steward although since the physical merger and combining of the lists Nastro did not acknowledge his status.  
<sup>9</sup> The 1982 agreements had provided for no paid sick days. The final agreement for 1985-1988 contains 6. It is clear that the Union sought at least that many.

ing all Regional unit employees which carried forward, except as modified by a memorandum of agreement containing eight substantive paragraphs, the terms and conditions of employment contained in the Regional I & E Local 807 agreement that expired on June 30, 1985.<sup>10</sup>

In a preamble to the memorandum Regional I & E and Regional D & W expressly recognized that they constitute a single employer for purposes of daily operation and control of their truckdrivers and warehouse personnel. Aside from the 50 cent an hour increases in each of the 3 years of the agreement, the memorandum provided for contributions into the Local 807 Labor Management Pension and Health Funds, with pension contributions at a much higher rate per hour for employees on the Regional I & E payroll, 6 paid sick days each contract year, and a continuation of the provision moving Regional D & W employees up to the Regional I & E seniority list as vacancies occur.

### *B The Events Leading to the Creation of Newport*

According to Nastro, as a result of the negotiation process, which resulted in increases for the employees, shortly afterward he called a meeting with his executives at Regional. These included Ken Burrowes, Tim Nastro, Andy Ferrara, and John Heffer. Nastro told them to start going over each account to determine which ones were in arrears on payment and how much and which were good payers and to prepare letters seeking increases in rates to compensate for the employees' increases under the new agreement. Burrowes, in particular, was instructed to evaluate each account for profitability.

As earlier noted, Burrowes was deceased by the time of trial. Nonetheless, none of the letters that Regional introduced into evidence as corroborating its communications with accounts informing them of increases in rates relate to the period after Regional entered the 1985 union agreement. They all are dated 22 March to 30 April 1985 except for one dated as late as 31 July 1985 but relating to increases made effective 1 May 1985 and another dated 5 August 1985 relating to a meeting with the account held on 2 August.

Nastro continued that as a result of this meeting and review of accounts, he lost some accounts and started giving some accounts up.<sup>11</sup> It was at this time, probably late August or early September 1985, that according to Nastro, Ferrara first expressed interest in taking over accounts from Regional. Nastro testified, "We started giving some accounts up and this is when Andy came to

me and said you are going to give up these accounts, why not give them to me" (Tr 577A).

Ferrara testified that when the meeting broke up he asked for a separate meeting with Nastro and asked if he could buy some of the accounts. Nastro was going to give up so he could start his own business.

Nastro's reaction was to investigate whether he could give up Regional's lease for the Jersey City facility and to weigh Ferrara's proposal in light of the unprofitability of Regional's operation with the same customers. As Nastro put it, "I also had to take a look at Andy's proposal and say hey you are working the company for me, but you are not making any money how are you going to be able to do that on your own—but that is how the discussion started" (Tr 584A). Ferrara's response, as also recounted by Nastro, was to say "he was going to get a contract he could live with" (Tr 589A).

Ferrara testified that after their initial discussion, a few days later Nastro told him they could work something out on certain accounts. Ferrara said he did not have much money. He would like to lease some equipment from him and Nastro said that could also be worked out. Ferrara said he would need some desks, typewriters, and office equipment and again Nastro agreed to work something out. Ferrara did not recall discussing the terms under which he would obtain trucks from Nastro but claimed that at some point in time they agreed on a price after going back and forth for awhile. Nastro said he attempted to bind Ferrara as much as possible to use Regional equipment. He recalled reaching agreement on a price of about \$70 a truck, based closely on what he, Nastro, pays to rent trucks from Ryder. On trailers, Nastro also said he agreed to rent them to Ferrara for somewhere around \$8 or \$10 a day. Nastro also said he agreed to supply mechanics to maintain the Regional equipment. Ferrara was to use. On both the decisions to lease rather than to sell and to supply his own mechanics, Nastro expressed his judgment that he was protecting his interests and making a sound business decision in the event Ferrara failed in his venture.

Ferrara testified that his costs of rental of equipment would also include the cost of their maintenance. He also said after discussions about the nature of a fee arrangement for Regional providing him with customers they finally reached a tentative decision that he would pay Regional 5 percent of the gross revenues from the accounts he took from Regional excluding such charges as loading charges at the pier.

After two or three negotiating sessions according to Ferrara he met with the law firm of Dickson & Creighton with offices in Hoboken, New Jersey, on Nastro's referral to draw up agreements. As early as 6 September 1985, Ferrara had executed a Certificate of Incorporation for Newport Transportation Co., Inc. The document lists Donald R. Creighton of the firm as the corporation's initial registered agent and as witness to Ferrara's signing. Ferrara had no lawyer of his own and this firm had represented the Nastro family interests and businesses for many years. Ferrara has neither been billed nor paid for any of the legal services provided to Newport by this law firm which involved not only its

<sup>10</sup> One of the matters left unresolved by the hearing concerns this expiration date. As earlier noted, the predecessor Regional I & E Rider to General Collective Bargaining Agreement contained a 30 June 1985 termination. However, the Master Freight Agreement which was claimed by the Union as its basic or general underlying agreement had as earlier noted an apparent termination date of 31 March 1985 because the Master Freight Agreement in evidence ran from 1 April 1985 to 31 March 1988.

<sup>11</sup> Nastro specified that Regional lost two accounts, F. W. Woolworth and Allied Stores. At least one of them, Allied Stores, was probably lost earlier in the spring of 1985 when Regional informed them about increases in rates. A third account, Avon Products, commenced doing their own consolidation of freight at their own facility in Totowa, New Jersey, sometime in 1984 but Regional continued to perform their local trucking services.

preparation of documents executed between Regional and Newport but also a separate lease for premises entered into by Newport which it prepared or reviewed. Neither could Ferrara recall whether Newport had paid Nastro's accountant Herb Braverman whose services Newport also used. At all times Ferrara has been the incorporator, sole stockholder, and director of Newport as well as its president.

### C. *The Agreements Between Regional and Newport*

Two agreements dated and executed 27 January 1986 were drawn up by Dickson & Creighton and Newport commenced operations within 2 weeks thereafter on 7 February 1987. One agreement, a motor vehicle lease between Regional I & E and Newport set forth terms under which Newport agreed to lease from Regional I & E 2 cars, 15 tractors, and 10 trailers described by make, year, serial number, and plate in an annexed schedule. In fact, this schedule was not followed. Nastro explained that on any given day Newport had available to it any of Regional's 60 or more trailers and 30 tractors in addition to a straight truck not listed in the schedule. Newport's use of such equipment varied as its needs to service customers varied over time. According to Nastro, the schedule in part merely reflected the tractors that Ferrara preferred at the time the agreement was drawn. Of the two cars listed in the original schedule, one, a Ford LTD, was actually retained by Nastro for his own use in Florida where he since spends much of his time, and two other cars, a 1981 Mercedes and 1983 Ford, finally appear in a letter dated 23 May 1986 from Nastro to Ferrara referring to the three vehicles we are leasing to you for which rental charges will be as follows and listing monthly charge varying between \$150 and \$450 per month, none of which Nastro was able to testify affirmatively he ever received.

Although a servicing section requires Newport to repair and maintain the vehicles at its own cost and expense, in fact and in contravention to both Ferrara's testimony and the language of the agreement, Regional has always serviced the leased vehicles by assigning a supervisor and three mechanics to Newport's terminal. This decision to do so was made by Nastro even prior to Newport starting operations.

Although reference is made to a fixed rental charge plus a mileage charge with a schedule annexed, the agreement lacks any such schedule. No rental fees have ever been fixed in writing, billed, or paid. A required mileage record for each vehicle to be furnished weekly to Regional to aid in determining mileage charges was also never adopted and no mileage records have ever been forwarded or reviewed. Another section calling for Regional to invoice Newport monthly for all charges has also been ignored and Newport has never been billed for the use of the mechanics or vehicles. While the agreement requires Newport to insure the leased vehicles, Regional carries the insurance for all equipment and is thus at risk under its policy for any accident involving a Newport driver. Finally, Regional may reclaim any vehicles or require Newport to purchase the same on any default of required payments or other covenants or conditions required of Newport continuing for 5 days after

written notice of default but the purchase price is based on the value of the vehicles and the required schedule of values is also missing. Nastro failed to adequately explain any of these discrepancies and exhibited a general lack of familiarity with the agreement.

A separate agreement executed on and bearing the same date, 27 January 1986, provides for the sale by Regional I & E to Newport of certain accounts. In it, Regional agrees to sell to Newport certain accounts, shippers, and consignees listed on an attached schedule, and starting 1 February 1986, Newport agrees to provide the necessary personnel, trucks, trailers, and other equipment to properly service them in the same manner previously performed by Regional. For 10 years, Newport agrees to pay Regional an amount equal to 5 percent of the gross revenues billed by Newport for the services it performs. Payments of such commissions to be made on a monthly basis on or before the 20th day of the month following billing. Nastro claimed he originally sought a lifetime obligation but finally agreed to the 10-year period. Regional may inspect Newport's books and records pertaining to the transferred accounts. The parties recognize Regional is not assigning any part of the good will of its business and Newport agrees to indemnify Regional from any claim against it arising from any transaction with its customers after 1 February. Paragraph 9 requires Newport to reassign the transferred accounts without any obligation by Regional on its written demand in the event that Newport, in the opinion of Regional, fails to properly and adequately service said accounts in the same manner as presently serviced by Regional or in the event Newport no longer desires to service said accounts.

Nastro agreed that this language provides Regional with the power to discontinue Newport's servicing of the assigned accounts anytime it chooses and to get these accounts back. Nastro did question his power to control the accounts but that power was apparently manifested when the accounts enumerated in schedule A and others since agreed to Newport's providing their transportation services instead of Regional.<sup>12</sup>

The schedule annexed lists 11 accounts transferred among them Toys R Us, Channel Home Center, Nestles, and Chock Full of Nuts. Newport did not service all of them and began in business by servicing only a few, adding customers from this group as it continued in business. Subsequently, Newport started servicing other Regional accounts, including Clipper Express, I.S.A., F.S.I., Carolina Holmes Transportation, and Foster Medical, a subsidiary of Avon. As a result, the only accounts that Regional retained were Avon Products, North American Phillips, and General Electric.

Although the agreement requires the commissions to be paid on the basis of gross revenues, both Nastro and Ferrara testified that invoices would govern such payments. Most significantly, Regional never billed Newport monthly and Newport has never paid any moneys to Regional for the sale of the accounts. In an exchange of

<sup>12</sup> Whether the transferred accounts in reality continued to be serviced by Regional in another guise and not an independent purchaser for value constitutes one of the central issues in the case.

letters dated 2 and 7 September 1986 respectively *after* the filing of the initial charges in this proceeding against Regional and Newport on 13 August 1986 placing the Respondents on actual notice of all the allegations of violation now being litigated. Nastro first informed Ferrara of his intention to have Newport comply with payments under both agreements and that his willingness to forgo such payments for 6 months in order to permit Newport to successfully operate during its initial stages is not to be viewed as a waiver of such obligations. Ferrara replied by confirming this arrangement suggesting as well that they finalize the financial arrangements concerning office furniture, computer equipment, computer programming, the lease or sale of three automobiles, possible reimbursement to Newport for space occupied by the Regional mechanics and clerical support for Regional payroll.

Ultimately Ferrara balked at permitting an audit of Newport's books and records which Nastro later sought to have made by their common and Nastro's longstanding accountant, and the matter remains unresolved no audit, no billing, no payments. There is little basis for believing that the principals consciously arranged a hiatus in enforcement of the leasing and commission agreement when entered but much reason to find that the language of the September letters was concocted after the fact to aid their defense. The agreements themselves contain no hint of a delay in compliance. In any event, 6 months was up 7 July not 2 September 1986.

*D The Transfer of Accounts, Equipment and Staff from Regional, the Blurring of Separate Operations and the Layoffs of Regional Drivers and Platform Employees*

In February 1986, Newport opened its business from a part of a truck terminal it had subleased located at 1200 Newark Turnpike in Kearny, New Jersey. Lessor was ABF Freight System Inc. as tenant at the location and lessee was James G. Nicholas-Newport Transportation Co. Inc. Nicholas executed this sublease solely as a guarantor of the payment of the monthly rental required. Under the guaranty on failure of Newport to reimburse Nicholas within 15 days of any payment Nicholas made on notice of Newport's nonpayment of rent, Newport agreed to immediately vacate the premises and Nicholas then acquired sole right of possession for the balance of the term. The sublease ran for 7 months from 1 February to 31 August 1986.

Nicholas with his son was the owner of the facility at Van Keuren Avenue in Jersey City which Regional had leased in January 1983 for a term of 10 years at a rental of \$238,500 per year for a rental over the term of \$2,385,000 and which rental space was expanded by approximately 18,000 square feet with an additional monthly charge of \$3000 by September of that year. By October 1985 Burrowes on behalf of Regional had commenced discussions with Nicholas to seek relief from its Jersey City lease and by December was arranging to vacate the facility by the end of February or March 1986. In 1984 Regional had also leased a separate lot in Jersey City from Nicholas at a monthly rent of \$1500 for storage of Regional trailers. Thus, Nicholas had a sub-

stantial business relationship and dealings with Regional by the time Ferrara sought a terminal for Newport. There is no question but that Ferrara's ability to obtain a guarantor of the stature of Nicholas on his initial entry into business for himself with few accounts and no credit history was aided in no small measure by Regional and Nastro's leaseholds. Nastro's tacit role in Ferrara's entry into the trucking business is acknowledged by him when he sought to explain the elapse of time between the summer of 1985, when Ferrara incorporated Newport, and the end of January 1986, when Regional sold its accounts and leased its equipment to Newport. Nastro explained, "As I recall it took time to get a facility to get a company set up where I was satisfied with it and it took me time to gain the confidence in what was going to happen."

Subsequently, in June and July 1986, Newport entered into a direct lease with the landlord at the Kearny location for the previously subleased space as well as additional space at the same location. Part of the complete package of lease agreements was a guarantee to the landlord of the lease payments executed by Timothy Nastro, secretary on behalf of Regional I & E. Newport also leased additional space for storage of trucks and trailers on 1 August 1986 for a 6 month term consisting of a portion of a vacant lot at 44 Porete Avenue North Arlington, New Jersey. Fifteen days later Regional I & E leased a portion of downstairs office space across the street at 43 Porete Avenue on a month to month basis. Testimony established that in actuality Regional retained a trailer on the 44 Porete Avenue lot for use as its office on space which Ferrara could not deny may be leased by Newport and stored trailers and tractors there in space undistinguishable from that used by Newport. According to Ferrara, Regional and Newport equipment on the site are separated by about 15 feet; other businesses store vehicles and equipment there as well. Ferrara also said he knew Regional used this space when he arranged his own lease.

In connection with the Kearny June 1986 lease, Newport obligated itself to provide an irrevocable letter of credit in favor of the landlord for \$40,000 to be available on a default in rent payments. Ferrara testified he arranged the letter of credit from Banco Popular dated 12 September 1986 effective for 1 year and signed by two bank officials. Ferrara at first could not recall with which bank officer he dealt, reciting that normally John Heffer (Regional's and then Newport's comptroller) deals with the bank. There is strong evidence that Nastro and Regional retained a firm relationship with Banco Popular. Nastro borrowed \$400,000 from this bank in part to buy used equipment, at least some of which is being operated by Newport, becoming individually liable on the loan, in either 1984 or 1985. And Regional had regular business dealings there over the years. Thus, again, just as in the case of Newport's lease, the inference is strong that Regional played a determinative or, at least, substantial role in Ferrara's ability to arrange this letter of credit as well as a series of unsecured notes which Ferrara claimed he arranged to capitalize his venture. Indeed, Ferrara initially testified that Nastro per-

sonally guaranteed the series of notes, originally taken out in early 1986 but which were later replaced by a secured note of \$100,000 in July 1986 both at a very favorable rate of interest of prime plus one half percent.<sup>13</sup> Nastro later took the stand specifically to deny his guarantee, yet Nastro acknowledged referring Ferrara to the bank, his extensive dealings there are a matter of record and neither Respondent saw fit to produce all the documents relating to the loans including the bank's file dealing with them. Because the matter was deemed by Regional counsel of sufficient import for Nastro to retake the stand solely for the purpose of denying a role in guaranteeing Ferrara's loans, I conclude that if it wished any inference of Nastro's connection to the loan to be dispelled those records should have been forthcoming. It appears incredible and substantially unbelievable that the bank would have granted Ferrara the irrevocable line of credit and the series of unsecured notes and, ultimately the secured notes, all at an extremely favorable rate of interest without requiring, as Ferrara would have the Board believe, any written application, personal collateral, or detailed information about the nature, extent, and accounts of Newport's business, or without Ferrara consulting, as he also claimed, an attorney, accountant, or other professional. Both Ferrara's and Nastro's denials of Nastro's participation in Newport securing these loans and line of credit from Regional's bank is not credited.

Just as soon as Newport opened for business Regional cut back severely on its operations. Effective 1 February 1986, Regional and Nicholas mutually terminated their tenant-landlord relationship at the Jersey City facility and a sublease of smaller space by Regional at the same terminal continued thereafter until 15 October 1986, when Regional quit the Jersey City facility for good. Nastro testified however, that Regional gave up its dock facility in Jersey City months earlier effective 1 July 1986.

Newport began business slowly with few accounts and equipment all of which however were supplied by Regional. In addition to trailers and tractors it included office equipment. These were desks, chairs, cabinets, photocopier and typewriters. Ferrara in his 7 September 1986 letter also acknowledges receiving computer equipment and programming from Regional.

<sup>13</sup> That security interest described in the note as all personal property of debtor including machinery, equipment, furniture, inventory, goods and accounts receivables now owned or hereafter acquired may have been rendered worthless in view of Ferrara's much more recent execution of a security agreement dated 31 October 1986 in which the same assets of Newport are pledged to secure payment by Newport of its obligations owed Regional I & E. This belated agreement was executed on the eve of trial and so may be disregarded as providing any evidence of an arm's length business transaction between independent entities at all times material to the allegations in the complaint. Put another way it was the nature of the relationship when Newport started in business and employees' rights were affected thereafter that is crucial to a decision on the alter ego issue, not steps taken after the companies are charged with major violations of the Act. Ferrara's execution of the lien agreement however does illustrate his willingness to accede to Nastro's wishes even where Newport's interests should be adverse. Thus Ferrara testified he signed the instrument without reading it or consulting an attorney after Nastro asked him to do so because, as Ferrara explained, he had no choice.

An independent witness with no apparent reason to fabricate explained how customers were transferred to Newport. William Marsh, traffic manager for Channel Home Center testified that because Regional had performed its local pier work starting in 1982, Burrowes had been his chief contact. In February 1986, Burrowes called him to say Newport was going to do the pier work out of a new terminal location in Kearny. The service, the rates, and the management supervisor support would be the same. Although Marsh could not state that Newport was specifically identified to him as a subsidiary of Regional, he noted that this was his understanding of their relationship from the conversation. Since that time he has been dealing basically with the same principals, the same services, the same everything. Since Newport started to perform the work he has dealt with the same people, Burrowes until his death around August 1986, Ferrara as liaison if Burrowes was out of town, and on a day to day basis with the dispatcher and the supervisors Jim Elia and Tony Ponzio. Marsh later noted that when he needed a quick answer on a business matter and no one else was available at Newport he might call Tim Nastro because he knew him from other times. Starting in February 1986, he reached Burrowes and Tim Nastro at a different telephone number, in all likelihood that of Regional.

The managerial and supervisory hierarchy of Regional by and large transferred over in the spring and into the summer of 1986 to Newport's payroll and facility in Kearny. Ferrara, Regional's de facto vice president and Newport's president of course moved immediately on Newport's entry into the trucking operations. Anthony Ponzio, one Regional dispatcher moved to Newport in the same job in April, Gregory Lenhardt, the other Regional dispatcher became a Newport dock supervisor in July. The two Regional dock supervisors Cruz and Curcio moved to Newport in the same jobs in May and June, respectively. Ferrara also hired Boris, the Local 807 shop steward employed by Regional in June 1986 as a supervisor. Ferrara explained that although Boris may not have had the brains or intelligence to perform in that capacity he did have the experience to cut down on claims resulting from damages or thefts from shipments—a problem that existed at Regional. Boris has since left Newport's employ. James Elia, Regional's terminal manager transferred in May or June to become Newport's head dispatcher and manager. John Heffer, regional controller transferred to the same position with Newport in July. Burrowes, Regional executive vice president who, according to Nastro, was moving toward a possible retirement or commission arrangement on accounts he produced in the future for Regional and/or Newport passed away in the summer of 1986 and was never replaced. Nastro himself ceased being involved in Regional's day to day activities sometime in 1985. Thus Regional retained only Tim Nastro and dispatchers Gerard Elia (James Elia's brother) and Robert Shapiro among its active managerial and supervisory hierarchy at its own location on Porete Avenue 6 months after Newport started up. Even Tim Nastro began spending part of his time at Newport's facility in Kearny to arrange for

the preparation of Regional's payroll by Newport clerical employees and to consult with Vincent Lucci, the Regional mechanics supervisor located there. Nastro directly confirmed that his cousin Tim works in Kearny and Porete Avenue, North Arlington.

Every clerical worker employed by Regional as of February 1986 was eventually hired by Ferrara and moved to the Kearny office. These included Helen Muscarella, who had been an executive secretary for Nastro and Ferrara among others. She began to work at Newport on 18 October 1986, although in November she was still on Regional's payroll. The lame explanation for this offered by John Heffer was that when we finish our vacations and everything to be paid from the Regional payroll she will become eligible for the Newport payroll. At Newport she works as Ferrara's secretary. The others who transferred were Julia Saychuk, billing clerk, transferred week ending 14 June, Pauline Petrich transferred 12 July, Lorraine Zupicich, bookkeeper, transferred 5 July, Rose Ann Wassong, clerk, transferred 5 July, Robert Smith, computers and billing, transferred 12 July, Betty Juystic, nee Brennan, transferred 5 July, and Antonio Santoro, transferred 14 July.

Three of them, Juystic, Petrich, and Santoro were terminated after September 1986. The office complement at the time of hearing were the five (Muscarella, Saychuk, Zupicich, Wassong, and Smith) plus Joan Rock, hired as a receptionist on 8 March.

All the executives, supervisors, and clerical employees were hired by Ferrara at the same rates of pay they had been receiving while on Regional's payroll. Boris received an increase when he became a salaried supervisor at Newport. Recently, Ferrara provided all supervisors and clerical employees with an increase.

As noted earlier, in addition to accounts listed in the buy/sell agreement, Newport gradually took over other Regional accounts not specified in the agreement. On all these accounts Ferrara testified he would be obligated to pay the 5 percent commission.<sup>14</sup> As his operations developed, he acquired some customers that had not been serviced by Regional. One a firm called Williams System became a customer in March or April 1986, and at the time of hearing accounted for 10 percent of Newport's business. By July 1986 when Regional gave up its dock lease, Ferrara conceded that 70 percent of Newport's business was made up of accounts that had formerly been serviced by Regional. This 70 percent did not include one good sized Newport account, Clipper Express, which admittedly had previously been a Regional account but one which Ferrara protested he had procured while he was an executive for Regional. It was Ferrara's contention that he was not obligated to pay a commission to Regional for this account. Any disagreement between Nastro and Ferrara on commissions due from this account remained to be resolved pending the outcome of this proceeding. In any event, despite Ferrara's protestations to the contrary, Clipper Express had been a Re-

gional account that Ferrara took over without objection from Regional after Newport went into business.

Aside from the apparent lack of bona fides of the leasing and buy/sell agreements entered between the two, a number of facts have already been elicited bearing on the clouding of any real differences between Regional and Newport as separate business entities. Regional stored vehicles at Newport's Porete Avenue facility without distinction and without evidence of any rent being paid for such use. Tim Nastro, on Regional's payroll, spent a good portion of his time at Newport's Kearny facility. Helen Muscarella was still being paid from Regional's payroll more than a month after transferring to work as Ferrara's secretary at Newport. A regular customer of Regional after switching to Newport continued to be serviced by and have business dealings with the same people, whether on Regional's or Newport's payroll, and under such circumstances that he could draw no distinction between the two. Regional serviced its own equipment with its own mechanics at Newport's facility with out any billing or payment.

Other instances of such common or overlapping conduct involving Regional and Newport about Ferrara testified that Newport on occasion would consolidate trailer loads in Kearny and then drive the trailer to Porete Avenue where it would later be taken away by Regional drivers to its final destination. Nastro was not ultimately able to dispute this relationship. Controller Heffer, when asked about the nature of Muscarella's work after she began reporting to Kearny, replied that "we perform the services for Regional so everybody" (all office staff) does part of the work. Prior to July 1986 Regional had performed Newport's payroll and billing. Starting in July, according to Heffer, Regional's entire clerical function was transferred to Newport. The Regional clerical staff had moved over by this time and the equipment, including the Regional computer and other equipment was now at Kearny as well. Although now paid from Newport's payroll these clerical employees continued the same work they had done before—the billing and payroll for both companies. To the close of hearing, Newport had not billed Regional for any of the Regional office work it regularly performed and indeed, there was no evidence that any attempt had been made to break down for accounting or billing purposes Newport's time and material in performing this service.<sup>15</sup>

Detailed testimony was elicited about certain Regional accounts later transferred to Newport and about Regional's continued billing of one account it retained which also bear on the absence of any arm's length business relationship between the two.

<sup>15</sup> Late in the hearing testimony was elicited by Newport from Controller Heffer about the proportion of time each clerical employee spent on Regional or Newport accounts and payroll on a daily basis. All but the receptionist divide their time apparently the majority on Newport work and Heffer himself spends 3 days on Newport work both accounts transferred from Regional and new ones and 2 days on existing Regional accounts although his pay is now received in full from Newport. None of this testimony undercuts the conclusion that Regional has ever been billed nor has an audit ever been prepared by Newport consistent with the breakdown provided by Heffer on the record.

<sup>14</sup> Ferrara finally took the position that he would await the outcome of this proceeding before agreeing to an audit of his books to fix his mileage sales or invoices or to pay any moneys to Regional under the agreements.

By agreement made on 1 January 1985 Regional agreed to service certain accounts of ERA Trucking Co Inc which was being dissolved and, in return to pay Louis Schiff ERA's sole stockholder a commission of 5.5 percent on all billings received from the ERA accounts listed on an attached schedule. Although similar to the buy/sell agreement reflecting transfer of accounts from Regional to Newport in practice under the Regional-ERA agreement Regional maintained detailed records of the amounts billed and paid Schiff on a monthly basis. No such records were maintained by Newport under its agreement with Regional despite the specific provision also requiring commissions to be paid on a monthly basis.

One of the accounts Regional took over under the ERA agreement was Chock Full of Nuts. This account among others was later transferred to Newport. While it serviced this account, and to date since its transfer to Newport Regional has permanently assigned and paid two of its own clerical employees to work at the customer's location. Regional has not billed Newport for this service and Newport has billed and been paid for all trucking services performed by Chock Full of Nuts, presumably including the support service performed by the two Regional employees. In any event these services, which have aided Newport in the work it performs for this account, have never been acknowledged by Ferrara as an obligation owing to Regional.

At least one other ERA account Cofinco was also transferred to Newport. Yet on both accounts Regional is continuing to pay Schiff 5.5 percent of billings monthly while receiving nothing from Newport. Even if Newport were paying commission on these two accounts Regional would be out of pocket 5 percent and in no event generating any net income from their transfer to Newport for servicing. Nastro testified that before computing Schiff's commission the monthly billings of the two accounts are reduced by the amount of Regional's commission from Newport. The Regional records in evidence however contradict this assertion and show no reduction of Schiff's commissions to reflect the amounts owed by Newport to Regional. Nastro's reaction to these facts was one of apparent surprise yet Nastro had to acknowledge that he never discussed with Schiff nor set forth in a writing with Schiff any change in Regional's obligation to pay the 5.5 percent commission under the ERA agreement to reflect that the billings on the accounts would be affected by a second assignment to a third party Newport. The consequence of course is as Nastro conceded he (Regional) was losing five percent on everything I do for Lou Schiff (Tr 900).

According to Heffer a certain payroll designation on the records of Regional into October 1986, department 12, represented payroll checks for Regional office personnel as well as the billing of a Regional account, Reisch Trucking Company, for the service Regional performs of preparing Reisch's employee payroll for a fee of 10 percent. Heffer explained that the employees involved were not hired by Regional or Newport supervisors but by employees of Reisch and that Regional had no connection with these employees other than preparation of the payroll. Nastro contradicted Heffer's characterization

of Regional's relationship with Reisch. He produced a Rider To General Collective Bargaining Agreement listing Regional D & W f/ac (for the account of) Reisch Trucking Company at a South Kearny location and signed by Lenihan and President Mangan of Local 807 and describing wages and other benefits of drivers hi lo operators and platform men for the period 1 July 1985 to 30 June 1988. Nastro maintained 20 employees work there. They are not involved in this proceeding. It remained unclear to what basic or underlying agreement this document is a rider. The rider lists wages and other benefits but no other terms or conditions of employment. It was Nastro's claim that under his understanding with Reisch, Regional receives 10 percent over payroll for performing services for Reisch. Later Nastro conceded that under a longstanding relationship with Reisch Regional only supplies labor to Reisch and the employees who work at the South Kearny location are dispatched and supervised by Reisch employees and drive Reisch tractors and pull Reisch trailers. It would thus appear that in fact the work force is employed by Reisch and Heffer's understanding as the controller dealing day to day with the subject, is the more likely set of facts.<sup>16</sup> Significantly since July 1986, Newport clerical employees have prepared the Reisch payroll, but the 10 percent commission is paid to Regional and not shared by Newport.

As Newport took over servicing Regional accounts its work force expanded and Regional's decreased in size. In addition Newport's payroll shows a high degree of turnover over Regional's work force, particularly the Regional D & W work force was reduced gradually between February and June but was severely reduced in late June 1986. The Regional I & E guards were all removed during February 1986. Its clericals were transferred to Newport as earlier noted beginning in June while its supervisors and managers were transferred in the period May to July. Regional I & E platform employees were all removed from the payroll between July and September 1986. The facts regarding the termination of Regional platform employees and drivers, particularly at the end of June 1986 will be discussed infra as the testimony of the employees who testified for the General Counsel is reviewed.

#### *E The Complaints of Unit Employees to Local 807 and the Union's Inaction*

Neither Nastro nor any other executive of Regional, to Nastro's knowledge notified the Union of its transfer of accounts to Newport or that its chief operating officer Ferrara was the recipient of vehicles, accounts equipment, and would eventually be receiving the aid of its clerical managerial and supervisory staff in operating the same or a similar business at another location. The employees soon become aware of these developments and let their Union know in no uncertain terms of the

<sup>16</sup> There is no dispute that Regional does maintain a complement of its own employees at the facility of Sun Chemical who perform Sun Chemical transportation services and are governed by a separate collective bargaining agreement with Local 807 not germane to this proceeding.

basic facts and what protection they expected from their bargaining agent

Fernando Sanches an employee on the Regional D & W seniority list and payroll, testified that sometime in early February 1986, he met an employee he knew as Joe who had been laid off from Regional at a bank where he, Sanches, was cashing his check. Sanches learned during this conversation that Joe was hired by Newport the day after his layoff by Regional.<sup>17</sup> Sanches also learned that Newport was doing transportation work on an account previously serviced by Regional D & W. As a result of this conversation and others with fellow employees Sanches went by the Newport Kearny facility at least twice, and saw Regional tractors and trailers now containing Newport signs on the second occasion at a much later date noticing about 14 or 15 of Regional's tractors, about one half of Regional's fleet now operating for Newport.

By letter dated 5 February 1986, postmarked 10 February 1986 and received on or about that date by Local 807, addressed to Regional Grievance Committee Local 807, and signed Members of Regional Import and Export Regional Distribution Services, unit employees expressed their concern about the transfer of their work as they had recently learned about it, as follows

ATTN JACK LANIHAM/MIKE GREELY/JOE MANGAN

BE ADVISED THAT INFORMATION THAT HAS COME TO OUR ATTENTION CONCERNING THE FUTURE OF EMPLOYEES OF BOTH REGIONAL IMPORT AND REGIONAL DISTRIBUTION SERVICE WE SUBMIT THIS LETTER, OUR SOURCE INFORMED US THAT NO LATER THAN JUNE 1986 OF PERHAPS SOONER REGIONAL WILL ASSUME A NEW IDENTITY AND LOCATION

ACCORDING TO OUR SOURCES THE NEW NAME SUPPOSEDLY WILL BE NEWPORT DISTRIBUTION CO LOCATED AT THE NOW VACANT ABF TERMINAL IN HACKENSACK AVENUE SOUTH KEARNY WE BELIEVE THAT THIS PROCESS IS NOW IN MOTION AND THAT THE PRINCIPLE MANAGEMENT WILL BE ANDY FERRARO WE REQUEST IMMEDIATE ATTENTION TO THIS MATTER AS IT WILL EFFECT BOTH OUR EMPLOYEES AND UNION MEMBERSHIP WE ARE ALSO PREPARED TO SEEK OUTSIDE AND GOVERNMENT INTERFERENCE NOT SHORT OF LEGAL ACTION TO AVOID THIS DISTURBING DEVELOPMENT WE THE MEMBERS WILL TAKE ACTION WITH THE BACKING OF OUR UNION AND ALL LEGAL MEASURES AT OUR DISPOSAL TO CORRECT THIS SITUATION

Local 807 President Joseph Mangan acknowledged receiving this letter and routing it to Business Agents Lenihan and Mike Grilli and his son and Union counsel Warren Mangan

Another Regional employee driver Joseph Marino testified that in February 1986, he mailed by regular mail to Local 807 at its Long Island City address a two page letter unsigned, raising employee concern about the Regional-Newport relationship and its adverse impact on

Regional employees Marino testified that the letter represented the sentiments of everyone at Regional. The first page reads as follows

International Brotherhood of Teamsters  
Local 807

February 24, 1986

Gentlemen

You have been notified and made aware of the actions of Regional Import & Export Trucking Co and their attempts to break their contract with your union 807. Eventhough the way that they are going about breaking the contract seems to be totally illegal your local has failed to act in anyway

This letter is to explain to you once again what's been going on at Regional

Number (1) Regional has started a new company by the name of Newport Transportation Co they are located at 1200 Newark Tpk Kearny NJ Tel 201-991-8400

Number (2) They are going under the pretense that Mr. Ferraro is the sole owner of the company and that it has nothing to do with Regional other than Regional just happened to give Mr. Ferraro most of its accounts and sell him all of the trucks that he uses and all the other equipment he has so that he could start a company of his own and be a competitor of Regional (PURE FICTION) Mr. Nastro owns both Regional and Newport and Mr. Ferraro is just his front (FACT)

Number (3) They brought in a new Union other than 807 before even hiring any workers

Number (4) Little by little Regional's Equipment is being taken over by Newport and before long most if not all of Regional's Equipment will be under Newport name until Regional no longer exists. Its all very obvious what is taking place. Mr. Nastro could build up Newport Trans in place of Regional and pay the Newport workers 6 to 8 dollars an hr plus less union benefits—so why keep Regional at all or your local

Joseph Mangan denied ever receiving this letter or having any knowledge about it prior to the hearing. Marino testified that after he had succeeded Boris as shop steward by Regional unit employees at a meeting held on 15 July 1986 at the union offices, attended by Nastro, Union Business Agent Mike Grilli, Secretary Treasurer John Hohmann, and himself at which he informed the union representatives he was going to get a lawyer when it appeared that the Union was not pressing Nastro to remedy the problems primarily the layoffs resulting from the transfer of work and had not even mentioned their identity as employers, he referred to his earlier letter and received a reply implicitly acknowledging its receipt by the Union. The meeting became heated and Marino mentioned to Hohmann that the Union had his letter for over 6 months and nothing was done. Hohmann said that things take time or something like that

<sup>17</sup> Ferrara acknowledged that a Joseph Kearny a guard at Regional was hired by Newport as a platform employee

I credit Marino on this exchange, and note that Grilli was not called as a witness by Local 807 and that Hohmann during his examination did not deal with Marino's testimony about his reference to the February letter or his attribution to Hohmann of the response about things taking time. Further, I will apply here the presumption of regularity in the receipt of regular mail and find that Mangan's bare denial is insufficient to overcome this presumption. Hohmann's response provides other evidence that the Union had received the 24 February letter. It is also self-evident that having admitted its receipt of the 5 February 1986 letter from a group of members employed by Regional, the Union was placed very early on actual notice of the ramifications of the Regional-Newport relationship and its effect on the contract and statutory rights of its members theretofore employed by Regional.

Another Regional employee, Charles Edward Lampkin, a driver for Regional, who had from time to time on a regular basis picked up loads of merchandise at Port Newark on behalf of customers Channel Home Center and Mikasa, started to see at the port the trucks he and other drivers used to drive now designated as Newport and being driven by other drivers. In late February 1986 Lampkin and others raised their concern with Shop Steward Boris and Nelson Morales. At the end of February, Union Agent Lenihan came over to the Jersey City facility. When informed of the Newport problems he told the men that they were going to check out and see if that was the same company because a lot of Regional drivers with lesser seniority than Lampkin, who started in June 1981, were losing their jobs, were being laid off.

As time went on and Lampkin saw more of the Regional trailers and tractors going over to Newport and finally office personnel, he continued almost on a daily basis to question the shop stewards with no positive results. They responded that the Union was going to go over to Newport and subpoena Ferrara's records but they, the stewards, could not find out anything or ease the employees' fears. By March 1986, Lampkin himself was laid off. The records show he last worked for Regional D & W in the week ending 1 March 1986. He had asked Terminal Manager Jim Elia when he would be reached for lay off and finally was told there was no more work for him. When Lampkin asked why Elia told him the Company was giving up certain accounts that they were not making money with and that would mean some of the drivers were going to lose their jobs, Elia never testified. I credit Lampkin. Two to three months later Elia was head dispatcher and manager for the lost accounts, among others at Newport.

The unit work was assigned on a daily shape system, with those with higher seniority and indeed most employees in the past, working on a daily basis with only short periods of limited or no work for lower seniority workers. Lampkin continued reporting to the facility for a few days and then a week or two later and still there was no work. He starting calling in on and off for a few weeks after that and kept receiving the same reply from Elia: there just ain't no work. Lampkin was never recalled by Regional.

During all this time and into June 1986, the Union took no action to grieve or otherwise assert the rights of

the Regional employees to the retention of their jobs in the face of the transfer of their work to Ferrara under all the surrounding circumstances evidencing a less than arm's length transaction and an attempt by Regional to avoid the full consequence of its 1985 bargain with it.

In fact, Local 807 took advantage of the creation of Newport to obtain a completely new collective bargaining agreement from Newport with terms far inferior to those previously enjoyed by its Regional group of employees but guaranteeing to it dues remission under a checkoff clause from a separate group of employees on Newport's payroll. It did this without raising any question as to the effect of its action on its Regional members to whom it owed a continuing obligation to investigate and pursue their claim of a sham business transaction between Regional and Newport depriving them of their rights of employment and related benefits. How this new relationship came about as related by Mangan and Ferrara now follows.

*F Newport's Relationships and Agreements with  
Locals 819 and 807 and Regional Employee  
Complaints to the Union Continue to be Made  
Without Response*

Mangan testified that in the latter part of 1985, Ferrara came into his office and said he was going into business and that he was going in for container work—according to Mangan this was work off the piers and the railroads that is primarily done by gypsies or owner/operators today and not normally represented by a collective bargaining agreement. Mangan told Ferrara it would create a problem if he got involved with Regional. Ferrara said he was going after under the hat work he would like an agreement competitive with that type of work like work performed by owner drivers and he was not touching any of Regional's work that there would be more than enough work for Regional to keep all the men employed. He told Mangan he would let him know when he went into business and get back to him. According to Mangan he never got back to him.

Sometime later, probably on 3 March 1986, Mangan testified he learned from Shop Steward Boris who happened to be at the Local's office that Ferrara had signed an agreement with some local union another Teamsters local. However, Hohmann testified that at the end of February he learned from a friend in another local that Andy Ferrara was shopping around for a local. In all likelihood this information triggered Mangan's inquiry. Mangan started checking and after one false lead called Joe Scalza, president of Teamsters Local 819. Scalza told him he had a contract and cards signed. Mangan said he would write to the Teamsters Joint Council and claim jurisdiction. By letter dated 3 March 1986 Mangan wrote to Scalza informing him that unless jurisdiction over the Newport employees and their terms and condition of employment was not immediately transferred, Local 807 would commence a jurisdictional dispute against Local 819. On 13 March 1986, Scalza informed Mangan by telephone that the shop was turned over to Local 807.

Ferrara corroborated his dealings with both Unions. He had approached Scalza whom he knew from past

dealings seeking wages and fringes he could afford and Scalza shortly after agreed to the terms Ferrara had approached Local 819, and the agreement bore an effective date prior to Newport commencing business or hiring any work force. Although Ferrara could not recall signing an agreement with Local 819 he authenticated his signature on the agreement admitted in evidence. It clearly violated the proscriptions contained in Section 8(a)(2) prohibiting recognizing or negotiating with a minority union and Newport, on the record, has admitted its violation for having done so.

As related by Mangan, Boris went to Local 807 headquarters on or about 3 March 1986. On that occasion he raised a number of problems regarding the Regional bargaining unit with Union Agent Grilli. In addition to complaining to Grilli, as overheard by Mangan about Newport bringing in another union, Mangan now added for the first time on cross examination that Boris also claimed that Newport was taking work away from Regional and was using Regional's trucks. Mangan admitted that he was already aware of this complaint from the employee committee's 5 February letter, copies of which he had forwarded to Lenihan, Grilli and counsel Warren Mangan. Yet, Mangan's only (and immediate) reaction to this information was to assert a jurisdictional claim to the Newport job through the Teamsters Joint Council because Local 807 had the charter for general trucking in the New York metropolitan area. Even after obtaining Scalza's agreement to turn the job over to him, Mangan took no steps to secure the jobs of the bargaining unit members who had been employed at Regional. In response to the General Counsel's questioning in this area Mangan was extremely evasive and contradictory. After belatedly acknowledging Boris' complaint about taking away their work he now denied that Boris claimed Newport was performing work for former Regional customers and then would not answer a direct question whether he knew if Newport was using Regional equipment, then replied when pressed to answer that he would not know because he had no physical contact with Newport and Regional, and then still would not answer directly when asked if he had received such information from the men. Finally Mangan responded that in the conversation with Boris they could have discussed the trucks, but nothing about the customers.

The other problem Boris raised had to do with a claim that certain Regional employees who had moved up to the higher rate were not receiving it nor the higher pension contribution. When Mangan took Boris to the pension fund office to investigate he noticed that the record appeared to show an underreporting of hours resulting in less than proper contributions being made to the fund by Regional. Whether this underreporting was due to fewer actual hours worked by Regional employees arising from the transfer of accounts and equipment to Newport was never determined. It is significant, however that although the fund records Mangan examined showed some layoffs by Regional and probably showed less work being performed by Regional still Mangan did not use this information to pursue a further investigation or grievance against Regional arising from its transfer to Newport. This discovery led to audits of Regional's

records by the fund administrator and an ultimate settlement of the delinquency with Regional. According to Mangan, Boris' complaint about three employees receiving improper rates was not followed up in the absence of any identification of them by Boris then or any time thereafter.

Shortly after 13 March 1986, Ferrara came to Mangan's office with a copy of the collective bargaining agreement he had entered with Local 819, containing both his and Scalza's signatures on the last page. That agreement had a term running from 1 February 1986 to 31 January 1990. It contained a starting rate for drivers of \$7.50 per hour and for warehousemen of \$6 per hour, at the time more than \$5 an hour less than the rate for Regional I & E drivers and approximately \$3 an hour less than the rate for Regional D & W drivers. The warehousemen's rate was lower than the Regional rates by comparable amounts. Rates of both groups increased by 25 cents per hour per year on the successive anniversary dates. Mangan realized the benefits package stunk but testified he assumed it was binding and that he was stuck with the agreement. Nonetheless, on determining that the agreement had no health benefits,<sup>18</sup> but did have pension contributions, Mangan checked with the Union's health fund assistant administrator and came up with a proposal to convert the pension fund contributions into contributions to the Union's self-insured health fund at the rate of 80 cents per hour in order to purchase some health care for the employees. Further, despite Mangan's assertion that no other modifications were made, the agreement which Mangan had retyped, signed, and forwarded to Ferrara by letter dated 16 April 1986 was further revised in many other significant respects. Indeed a comparison of the Local 819 with the Local 807 agreement shows them to be very dissimilar in form and substance aside from the addition of the health fund article. One significant area however, in which there was no change, was with respect to wages where the much lower Local 819 rates prevailed.<sup>19</sup>

Ferrara recalled a telephone call from Hohmann or Mangan in late February or March complaining he had gone into business doing general trucking under Local 807's jurisdiction and the Union would seek Local 819's replacement through the joint council. Ferrara said he did not care which union it was as long as he could get the same agreement he could live by. Ferrara then acknowledged that the only economic change that did not affect his ability to pay made by Local 807 was in the area of health benefits.

At his meeting with Ferrara in April Mangan testified he did not ask how many employees he had nor did he ask what customers he was servicing. He did not do so because he didn't get a chance an explanation that defies logical analysis. At this time, Mangan had an early

<sup>18</sup> In fact the Local 819 agreement did contain a welfare fund provision under which Newport was to pay \$50 per month per person into the Local 819 welfare fund for the purchase of group insurance and other benefits.

<sup>19</sup> They were 50 cents an hour higher for drivers than the written provisions in the Local 819 agreement (starting at \$8 per hour) but were consistent with the rates Ferrara testified he agreed to pay his drivers when he entered the Local 819 agreement.

February letter accusing Newport of operating in the guise of Regional and other complaints particularly Boris, of Regional work being taken by Newport with Regional vehicles. It strains credulity beyond the breaking point for Mangan's denials to be believed. He had in his office the individual who was taking the work of his men and yet Mangan would have the record show he did not inquire of him to determine the facts to sustain the substantial complaints already made over months by the unit employees. He was only reviewing an agreement that would permit the Union to succeed as bargaining agent under terms far inferior to the ones then in effect for the Regional workers. Mangan's testimony at this point in the record reveals his distinct unease with the line of the General Counsel's examination and the argumentative and hostile nature of his responses.

Although not prepared to investigate the matter personally face to face, when he arranged to meet the chief culprit in his office Mangan instead assigned Grilli to visit Newport to obtain authorization cards after he had signed the new Newport agreement and forwarded it to Ferrara. By this time or earlier, Grilli had succeeded Lenihan as business agent at Regional, Lenihan having retired. According to Mangan Grilli was at the Newport facility until he got the cards signed. Whether Grilli made any other inquiries or followed up on an earlier assignment by Mangan to investigate the employees' complaints regarding Newport was information not made available on the record by the Union because it did not call Grilli as a witness. Surely Grilli would have noticed some trailers with Regional markings in Newport's yard. I can only infer from its failure to do so that Grilli's testimony would not have aided the union defense to the complaint allegation of its failure to accept and process a grievance concerning the creation of Newport and its adverse consequences to Regional employees.

Mangan did claim that after he received the 5 February letter he assigned Grilli to check it out and that Grilli reported back that the men would not talk to him. When Mangan was then asked when Grilli had gone to the job he at first did not reply and then responded you will have to ask Grilli. In light of all the circumstances presented by the record including my discrediting of Mangan as a reliable witness particularly on matters involving the Regional-Newport transaction the absence of any testimony by Grilli himself and the corroborative testimony of the various employee witnesses demonstrating a consistent and continuous effort to involve the Union on their behalf I do not credit Mangan's characterization of the negative employee response to Grilli's visit to the Jersey City facility,<sup>20</sup> if indeed Grilli made one or sought information from employees on his visit.

There is testimony about a later May visit to Regional's facility made by Grilli which establishes that on this occasion Grilli was made aware of the workers' claims regarding Newport's relationship to Regional. Sometime in May 1986 Boris called the Regional employees to

gether and told them the Company could not afford to pay the wage increase of 50 cents per hour due all employees on the upcoming 1 July and in order for the Company to survive was asking all of them for a give back. The employees all objected and Boris said we expect Regional to comply—to fulfill its obligations the remaining 2 years on our contract. On 12 May, Sanches along with other drivers on Regional D & W list were laid off. He and three other drivers laid off went to Local 807 to see Mangan. They complained to him that their work had been taken away to Newport that five of them had been laid off but there should be enough work because Newport was doing their work that their accounts had been switched over to Newport, their equipment had been switched over to Newport and nobody was doing anything about it. According to Sanches testimony, which I credit Mangan said I don't know what you're telling me is totally strange to me. I know nothing what's going on. Nobody told me anything. I find that these responses were designed to shield Mangan's true knowledge of the employee claims made previously in writing and orally. Mangan did not promise anything except sending the Union's business agents their delegates. When Sanches asked if Local 807 was at Newport, Mangan said yes, Local 807 was the representative there.

The next morning Grilli arrived at the Jersey City facility at 6:30 a.m. He told Sanches and Marino that he had spoken to Boris the day before and they had arranged to meet there. Sanches and Marino repeated their complaints to Grilli about switching of their work and trucks to Newport. Then at 7:40 a.m. while they were standing at the Regional gate Boris came up apologized for being late and asked if they could all go for a cup of coffee. Boris was scheduled to start work at 7 a.m. Sanches and Marino declined the invitation and Boris and Grilli went off together.

Sometime later between this date and mid June when Boris left Regional's employ to go to work for Newport as a supervisor Sanches engaged Boris in a conversation about the employees' problems. Sanches said You know our workers have been laid off, were being laid off systematically and the Union is not doing anything and nobody is doing anything and they're getting away with everything they feel like. Boris replied Listen I think I've been doing the best I can and you know they all pee in the same pot. Marino who also pursued the employees' concerns about Newport with Boris on a regular basis, received the reply that he was getting no response from the Union and was eventually informed by Boris in the spring that it was a lost cause. All of these statements attributed to Boris who was not called as a witness by the Union as its shop steward, are credited.

Union Counsel Warren Mangan testified that he met Boris on a visit to Local 807's office. This was probably the 3 March date previously discussed. When Boris complained to W. Mangan that Regional's trucks were being used at Newport, he told Boris to find out if there was any lease agreement and to whom the trucks were registered and to keep him informed but that alter ego and single employer cases are tough. Warren Mangan conceded he did not question Boris about Newport's cus-

<sup>20</sup> For the same reasons I do not credit the same negative implication arising from Hohmann's testimony that on Marino's 18 June visit to the Union Marino replied with a shrug when asked if he ever talked to Grilli when he had seen him at the Newport facility.

tomers or work force, including its supervision and management. Neither did he request any union officer or business agent to follow up on Boris' disclosure and expression of concern about the future at Regional.

*G The Final Regional Layoffs Regional Meets with Local 807 Continued Union Inaction and the Regional-Newport Relationship Continues*

On 18 June 1986, employee Marino testified he went to Local 807 to complain again about the Regional accounts and equipment being taken over by Newport. In May Marino had seen five Regional tractors operating out of the Newport Kearny facility and he complained about these transfers, among others. Marino said his complaint in June was more or less a repeat of the claims he had made in his 24 February letter to the Union. On this occasion he saw Joe Mangan, John Hohmann and Mike Grilli. Marino derived the impression from the lack of surprise of the union representatives that they were aware of the problem. They said they were looking into it. Also on 18 June Marino reported that Boris had left Regional and gone to work for Newport and Grilli appointed him shop steward. Afterward Marino returned from union headquarters and either that day or the next informed Jim Elia of his appointment after the men voted him in as steward and signed in writing to that effect.

Marino testified that a meeting was called by the Union for the following week. It was held on 25 June at union headquarters. In attendance were Nastro, Ferrara, Joe and Warren Mangan, Grilli, Hohmann, and Marino. Marino recalled Warren Mangan telling Nastro that any time in the future anyone could bring this matter up, make it public, and in that event the Union would have to go ahead in full force and do whatever had to be done. Under cross examination by Union Counsel Mangan, Marino emphasized this position taken by Counsel Mangan. After agreeing that W. Mangan had said that the appearance was that Pat Nastro controlled both Regional and Newport, the thing that he recalled most vividly was that when W. Mangan then told both Nastro and Ferrara that they should straighten this out before the matter had to go to arbitration, the court, or the Labor Board, he also noted that if the question is raised by anyone, he, W. Mangan, would get on it and pursue it. Ferrara, when questioned on this meeting, also believed that Warren made some type of statement that if any individual employee went to the Labor Board, the Union would have to proceed against Regional and Newport full force. Neither Hohmann, who testified about this and subsequent meetings held with Nastro into July, nor Warren Mangan himself, who limited his own direct testimony to union grievance arbitration efforts commencing in September 1986, disputed these statements attributed to union counsel and they are credited. According to Marino, in response, Nastro said he understood and would honor whatever resulted or became of these union efforts.

Hohmann reported that the 25 June meeting was arranged by Grilli at Mangan's behest, who wanted Nastro and Ferrara to attend. But Nastro did not appear. According to Hohmann, a discussion took place with Ferra-

ra about Newport being part of Regional. Also the Local 819 contract was brought up—that Regional was trying to run away from the Union and go to Local 819 for a cheaper contract. The Union pressed the point that Newport was the same company as Regional and was just set up as a division. When the union representatives asked Ferrara where Nastro was, Ferrara telephoned Nastro from the union office and another meeting was arranged for 27 June with both to be present.

Although Marino placed Nastro at the 25 June meeting and his own brief notes made later the same day list Nastro among the participants, it is likely he was not present. This would help explain the early scheduling of the next meeting 2 days later.

Between June 25 and 27 other facts came into play. By Friday, 27 June, Regional had laid off almost all of its warehouse employees. Three last worked the week ending 21 June, six more finished up the week ending 28 June, one continued after 28 June for only a portion of the next 2 weeks, and one continued to 20 September. These actions were consistent with Regional's giving up its dock space at the Jersey City facility as of 1 July. Thus, the 27 June meeting dealt with this matter among others. Hohmann testified that at this meeting Nastro reported his lease was up the beginning of the next month. Nastro said that a few of his employees came to him between Wednesday and Friday to try to work things out. Being his lease was up and the men had approached him, he would look for a new lease or try to find another platform. If he could not stay at the facility, Nastro said the work Regional was then performing would go to trucking companies that had a national freight agreement if he could control the work, and if he could get a platform, he would bring the work back.

At the 27 June meeting, according to Hohmann, Marino reported that the men were notified that day there would be no more work, but Nastro wanted some people to shape on Monday, 30 June, in case he did have a new platform for them. On the subject of the Newport-Regional connection, Nastro said he had nothing to do with Newport and Ferrara said he had nothing to do with Regional. Hohmann described these mutual disavowals as a comedy act where one was saying they would buy the other out and it was back and forth this way. Nastro promised no existing Regional work would be transferred to Newport.

Nastro said as the men had now expressed interest in saving their jobs, he was willing to sit down and try to negotiate. These would be midterm negotiations during the term of the existing 1985-1986 agreement. Both Nastro and Ferrara said they would keep their future operations apart. When each said he was interested in buying the other out, the union representatives stated they wanted whoever did so to live up to the contract with the better terms that with Regional July 7, after the holiday was set for a negotiation meeting.

Marino placed the second meeting between the parties on 2 July. Present were Nastro, Ferrara, Joseph and Warren Mangan, Hohmann, Grilli, and himself. He recalled Nastro being told to find another warehouse and call back some of the platform men. Nastro said he

needed time but would work on it. To this extent Marino corroborates Hohmann's more extensive testimony about a 27 June meeting at which both Nastro and Ferrara appeared.

Both Marino and Hohmann agree on a 7 July meeting attended by Nastro, Hohmann, Grilli, Sanches, and Marino. By 30 June, the eight or nine remaining Regional D & W drivers had been laid off, including Sanches. Sanches testified credibly that on Friday 27 June, when the men were told they were laid off but to report back on Monday, 30 June, Marino told him that Nastro promised he would be there Monday morning. On 30 June, Nastro did not show up, but his nephew Tim Nastro told the men that the Company had lost a lot of work, a lot of accounts, and could no longer keep them. He said,

I'll keep some but not all of you. He said, We have been losing money since 1980 and we can no longer stay in operation in business. When someone asked if they should report for unemployment, Tim Nastro said, Yes, there is no more work for you, look someplace else. Sanches reported that more than 20 employees were not sent out that day.

Sanches and nine other drivers then went to union headquarters. They met with Joseph Mangan and Mike Grilli. Sanches said, We've been laid off, most of us. Only ten people are at work today and they suggest to us to look someplace else for work. What do you think we can do? Mangan said, Not much. I don't think much because lately a lot of companies have been doing this and they've been getting away with it—going out of business to get rid of responsibility to contract. Sanches understood Mangan to mean companies evading responsibility by opening up in a different place because Mangan then told an anecdote about a company some where in the Midwest that just moved from one side of the street to the other and got away with it. There was nothing the employees could do to avoid the layoffs.

Sanches then asked Mangan how long Local 807 had represented the employees at Newport. Mangan at first wanted to refer to his records but then when asked for an approximation said it was 1 1/2 or 2 months. When Sanches then asked why only last week was Grilli sent out with union cards to be signed so the personnel could join the Union, Mangan did not reply but Grilli acknowledged bringing out 14 cards himself. The meeting then broke up, but before he left Grilli invited Sanches to attend the next meeting with Nastro and Marino on 7 July.

When the 7 July meeting started, Nastro objected to Sanches being present. Hohmann defended his presence and he remained. Nastro proposed a \$5 per hour cut in wages. Hohmann rejected this out of hand and suggested Nastro come back with a proposal regarding sick days, vacations, holidays and other benefits so as not to take all the money off them. Nastro agreed to set up another meeting. When Hohmann asked if Nastro had found a platform yet, he said no. According to Marino the issue was not pressed. Hohmann did not disagree.

A 15 July meeting was held attended by Nastro, Grilli, Marino and Hohmann. Nastro was now seeking a wage reduction of \$1.50 an hour, with holiday and vacation givebacks as well. Hohmann started to do some figuring

trying to determine the value of a week's vacation and holidays when Marino got upset and exclaimed, Well, you are on their payroll, no sense sitting here. Hohmann told Marino you can go where you want to and Marino left. Nastro said he was not going to sit down in a meeting where it was obvious they could get nowhere. The meeting then broke up. The following day Marino telephoned Hohmann to apologize but added they contacted the lawyer. Hohmann said, Fine, anything we can do to help you we will, have your lawyer contact O'Connor & Mangan and we will go from there but once the lawyers are involved I step out of the picture. Marino said he would be in touch. This was the last meeting held between the parties.

Marino recalled that it was at the fourth meeting, held on 15 July, that things got heated and he told Hohmann that the Union had his letter for over 6 months and nothing was done. Marino got upset when he saw that Union Representative Hohmann was saying we can do things to make up these cuts—in essence seeking to accommodate to Nastro's demands. Marino pointedly noted that while this discussion was going on, there was no mention of Newport and Regional being one or combining to be one. Marino told the Union he was going to get a lawyer. The meeting lasted 15 minutes before it broke up. No further meetings were held and the first charge was filed on 1 August 1986 by Sanches against Regional and Newport which contained all the basic allegations ultimately set forth in the amended complaint against the Respondent employer but without listing the names of the terminated employees. The charge against the Union followed on 13 August.

Hohmann claimed during his cross examination by Charging Party counsel that the Regional-Newport conduct of continuing the same entity at a different location—an alleged alter ego arrangement as existed here—would violate the Master Freight Agreement and that the Union could pursue a successful grievance or arbitration. The Master Freight Agreement in evidence covering the relevant period 1 April 1985 to 31 March 1988 contains an article 32 Subcontracting, prohibiting in section 1 any diversion of work in full or in part to any other business person or nonunit employees unless specifically provided and permitted in the agreement. Under section 2, a diversion in violation of section 1 is presumed to have taken place when work presently and regularly performed by employees of the signatory employer has been lost and is being performed in the same manner by an entity owned and/or controlled by the signatory employer. The burden of overcoming the presumption in the grievance procedure is on the employer. Section 3 permits subcontracting only when all an employer's regular employees are working. Furthermore, no present road work or runs established during the life of the agreement may be farmed out. Under article 1 section 3 the Agreement and Supplemental Agreements thereto shall be binding on assigns but these obligations shall not apply in the event of the sale, lease, or transfer of a portion of the rights comprising less than all the signatory employer's rights to a nonsignatory company unless the purpose is to evade the agreement.

Assuming the Master Freight Agreement to underlay the parties 1985 Memorandum Agreement, these provisions would surely appear to be applicable to a union grievance charging Regional with establishing an alter ego relationship with Newport

Hohmann noted also that in the summer of 1986 the Union was dealing with an effort to save the jobs of the membership at Regional by agreeing to negotiate concessions midterm as then sought by Nastro Hohmann was aware at the time that both platform employees and drivers were being laid off because Regional had closed its platform Although the Union was also aware in the period 18 June to 15 July that accounts had been transferred leading to these layoffs, since Nastro had taken the position the only way he would go back into the platform business was if he had some concessions, the Union was prepared to go along with that process The Union's thinking then was to negotiate concessions to get some jobs back Significantly, Hohmann did not suggest that the Union then had any plan to grieve and seek the retransfer of accounts and equipment from Newport and the restoration of Regional at least for the term of the current agreement

*H The Board Proceeding Local 807's Belated Pursuit of the Dispute with Regional and the Employer's Responses*

After the charge was filed against Local 807 under Section 8(b)(1)(A) and (2)<sup>21</sup> claiming a breach of its duty of fair representation owed the Regional unit employees as well as collusion with Regional resulting in the discriminatory termination of these employees the Union by letter dated 2 September 1986, filed a demand for arbitration against Regional claiming contract breach arising from loss of work and transfer of unit work to Newport as its alter ego with the New York State Board of Mediation (State Board) copies to Regional Sanches, Charging Party counsel Region 22 of the NLRB and union counsel On 4 September W Mangan received a telephone call from Charging Party counsel Martin Garfinkel, regarding processing the grievance Mangan replied he had a concern with respect to the arbitration provision applicable to the parties memorandum agreement In his opinion, the memorandum incorporated the current Master Freight Agreement but the forum for submitting this dispute was not spelled out with clarity He was attempting to work out this problem while he sought an arbitration at the State Board Garfinkel said he wanted to participate in the selection of an arbitrator, the arbitration itself and any settlement discussion Warren Mangan and Garfinkel ultimately agreed on the extent of Garfinkel's participation They and Regional Counsel James Dean agreed on an arbitrator, Robert Light to hear the dispute Meanwhile, Regional Counsel Dean at first telegraphed the Regional Director on 12 September 1986, the day the original complaint issued, urging deferral to the arbitration provision but later re-

frained from executing a supplement to the memorandum referring all disputes arising between Local 807 and Regional to the State Board for final and binding arbitration which W Mangan had forwarded to him on 23 September and informed W Mangan his client was not prepared to go to arbitration Nonetheless, on the first day of hearing, 11 November 1986, Dean, on behalf of Regional did stipulate that the Master Freight Agreement was the basic agreement of the parties and that the State Board was the appropriate forum for the dispute

During this period of time, the Regional employees still working, with Marino as their spokesman voted to approve a settlement they had worked out with Nastro which they believed would result in Regional's continuing a platform operation and restoration of platform and driver jobs Concessions were now agreed to by these employees<sup>22</sup> By letter dated 3 October 1986, W Mangan informed Dean that a letter forwarded to Grilli by Tim Nastro containing these agreed on modifications in the terms of the current agreement could not be approved by the Union without the participation of all unit employees, including those on layoff, in a secret ballot vote Nothing further transpired on this matter

Finally, by letter dated 25 November 1986, Dean informed the State Board that the employees do not agree to the processing of the dispute to arbitration at this time The reason spelled out was the pendency of the unfair labor practice complaint against the Employer and the Union Dean concluded any arbitration proceeding must legally await the results of the trial This letter followed the first 2 days of hearing

At the hearing after withdrawing Respondent's affirmative defense of deferral, Dean amplified that position to note that so long as the General Counsel was claiming taint and/or conflict of interest on the part of the Union in representing the Regional employees it would not be appropriate for it to voluntarily participate in an arbitration whose results could be attacked on that basis With a substantial risk that the arbitration proceeding would thus not resolve the dispute because of the clouded status of the Union which could ultimately be determined to be an improper representative of the employees he did not wish to expose his clients Regional and Newport, to contemporaneous proceedings dealing with the same issue until the Board had ruled on the issues In the Union's proceeding in Federal district court to compel arbitration the same counsel on behalf of Regional has rigorously opposed the Union's Motion for Summary Judgment<sup>23</sup> and on behalf of Newport has filed Cross Motion to Dismiss and/or for Summary Judgment because Newport is not a party to the Regional labor agreement and, therefore cannot be compelled to arbitrate thereunder

<sup>22</sup> These included extending the current agreement 5 years from 1 July 1986 reducing paid sick days by 3 and foregoing the two 50-cent an hour wage increase due 1 July 1986 and 1987

<sup>23</sup> The thrust of Regional's argument in the court papers is that so long as the General Counsel is questioning whether Local 807 will adequately and fairly represent the grievants in arbitration it would be inappropriate as a matter of law for the Board to defer until it has determined that issue

<sup>21</sup> Complaint issued only on the 8(b)(1)(A) charge alleging a failure to pursue the grievance between the finite dates of 24 February and 21 September 1986 No union collusion or conspiracy was alleged as a violation in this case

In its brief, Respondent Regional now argues assuming arguendo that a violation of Section 8(b)(1)(A) has been proven because of the Union's delay in processing the grievance which it rejects as a legal conclusion that delay does not render the Union incapable of now processing the grievance and deferral would be appropriate. However, the brief does acknowledge that it has asserted in the court action and before me that arbitration is inappropriate until the allegations of taint are resolved.

On 4 November 1986 Sanches received a mailgram from Tim Nastro of Regional offering an immediate and unconditional offer of reinstatement to your former position at Regional Distribution and Warehousing Services at the wage rate of 10.30 per hour. Nastro testified that Regional made this offer to the Charging Party after complaint issued and a week before hearing opened on advice of counsel and to limit liability. Sanches telephoned and arranged to report the following Monday. That day he shaped but there was no work available. Sanches shaped 3 of the remaining 4 workdays that week and was assigned to work only 1 day. Since that time except for days spent at the hearing and one other day, Sanches shaped regularly and was only sent out to work on 4 days. Thus the evidence shows that Sanches was not restored to his prior position on which he had worked on a regular basis.

On the same day 4 November 1986, Newport sent mailgrams to 10 former Regional drivers and platform employees, named specifically in the complaint as discriminatees, offering them immediate employment in their job category with Newport at the Kearny facility. Although signed by Ferrara for Newport each mailgram bore a return address showing Regional Import and Export Trucking, Helen 44 Porete Ave North Arlington NJ 07032. Thus contrary to Newport's claim Helen Muscarella appears to have still been physically located in November 1986 at Regional's office location after its move although acting as Ferrara's secretary since mid-October Ferrara disclaimed these were offers of reinstatement, consistent with his position that his operation was independent of Regional's. He also claims that he was not advised to take this step by Nastro. Yet, how would Ferrara have learned the identity of these ex-Regional employees and their availability for employment if not through consultation with the Nastro's or their counsel? I find the Newport mailgrams were part of a continuing scheme first hatched when Nastro agreed to finance Ferrara's entry into business.

The record contains no evidence about the employees' responses, if any, to these offers. In any event, assuming a conclusion that Newport is Regional's alter ego and that these employees among others were discriminatees under the Act, it is clear that even if it is later claimed that these offers should be deemed offers of reinstatement, the significantly lower wages and benefits being paid by Newport to its employees would preclude them from being found to be offers of equivalent employment. Indeed, the conditioning of employment on the employees working under noncontract terms for Newport is itself a violation of Section 8(a)(3), although not alleged in the complaint.

## Analysis and Conclusions

A. The issues presented in this case are as follows:

1. Is Newport an independent business entity or an alter ego of Regional created to avoid Regional's obligations under its union contract and the Act and were the terminations of Regional employees resulting therefrom discriminatory actions in violation of the Act?

2. Even if a specific antiunion motive is lacking for Regional's conduct vis a vis its employees, was its course of conduct nonetheless inherently destructive of employees' statutory rights?

3. Did Newport recognize and contract with Local 819 as a minority union and, if Newport is not an alter ego of Regional, did it likewise recognize and enter a bargaining agreement with Local 807 as a minority union?

4. Did the Union refuse to accept and process a grievance concerning the creation of Newport and the resultant discharge of Regional employees, and thereby fail to properly represent unit employees in violation of its obligation under the Act?

5. If the Union is found to have violated the statutory duty it owed the Regional employees, should the remedy against it include a make-whole provision, and may Regional and/or the Union, as the General Counsel contends, be required to make whole the Newport employees?

6. Regardless of the answer to question 4, is it appropriate to defer this dispute to grievance arbitration?

B. Regional's termination of employees was made in violation of the Act.

### 1. Regional's motivation and creation of Newport as its alter ego

The Board has recently had occasion to reiterate the standard it will apply in determining whether it will find alter ego status. In *Electrical Workers IBEW Local 3 (Telecom Plus)*, 286 NLRB 235-236 (1987), the Board stated as follows:

The Board will find alter ego status when two employers have substantially identical ownership, management, business purpose, nature of operations, equipment, customers, and supervision. The Board also considers whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.<sup>3</sup> Indeed, in many cases when an alter ego relationship is found, the alter ego is a newly created nonunion company.<sup>4</sup>

<sup>3</sup> *Advance Electric*, 268 NLRB 1001 (1984), quoting *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), enf'd, 725 F.2d 416 (D.C. Cir. 1984).

<sup>4</sup> See *Continental Radiator Corp.*, 283 NLRB 234 (1987); *Samuel Kosoff & Sons*, 269 NLRB 424 (1984).

Each case must turn on its own facts. *Advance Electric*, 268 NLRB 1001, 1002 (1984). No one factor is determinative of alter ego status. *Continental Radiator Corp.*, 283 NLRB 234 (1987). All factors need not be present; an alter ego relationship may be found to exist even though

no evidence of actual common ownership is present *Woodline Motor Freight* 278 NLRB 1141 (1986), *All Kind Quilting*, 266 NLRB 1186 fn 4 (1983) *American Pacific Concrete Pipe Co* 262 NLRB 1223 1226 (1982) What is crucial in finding such a relationship is a finding that one company exercised a degree of control over the other so as to obliterate any separation between them *American Pacific* supra at 1226 The crucial element in a decision to apply the alter ego doctrine however is a finding that the older company continued to maintain a substantial degree of control over the business claimed to have been sold to the new entity *NLRB v Scott Printing Corp* 612 F 2d 783, 786 (3d Cir 1979)

As to the illegitimacy of the purpose behind the creation of the alleged alter ego, where there is present substantial evidence that the second company was formed for the purpose of eliminating the high cost of dealing with the Union, *J M Tanaka Construction v NLRB*, 675 F 2d 1029, 1035 (9th Cir 1982), or to evade the first company's responsibility under the Act to honor its collective bargaining agreement with the Union, *Advance Electric* cited supra at 1004, or to crush the successful organizing efforts of its employees *Fugazy Continental Corp*, 265 NLRB 1301, 1303 (1982), enfd 725 F 2d 1416 (D C Cir 1983) that purpose is independently significant in finding an alter ego

Finally, single employer status—cutting through the ostensible independence of the other business—ultimately depends on all the circumstances of the case and is characterized as an absence of an 'arm's length relationship found among unintegrated companies *Operating Engineers Local 627 v NLRB*, 518 F 2d 1040, 1045-1046 (1975), affd on this issue sub nom quoted and cited with authority in *NLRB v Transportation Consultants*, 607 F 2d 290 295 (9th Cir 1979)

Although Regional and Newport lack common ownership all the circumstances surrounding Newport's entry into business show less than an arm's length relationship between the two in its creation and continued operation such that Regional in essence exercises effective and substantial control over Newport

Nastro did not seek a purchaser or lessee with experience in running his own company Instead he dealt with his own assistant who lacked the financial resources experience or business judgment one would expect an entrepreneur to possess in the highly competitive area of the trucking industry involving import export work and less than full loads in which Regional operated Nastro's close scrutiny of Newport's lease arrangement the inclusion of Regional's long time lessor as cosubtenant with Newport and guarantor of Newport's rental payments on Newport's taking business space his nephew Tim's guarantee of Newport's subsequent lease and his involvement in helping Ferrara secure the series of unsecured notes and the substitute secured note at extremely favorable terms from his own banker, Nastro's denial of the latter participation to the contrary notwithstanding, have been earlier described at length

Both the terms of the vehicular lease and buy/sell agreements with Regional vary significantly from the parties actual practices under them tending to support the conclusion that they were drawn rather hastily with

out full consideration of Newport's true subordinate role and to provide a cover that Newport was formed pursuant to normal business dealings Although Newport was incorporated as early as September 1985 these agreements were not executed until the end of January 1986 within 2 weeks of Newport's commencement of operations This delay was never explained, although Nastro may have indirectly provided one reason, that he had to satisfy himself about Newport's facility and business setup, considerations that would not normally accompany a true transfer of accounts for value Newport's incorporation follows almost immediately the execution by Regional of the 1 July 1985 3 year successor agreement with Local 807 lending weight to the view regarding the purpose of the transfer of accounts, that Nastro had determined to void the consequences of the deal he had reluctantly struck with the Union by ridding himself of the accounts and the employees whose contract terms and benefits were an anathema to him Other evidence leading to this conclusion will be examined shortly The late entry of the agreements probably also reflects the fact that Nastro finally realized that he needed some formality to the arrangement for appearance sake Be that as it may, the other circumstances surrounding their entry are also suspect

Ferrara met only two or three times and agreed on terms with Nastro They used the same lawyer, Nastro's whose services on these documents as well as Newport's lease and other papers to the benefit of Ferrara have been accepted without charge Contrary to the lease agreement Regional has been both substantially and financially responsible for the maintenance of the vehicles and the attachment listing those vehicles leased has never been followed with Ferrara having unlimited choice of Regional trailers and tractors without charge Indeed the agreement lacked any fee arrangement, the parties have not followed any of the precedural provisions for fixing costs to reimburse Regional for vehicle use and Regional continues to be responsible for insurance premiums and ratings Under the lease agreement Regional may reclaim the vehicles on written notice of default and under the buy/sell agreement Regional may require retransfer of the accounts whenever in its sole opinion, Newport fails to properly and adequately service the accounts As additional accounts were transferred no documents were prepared noting any new obligations on the part of Newport and an apparent dispute involving whether a significant Regional account Clipper Express later serviced by Newport was covered by the agreement has never been resolved

Although the buy/sell agreement does contain a 10 year, fixed commission obligation, Regional has never billed Newport, nor until well after 6 months from its effective date and the filing of the charges and issuance of complaint did Regional make any attempt to audit Newport's books through its long time accountant also employed by Newport

Although technically Regional and Newport are not commonly managed there are many factors that demonstrate that management of the two companies overlap and that the identical supervisory hierarchy and manage

ment of Regional now continues in place in the substantially similar business, at a new location and under conditions, including contacts with accounts, continuation of the same accounts, and physical integration of equipment, from all of which the conclusion is self evident that Newport constitutes the continuation of Regional in a disguised form

All Regional management eventually moved full time to Newport's facility and payroll, with the exception of Burrowes who died and Tim Nastro who nonetheless spends considerable time at the Newport location involved with maintenance, billing, and account matters because the maintenance of Regional's vehicles and all Regional billings and payroll functions are performed at Newport Newport's supervisory staff all transferred from Newport as the accounts transferred, its work grew as Regional's declined, and more platform employees and drivers were hired or replaced Managers supervisors, and office employees all received the same compensation on their transfer from one payroll to the other

The evidence shows that no breakdown is regularly made by their common controller of the proportion of time that the same clerical staff, previously on Regional's payroll but now on Newport's, spend on Regional or Newport accounts All billing of both Regional and Newport accounts and all payrolls for both Regional and Newport employees are performed by this same clerical staff and controller without invoices to Regional or payment by Regional for these services With respect to the 10 percent commission on preparation of Reisch payroll, these sums continue to go to Regional even though the work is performed by Newport clericals Regional has also never billed Newport for the clerical services performed by its two employees permanently assigned to Chock Full of Nuts, although this account was transferred to Newport Regional continues to bear the commission costs for the two accounts Chock Full of Nuts and Cofinco, originally transferred to it by Lou Schiff without any offset to reflect the commission due from, but never paid by, Newport

Aside from the overlapping managerial clerical and bookkeeping functions of the two corporations, other common or overlapping business elements include Helen Muscarella's functioning for Newport but paid by Regional as recently as November 1986 the apparent creation of the impression with at least one major customer of Regional that Newport was a subsidiary and that the change in the location of the dock for the performance of their work would not change any other indicia of their dealings and relationship<sup>24</sup> the intermingling of Regional and Newport vehicles at 44 Porete Avenue, North Arlington, and Regional's use of an office trailer on Newport leased premises there and the use by Newport of any of Regional tractors and trailers still containing Regional identification on an as needed basis

The complete reliance by Newport on Regional vehicles office equipment, and accounts when starting in business without any payment for their use, is also a sig-

nificant element of the substantial identity of the two companies As late as the summer of 1986 Regional's customers constituted 70 percent of Newport's business, and if Clipper Express is added as a former Regional account now serviced by Newport that percentage increases well beyond that figure Thus, Regional and Newport share a substantially identical customer base sufficient to satisfy this element of the Board's alter ego standard See *Continental Radiator Corp.*, supra, *Advance Electric*, supra at 1002-1003

Both companies operate in the same business, transporting deliveries locally to and from the piers and rail heads and stripping and consolidating less than full loads on behalf of various accounts including other shippers Although Respondent argues that Regional did not perform warehousing functions Nastro's description of the nature of the distinction between Regional I & E and Regional D & W work, including the use by Regional D & W of a receiving station and conveyor system with freight held for later reshipment, contradicts that assertion The fact that Ferrara took over completely Regional's managerial and supervisory hierarchy and office staff shows not only that Newport was simply operating Regional's business without certain costs previously incurred—most importantly, a new, much lower paid work force—but that Ferrara also understood that in the kind of transportation operation run by Regional in which he was relatively inexperienced (with no experience in handling LTLs<sup>25</sup>) he needed all the help he could get in continuing to service the same customers in the same market

As to the purpose behind the creation of Newport I have no difficulty in concluding that Nastro's purpose was to evade Regional's contract responsibilities and that Ferrara's interest in becoming an entrepreneur even under a less than independent arrangement suited Nastro's interests admirably

Nastro's complaints about the contract terms began in the spring of 1985 Because of the employees' militancy and uniform refusal to relent, Nastro felt compelled to enter the successor agreement without achieving his goal of substantial givebacks Some layoffs were begun as Nastro released some accounts and transferred others to Ferrara When again in the spring of 1986 the men refused to make any midterm concessions Nastro became resigned to not obtaining reductions in labor costs voluntarily but to achieving his end by another means—riding Regional of almost all its accounts and employees but retaining substantial control over and financial interest in the continuation of his business by an associate willing to operate in such a fashion A number of times on the record Nastro expressed his frustration and disgust with the actions of the Regional employees in not agreeing to givebacks, taking him to arbitration and now involving him in this extensive litigation He also frankly acknowledged that with a different labor contract Ferrara could make a go of the business

Regional's retention of the Reisch and Sun Chemical contracts, the former under a cost plus arrangement and where he received a union agreement to a freeze in benefits and the latter with a lucrative arrangement with Sun

<sup>24</sup> This concealment of the nature of the transaction with Newport in its dealings with a significant account was a factor in finding an alter ego relationship in *McAllister Bros.* 278 NLRB 601 (1986)

Chemical, do not prove the absence of animus as argued by Respondent, but rather tend to show only that where it was to Regional's advantage Nastro was not adverse to continuing employees on its payroll and a direct Local 807 relationship. In fact, Nastro noted he could have attempted to transfer the Reisch account to Newport if the employees there had not agreed to a wage freeze.

Regional retained the right to reclaim all of its vehicles on Newport's breach of payments or other covenants or conditions, such as failure to maintain and repair or failure to furnish a weekly mileage reading. Although the amount of the rental fee was omitted, apparently the parties discussed a daily rate for tractors and trailers and Regional would surely be entitled to a reasonable amount for their use under an implied contract. Regional also retained the power, unilaterally, to discontinue Newport's servicing of the transferred accounts if, in its opinion, Newport failed to adequately service them. Just as Nastro, through Burrowes and others, was able to convince accounts to look to Ferrara, he would no doubt reclaim them as his own were he to decide to do so. Given this authority, Newport's ability to continue the arrangement as it developed in practice was tenuous and illusory.

Nastro also exercised certain control through longtime trusted subordinates now employed by Ferrara, who, through their loyalty to him, would undoubtedly aid him in any attempt to reassert Regional control over vehicles, equipment, or accounts. It was only Ferrara's personal objection that prevented Braverman, Nastro's longtime accountant, but also now Ferrara's, from obtaining certain information adverse to Newport's interests in support of possible claims under the agreements.

Nastro claimed that he wanted to get out of the trucking business and retire and further, that his arrangement with Nastro provided a highly lucrative return of approximately \$300,000 in commissions for doing nothing (Tr 558-580). Both motives are highly suspect. Nastro is only 45 years old. Furthermore, he still retains collective bargaining agreements with Local 807 covering the Reisch Trucking Co and the employees assigned to Sun Chemical Corp., both running to at least mid 1988. He also continues operating Regional Transportation Co and retains Avon, N. A. Phillips and GE accounts for servicing by Regional I & E. So although Nastro spends considerable time in Florida, he and his family continue to receive the benefits of Regional's ongoing business. Nastro's decision to give up its 10 year lease in Jersey City effective 1 February 1986 just as Newport started up and later its dock space there as of July were also voluntary acts and not required as Nastro sought to portray to the Union in his discussions in the summer of 1986. His later termination of the sublease in smaller space there was also initiated by him as Regional's need for terminal and yard space dwindled.

As to making a large profit on his deal with Ferrara, that is also highly problematical. Even were Nastro to collect the 5 percent commission with all the difficulties that now entails Nastro's other obligations including the \$400,000 personal loan, the ongoing 5 1/2 percent commissions due Lou Schiff and the increased costs of insur-

ance<sup>25</sup> far exceed the moneys due under the Newport buy/sell agreement.

Aside from these facts which contradict Nastro's stated motives, Nastro was not a credible witness. I have already discredited his denial that he influenced Ferrara's procurement of working capital. Nastro was also not forthcoming when pressed to explain the variances between the parties' practices under the lease and buy/sell agreements and their written terms. His feigned expressions of surprise when confronted with the absence of any monitoring of Newport's compliance with the terms of the agreements also were not genuine. Nastro himself finally could not avoid the conclusion that Ferrara's success depended on one factor—its ability to operate free of legitimate Local 807 negotiated wage rates and fringe benefits.

Neither was Ferrara a credible witness. The opportunity to operate his own business was provided at the cost of dependency which Ferrara was unwilling to recognize. Ferrara claimed that he was able to avoid the large managerial expenses previously incurred by Regional. Yet Nastro's salary was allocated to Regional Transportation, not Regional I & E or D & W. Furthermore, any efficiencies in operation were not due to any new managerial or supervisory efforts because all such positions were filled by former Regional personnel. Ferrara, at times, was admonished for being too glib by his own counsel (Tr 988). At other times he could not recall the particulars of his dealings in obtaining capital to operate. I have previously discredited his ultimate denial that Nastro assisted him in obtaining financing and that he was not carefully scrutinized by the Banco Popular in seeking financing. Ferrara also did not know if the Regional office trailer occupied Newport lease space even though no Regional lease was produced for the location and Newport vehicles regularly park in the lot at North Arlington, a facility under his direction and control. Ferrara's lack of memory about the circumstances of his signing of the Local 819 agreement is particularly suspect. When finally confronted with his signature on the document he could recall nothing of the events leading to his signing although he had sought out Scalza and provided a writing of the terms he could accept. Although Ferrara kept insisting he wanted to protect his company yet without legal or other advice he readily signed a security agreement with Regional giving Nastro the right to put him out of business. Such conduct illustrates the degree to which Ferrara, despite his protestations to the contrary, was beholden to Nastro for all aspects of his business.

Just as did Nastro Ferrara was compelled to admit that the substantially lower wage rates paid to his platform employees and drivers was key to his ability to function competitively in the export import consolidation trucking business. He testified he could not afford to pay his employees much more than they were receiving.

<sup>25</sup> Regional's 1985 Federal tax return shows costs of \$453,917 for insurance and safety and \$173,455 for repair and maintenance. Nearly all the tractors and trailers are owned by Regional I & E and D & W and not by Regional Transportation. Regional's obligations for insurance and maintenance continue under the Newport agreement.

under the Local 819/Local 807 contract rates and he also agreed that even if he had been paying Regional the commission for his accounts and fees for leasing the vehicles he still would be making a substantial profit

Based on all the foregoing factors and the facts as previously summarized in an earlier section of this decision I conclude that Newport is the alter ego of Regional

2 The consequences flowing from Regional's discharge of employees as a direct result of Newport's creation

Because as there is also substantial evidence that Newport was created for the purpose of eliminating the high costs of the 1985-1988 Regional Local 807 agreement I also conclude that Respondent's discharge of the bulk of its platform employees and drivers in the period February to July 1986 were discriminatory actions violative of the Act. These terminations were made at a time when and because Regional was transferring its accounts for continued servicing by its alter ego, Newport in order to avoid continuing these employees on Regional's payroll and in order to avoid providing them with the benefits due them under the Regional/Local 807 agreement, in particular, the 50 cent an hour increase due the Regional unit employees as of 1 July 1986. See *J M Tanaka Construction v NLRB* 675 F.2d 1029, 1035 (9th Cir. 1982). Their discharges just as found by the Board in *Fugazy Continental Corp.* 265 NLRB 1301, 1303 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984) in analogous circumstances were implemented pursuant to the sham transaction with Newport and were designed to retaliate against them for their union activities and violate Section 8(a)(3) and (1) of the Act.

Regional and Newport's failure and refusal to retain these employees on Regional's payroll at Jersey City or to offer them the opportunity to continue their positions at the Kearny facility under the terms of the existing agreement was violative of the obligation owed to them under the Act not to discriminate against them because of their adherence to and support of Local 807. Clearly no offers were made to these employees to continue their jobs at Kearny because having unanimously rejected any giveback of their July 1986 contractual wage increase and having complained from the outset of the effect of the illegal scheme on their jobs they would have rejected such unlawful conditions. See *Advance Electric* supra at 1004.

Regional argues in its brief that the absence of any allegation of a refusal to bargain under Section 8(a)(5) of the Act requires a specific finding that the terminations were motivated by antiunion animus as required by *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). As I have already demonstrated the intent to nullify the benefits provided the employees under their collective bargaining agreement by removing their jobs from the unit pursuant to a fictitious scheme is more than sufficient to support both a finding of alter ego status and discriminatory motive under the Act. Respondent's attempt to justify the layoffs must rely on the transfer of accounts to its subordinate enterprise and thus must fail because the

transfer was the heart of the illegal scheme to deprive the employees of their jobs and benefits.<sup>26</sup>

The fact that Regional is continuing in business on a reduced basis also does not detract as Regional implies from the finding I have made. A company need not cease all its operations in order to establish that a sham transfer of certain of its assets was made in order to defeat rights of employees under the Act. See *American Pacific Concrete Pipe Co.*, 262 NLRB 1223 (1982) in which, the Board, under similar factual circumstances, found the Respondent's transfer of its trucks under a 1-year lease to a company which it completely dominated in order to avoid bargaining with the Union representing its drivers while it continued in business otherwise as construction products supplier constituted an alter ego arrangement, the consequences of which resulted in Respondent violating Section 8(a)(1), (2), (3) and (5) of the Act. Here Regional gave up by transferring accounts, vehicles, and other equipment a major portion of its business operation involving the warehousing and consolidation of freight, the consequence being that all its D & W unit employees and some I & E unit employees were let go in favor of its subordinates hiring of unrepresented employees and low wage operation while it still retained substantial financial and operational control over the subordinate.

Regional in its brief also relies heavily on the many factual parallels with *Oklahoma City Eastern Express*, 281 NLRB 927 (1986), in which the Board refused to find an alter ego relationship, adopted the recommended order of the administrative law judge and dismissed the complaint. Such reliance is misplaced. Unlike the situation in the case at bar, the former employer in *Oklahoma City* provided notice to the union of its intention to close, the new company hired some of the former company's unit employees, there is lack of substantial identity of the nature of their operations, less than 30 percent of the former company's top customers were serviced by the new company, the two companies lacked substantial identity in management personnel and the new company has paid what appear to have been fair and reasonable charges for leasing a portion of a single terminal out of eight previously operated by the former company, utility and other charges and for renting a small percentage of its former rolling stock, some of which payments predated the start of litigation. There is no indication that the new company was developed to avoid the former company's union contract and, finally, the former company's principal owner and major stockholder exercises no control nor derives any benefits from the operation of the new company. These facts illustrate that

<sup>26</sup> Regional also comments that the absence of an 8(a)(5) allegation was not an oversight but rather recognized the discussions that took place in June and July 1986. I do not agree. It is far more likely that there is no refusal to bargain alleged because the charges were filed by an individual discriminatee, there is a serious question whether the Union demanded real bargaining about the transfers at that time because as the General Counsel is seeking relief against the Union in the form of a finding of a failure to properly represent the employees for a period of time including the summer of 1986 because of a refusal to pursue a contractual claim it would be inconsistent to claim on the Union's behalf a refusal to bargain about the same subject matter.

each case raising the alter ego issue must be decided on its own facts based on the totality of evidence

Aside from the theory of violation arising from the finding that Respondent was motivated by antiunion animus in its creation of Newport, I also conclude that Respondent's discrimination against its union represented employees who were laid off in favor of unrepresented workers while all other employees were retained at their prior salaries was inherently destructive of important employee rights and, thus even absent proof of antiunion motivation and assuming *arguendo* the validity of Nastro's and Ferrara's business purposes in creating Newport and transferring the assets to it, was violative of Section 8(a)(3) and (1) of the Act. See *Wintz Motor Freight*, 265 NLRB 922-928 (1982), *Borg Warner Corp* 245 NLRB 513, 519 (1979), *enfd* 663 F.2d 666, 668 (6th Cir. 1981) cert. denied 457 U.S. 1105 (1981)

*C Newport's Recognition of Local 819 as a Minority Union in Violation of the Act: its Similar Conduct in Relations to Local 807*

As earlier noted, the collective bargaining agreement in evidence between Newport and Local 819 executed by Scalza and Ferrara was made effective before Newport's startup in business. The term ran from 1 February 1986 to 31 January 1990. Such a prehire agreement in which Local 819 was recognized as sole collective bargaining agent for all Newport's drivers, warehousemen and helpers constitutes the rendering of assistance by Newport to Local 819 in violation of Section 8(a)(2) and (1) of the Act. During the hearing, Newport amended its answer to admit this violation. Aside from the foregoing, and as a consequence of my finding that Newport was Regional's alter ego, the Respondent's bargaining agent in law continued to be Local 807. Thus, no other union, including Local 819, could legitimately represent Newport's employees at a time when by virtue of Section 9(a) of the Act Local 807 continued to be the exclusive bargaining representative of the single employer Regional and Newport. Newport's grant of recognition to 819 and enforcement of its agreement with that Union violates the proscriptions contained in Section 8(a)(2) for this reason as well.

It is also clear that were I to have dismissed the General Counsel's alter ego allegation Newport's recognition of Local 807 as exclusive representative of its drivers and platform men and execution and enforcement of a collective bargaining agreement at a time when the Union had not obtained authorization cards from any of the employees and thus represented none of them, would have constituted an independent violation of Newport by Section 8(a)(2) and (1) of the Act and an independent violation by Local 807 of Section 8(b)(1)(A). The alternative pleading alleging these violations and any resulting conclusion has been rendered moot by virtue of my earlier finding that Regional and Newport are one and that Local 807 had not ceased representing Respondent's employees for purposes of collective bargaining and indeed, was party to an enforceable agreement covering them running at least to 30 June 1988.

*D The Union Violated the Duty it Owed the Regional Employees to Represent Them Fairly*

Although the facts establishing Newport's recognition of Local 807 and entry of a new agreement may not form the basis for an independent finding of violation for the reason indicated, they are nonetheless germane on the issue involving the Union's alleged breach of its duty of fair representation. They should be examined in a setting which focuses on the Union's ignoring of a series of employee complaints about Regional's use of Newport to remove work and jobs from the existing bargaining unit.

Mangan personally was made aware of employee concerns as early as February or thereabouts when he received a letter in bold type from a group describing themselves as members of Regional warning that no later than June 1986 or perhaps sooner Regional will assume a new identity and location and that the new name will include Newport and be managed by Andy Ferrara. A somewhat more precise and detailed complaint was forwarded to Mangan toward the end of February. Both mailings urged the Union to take action, failing which the writers would pursue their own relief. At the same time Shop Steward Boris was receiving a daily litany of complaints and questions and periodically forwarding them to the Union.

The Union's short response was to ignore their members' grievances. Both Union agents who were responsible for servicing the Regional employees were never called as witnesses even though Union Agent Lenihan told employee Lampkin in February he would investigate and Union Agent Grilli was dispatched to Regional on at least three separate occasions in February in April to procure authorization cards, and again in May on Sanches' and other employees' complaints about their layoffs. I can only infer from the Union's failure to call them that their testimony would not support the Union's defense. Mangan later told Regional employees on their visit to the union office at the end of June when Regional laid off the bulk of its employees and closed its platform operation that he could do nothing for them even though their jobs were at stake and the future looked grim. Joseph Mangan not only denied the Union had any capacity to act on this occasion but more than a month earlier he deliberately misinformed Sanches and other employees when they had been laid off at a time when Newport was servicing their accounts with their trucks that he was totally unaware of the source of their predicament. Warren Mangan's superficial inquiry of Boris in early March was practically of the same order and did not lead, although it should have, to a focused investigation of the ties between the two employers.

It is also noteworthy that as late as 7 November 1986, less than a week before trial W. Mangan signed an answer on behalf of Local 807 in which the Union denied knowledge or information sufficient to form the basis for a belief about the allegations contained in paragraphs 4 and 5 of the complaint dealing with Newport's status as a disguised continuation and alter ego of Regional.

Although Mangan knew about the scheme from at least February 1986 and received continued reports as it

was implemented over time and its full ramifications of loss of almost all the unit work at Regional finally took hold, his only positive reaction was to rigorously claim jurisdiction over Newport as an independent operation and then proceed to negotiate a sweetheart contract with Ferrara for the new work force Ferrara had hired Mangan's testimonial denial that he ever discussed in April with Ferrara the nature of his operation and its relationship to Regional defies belief

With a new contract under his belt now Mangan had placed the Union in the untenable position of knowingly representing a group of employees whose interest in continued employment was adverse to the basic duty he had owed to the Regional unit employees for months of pursuing their rights to follow the work to Newport. It is significant that the Union was placed in this conflict of interest through its own intentional conduct. Clearly, apart from the information which the Regional employees provided and which Lenihan and Grilli must have made available to him as a result of their visits to Newport, Local 807 was now, since April, administering a contract with access to a workplace at Kearny where evidence of the Regional/Newport deceit was readily at hand. Yet, as Boris stated to the employees in expressing his frustration at failing to obtain union movement on the mens' problems, they pee in the same pot. Clearly the union inertia was related to its own institutional concerns, enhancing its longstanding relationship with certain employers and its own finances.

Only when finally pressed by the mass layoffs of Regional employees at the end of June did the Union arrange to meet Nastro and Ferrara. Still, these conferences achieved no concrete action by way of grievance lawsuit, self help or otherwise. The Union in fact showed its hand through W. Mangan's remarks that if the matter became a public dispute the Union would be compelled to take some action. The Union permitted the two employer principals to play games at the employees expense with the end result that it ultimately limited its role to arranging midterm concessions for Regional while Newport's operation continued to expand and flourish. No other action provides more concrete evidence of the Union's ethical bind arising from the conflicting duty it now owed to Newport employees not to undermine their job security than its conduct at the 1 July meeting.

It was not until charges were filed against the Union that it first filed a demand for arbitration of the underlying dispute. That proceeding has now been pursued with rigor but it cannot serve to shield the Union from responsibility for its crass and blatant undermining of the rights of the unit employees for whom it acts as fiduciary.

The complaint alleges a refusal to accept and process a grievance concerning the creation of Newport and the resultant discharges of named employees in violation of the Act. That conduct violates Section 8(b)(1)(A) of the Act only if the Union's refusal breaches its duty of fair representation. That duty requires that an exclusive bargaining representative such as Local 807 serve the interest of all unit employees fairly and in good faith and without hostile discrimination against any of them on the

basis of unfair, arbitrary, irrelevant, or invidious distinction. *Vaca v Sipes* 386 US 171 (1967), *Miranda Fuel Co.*, 140 NLRB 181 (1962).

The Supreme Court in *Vaca v Sipes* recognized that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion. Id. at 191. The ignoring of a grievance without explanation or with an explanation that is patently false warrants the conclusion that such inaction was arbitrary and met the *Vaca v Sipes* test. Thus in *Griffin v Workers*, 469 F.2d 181, 183 (4th Cir. 1972) the late Judge Sobeloff writing for the court described the union's duty not to be arbitrary as follows:

A Union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority.

This language and the standard it embodies was quoted with approval by the Board *Teamsters Local 315 (Rhodes & Jamieson)*, 217 NLRB 616 at 617-618 (1975). The Board also noted in this case that [a]t least as to rights under an existing agreement the duty of fair representation is more than an absence of bad faith or hostile motivation. Id. at 617. The Board noted further that Judge Sobeloff's reasoning was equally applicable to the administration of a collective bargaining agreement outside the grievance procedure. The Board also noted that duty although phrased in negative terms is to some extent an affirmative one because arbitrariness connotes the absence of some ingredient in the decision making process. Here the Union not only refused to act or respond to the Regional employees and then professed that any action would be futile it acted affirmatively to undercut their interests. It did so when confronted with Newport's union shopping. By dealing from the top with one of the two principal actors in the scheme to defraud, thereby obtaining recognition dues and inferior terms at their expense it knowingly deprived the Regional employees of the unfettered obligation to represent solely their rights to continued employment.

I do not adopt the General Counsel's conspiracy theory particularly because it has not been alleged or litigated. It is enough to conclude as I do that the Union acted arbitrarily and in bad faith to the Regional employees and by its conduct toward them at least during the period alleged in the complaint it breached its duty of fair representation and thereby violated Section 8(b)(1)(A) of the Act.

In a case of this nature where the employer as well as the union have been charged and been found guilty of unfair labor practices related to a breach of the duty of fair representation by the union and the Board thus may impose an order against the employer to reinstate and make whole the affected employees the union will have joint and several liability imposed against it for any loss of earnings resulting from their discrimination. *Pacific Coast Utilities Services*, 238 NLRB 599 fn. 4 (1978). *Newport News Shipbuilding & Dry Dock Co.*, 236 NLRB 1470 (1978), *King Soopers* 222 NLRB 1011 (1976).

*E The Proceeding Should Not be Deferred to the Grievance Arbitration Procedure*

There are a number of reasons why deferral to the parties dispute resolution procedures is not appropriate

In *United Technologies Corp* 268 NLRB 557 (1984) the Board resurrected its *Collyer* doctrine first enunciated in *Collyer Insulated Wire*, 192 NLRB 837 (1971) overruled *General American Transportation Corp* 228 NLRB 808 (1977) and agreed to defer cases alleging violations of Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2) to give the parties our dispute resolution machinery a chance to succeed In doing so, however, it also agreed to be guided by the principles set forth in the dissent of Members Penello and Walther in *General American Transportation*, supra at 817 Those principles embody the notion that deferral is only appropriate where there exists a reasonable belief that arbitration procedures would resolve the dispute in a manner consistent with the criteria of *Spielberg Mfg Co*, 112 NLRB 1080 (1955) Thus, the Board would still refuse to defer where the interests of the union which might be expected to represent the employees filing the unfair labor practice charge are adverse to those of the employee, or where the respondent's conduct constitutes a rejection of the principles of collective bargaining And where after deferral, the respondent has refused to proceed to arbitration the Board has rescinded the deferral and decided the case on the merits *United Technologies Corp* supra at 560

Each of these stated reasons for refusing to defer are present in this case Here, the Union's interests are adverse to the Regional employees because of the conflict it faces in representing the Newport employees at the same time it seeks to replace them with the Regional unit workers A further aspect of this conflict is its alignment with the interest of Ferrara and Newport against that of the Regional work force arising from its active role in seeking a contract with Newport at a time when it owed an exclusive duty to the Regional unit members in preserving their jobs at the expense of Newport and Regional Under these circumstances the interests of the aggrieved employees are in apparent conflict with the interests of the parties to the contract See *Plumbers Local 392 (Kaiser Engineers)* 252 NLRB 417 fn 1 (1980) see also *Fleet Carrier Corp* 201 NLRB 227 (1973) Furthermore Respondent has demonstrated a rejection of the collective bargaining principle by creating Newport in order to avoid continued collective bargaining with Local 807 and by discharging a substantial group of its employees without notice to Local 807 of the transfer of work to its subordinate or the resulting layoffs of the employees and by continuing to maintain in July 1986 and thereafter that Newport was independent and it would not assign any accounts to Ferrara Respondent has continued to maintain this posture in the proceeding to compel arbitration by moving to dismiss on the basis of Newport's inclusion in the case asserting it is not a party to the contract Finally Respondent has never taken an unequivocal position that deferral is appropriate Its position has repeatedly changed and, most recently it has opposed arbitration so long as the complaint proceeding remains unresolved and the General Counsel continues to assert Local 807's inability to fairly represent the

grievants Such equivocation hardly evinces an interest in resolving the dispute expeditiously under the parties own procedures See *Western Exterminator Co* 223 NLRB 1270, 1283 and cases cited at fn 28 (1976)

As is evident from the foregoing the criteria used to determine whether deferral is appropriate are applied without regard to whether there is an 8(b)(1)(A) charge against the Union or whether there has been a finding of 8(b)(1)(A) conduct See, e.g. *Anaconda Wire & Cable Co* 201 NLRB 839 (1973), and *Fleet Carrier Corp*, supra In this case, the Union's conduct, which forms the basis for finding it in violation of Section 8(b)(1)(A) is germane to its capacity to fairly represent the grievants

Deferral is inappropriate for other reasons as well Until early in the hearing there had been no agreement between the parties regarding the form or procedures for arbitrating the dispute Even after Regional's stipulation to the use of the New York State Mediation Board, some questions still remain regarding the scope of the submission agreement and whether all aspects of the dispute are encompassed by the arbitration agreement Regional's opposition to the inclusion of Newport as a party to the agreement illustrates that such problems remain unresolved

The Charging Party asserts that the issues in this case are not suited for arbitration I have previously described and discussed the substantive provisions of the Master Freight Agreement which appear to be relevant and Regional has referred to at least one other Yet, some question does remain whether the current Master Freight Agreement is the agreement underlying the parties memorandum agreement So long as that matter has not been laid to rest there is not reasonable assurance that the full ramification of the dispute will be disposed of by the parties There is also some question whether even the substantive provisions cited may fully encompass a situation involving Regional's rejection of collective bargaining through the device of creating an alter ego See *O Voorhees Painting Co*, 275 NLRB 779 fn 2 (1985)

Finally as the unfair labor practice proceeding alleges unlawful recognition and assistance on the part both Newport and Local 807 which are clearly interrelated with the alter ego allegation, to the extent these issues are not suitable for deferral under *United Technologies* the dispute cannot be resolved in full by arbitration and on that ground alone deferral is unwarranted See *George Koch & Sons* 199 NLRB 166, 168 (1972)

I therefore conclude that under all these circumstances this consolidated proceeding is inappropriate for deferral to arbitration

#### CONCLUSIONS OF LAW

1 The Respondents Regional Import and Export Trucking Co Inc, Regional Distribution & Warehousing Service Inc, and Newport Transportation Co Inc (Respondent Regional) are an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act

2 The Respondent Truck Drivers Local Union No 807 and Local No 819, a/w International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers of

20 America, AFL-CIO are labor organizations within the meaning of Section 2(5) of the Act

3 On or about 7 February 1986, Respondent Newport Transportation Co was established by Respondent Regional Import and Export Trucking Co, Inc and Distribution & Warehousing Service, Inc as a subordinate instrument and its disguised continuation

4 The Respondent Newport Transportation Co, Inc, for the purposes of this proceeding is the alter ego of Respondents Regional Import and Export Trucking Co Inc and Regional Distribution & Warehousing Service Inc

5 At all times material, Respondent Local 807 has been and is now, the exclusive collective bargaining representative of all local cartage drivers hi lo operators and platform employees employed by Respondents Regional Import and Export Regional Distribution & Warehousing and Newport Transportation at its Jersey City Kearny and North Arlington facilities within the meaning of Section 9(a) of the Act

6 At all times material Respondents Local 807 and Respondent Regional have maintained in effect a collective bargaining agreement covering wages hours and other terms and conditions of employment of the employees of Respondent Regional in the unit described in paragraph 5, above and containing inter alia a grievance and arbitration procedure

7 By discriminatorily discharging its local cartage drivers, hi lo operators and platform employees employed by Respondent Regional Import and Export and Regional Distribution & Warehousing at its Jersey City facility during the period February to July 1986 and thereafter failing and refusing to reinstate them in order to avoid its collective bargaining obligations Respondent Regional has engaged in, and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act

8 By granting recognition to Local 819 as the exclusive bargaining representative of its drivers warehouse men and helpers employed at its Kearny New Jersey facility on or about 1 February 1986 and by entering into and maintaining and enforcing a collective bargaining agreement covering wages hours of employment and other terms and conditions of employment of the aforesaid employees during a period between February and April 1986 despite the fact that at the time Local 819 did not represent a majority of the aforesaid employees Respondent Newport Transportation gave assistance to Local 819 and has thereby engaged in and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (2) of the Act

9 By refusing between February and September 1986 to accept and process a grievance concerning the creation of Respondent Newport Transportation and its resultant consequences, including the discharge of the employees as described in paragraph 7 above which its employees in the unit described in paragraph 5 above attempted to file under the provisions of the agreement described in paragraph 6 above thereby arbitrarily ignoring the grievance in breach of its duty to represent the unit employees fairly and in good faith, Respondent Local 807 has engaged in, and is engaging in, unfair

labor practices within the meaning of Section 8(b)(1)(A) of the Act

10 By virtue of the conclusions of law described in paragraphs 3 4, 5 and 6 above, Respondent Newport Transportation did not engage in any unfair labor practice within the meaning of Section 8(a)(1) and (2) and Respondent Local 807 did not engage in any unfair labor practice within the meaning of Section 8(b)(1)(A) by the conduct of Respondent Newport Transportation in having granted recognition to Respondent Local 807 as the exclusive bargaining representative of its drivers, warehousemen and helpers in April 1986 and by Respondent Newport Transportation and Respondent Local 807 having entered into, and since said date having maintained and enforced a collective bargaining agreement covering wages hours of employment, and other terms and conditions of employment of the said employees

#### THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices I shall recommend that Respondents be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act

With respect to Respondent Regional's unlawful discharge of employees in violation of Section 8(a)(3) and (1) of the Act the complaint alleges, and I conclude based on the record evidence that employees so discharged are listed on Appendix A attached. However, there appear names of other employees in the records of Respondent Regional who may have also been discriminatorily discharged in the relevant period.<sup>27</sup> When as here there is discrimination against a class of employees the General Counsel need not name each of them at the unfair labor practice hearing stage of the proceeding. See *Woodline Motor Freight* cited supra, and cases cited at footnote 6. If necessary their identity may be resolved at the compliance stage. I shall therefore include as discriminatees in addition to those named in Appendix A all other employees of Respondent Regional similarly situated. Because as the discriminatees are entitled to reinstatement to jobs which are now or may be held by Newport employees hired since 7 February 1986 by the alter ego I shall include language making clear their priority to unit jobs of Respondent Regional ahead of the employees hired by the alter ego since its creation. See, e.g. *La Famosa Foods* 282 NLRB 316 (1986) for the analogous treatment of unfair labor practice strikers. Accordingly I shall recommend that Respondent Regional be ordered to offer the employees listed on Appendix A and all other employees who were similarly situated immediate and full reinstatement to their former jobs or, if those jobs no longer exist to substantially equivalent positions without prejudice to their seniority or other rights and privileges discharging if necessary any employees hired

<sup>27</sup> These names include Nelson Morales a driver whose last week of work for Regional D & W ended 28 June 1986 and Weldon J Weaver a driver whose last week of work for Regional I & E ended 14 June 1986

by Respondent Newport Transportation on and after 7 February 1986

I have also found that Respondent Local 807 violated Section 8(b)(1)(A) of the Act by refusing to accept and process a grievance concerning the creation of Respondent Newport Transportation and the discharges resulting therefrom. Because I have found that Respondent Regional discharged the employees named in Appendix A and all other employees similarly situated in violation of Section 8(a)(3) and (1) of the Act and that Respondent Local 807's failure to represent them fairly and in good faith was a contributing factor on their loss of pay resulting from their discharges, I shall recommend that Respondent Regional and Local 807 jointly and severally, make the said employees whole for any loss of pay they may have suffered as a result of their unlawful discharges, by payment of sums equal to what they normally would have earned from the dates of their discriminatory discharges to the date Respondent Regional offers them reinstatement less their net earnings if any, during that period, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)<sup>28</sup>

In his brief, the General Counsel seeks a joint and several make whole remedies for the Newport employees who were victims of the unlawful contract arrangement Newport entered with Local 819 and then were subject to the low wage agreement between Newport and Local 807. I reject such a remedy. The General Counsel does not allege these employees as discriminatees in the complaint. In contrast, he identifies, by name the many Regional employees who were the victims of the Regional Newport alter ego scheme and alleges their discharges as violations of the Act. The General Counsel never moved to amend the complaint to allege them as discriminatees or as proper recipients of a make whole remedy. Thus Respondents were never placed on notice that this matter would be litigated. If anything, at least for the period of time from April 1986 through the close of hearing that Local 807 has represented the Newport employees, because the General Counsel has taken the consistent position, and rightly so that the allegations of violation arising from the Newport Local 807 contract arrangement were included in the complaint only as an alternative to the alleged violations flowing from Newport's creation as alter ego. Respondents could reasonably conclude that any remedies related to that transaction would fall if the violations alleged were dismissed because found to be inconsistent with the General Counsel's main allegation that Newport and Regional were a single employer as has been now determined. It is also problematical that the wages and benefits of the Newport employees are any less than they would have been absent Local 819 and Local 807 involvement. Furthermore, because Respondents under the remedy I recommend shall be required to make whole the Regional employees for the same period encompassed by the Newport employees employment, any additional remedy for

the Newport employees would be punitive in nature because it may very well result in duplicative wage and benefit payments. As this matter was not fairly or fully litigated, the General Counsel's request for such a remedy is denied.

The General Counsel also requests that the order include a visitatorial clause authorizing the Board, for compliance purpose, to obtain discovery from the Respondents under the Federal Rules of Civil Procedure under the supervision of the United States courts of appeals enforcing the order. I conclude that such a clause is not warranted under the circumstances of this case and I recommend that the Board deny this relief. See *Cherokee Marine*, 287 NLRB 1082 (1988); *Continental Radiator Corp.*, 283 NLRB 234 fn 2 (1987). However, because Respondent Regional has engaged in unfair labor practices of a sufficiently egregious nature as to demonstrate a disregard for its employees fundamental statutory rights I shall recommend that the Board approve a broad form of order requiring it to cease and desist in any other manner infringing on the rights guaranteed to its employees 35 by Section 7 of the Act. See *American Pacific* supra at 1227, see also *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record I issue the following recommended<sup>29</sup>

#### ORDER

A. The Respondent Regional Import and Export Trucking Co Inc Regional Distribution & Warehousing Service, Inc, Newport Transportation Co, Inc, its officers successors and assigns shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees with respect to their hire or tenure of employment or any term or condition of employment in order to avoid its collective bargaining obligations and because of their union activities or other exercise of their rights under the National Labor Relations Act

(b) Recognizing or contracting with Local 819 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America AFL-CIO as the bargaining representative of its drivers warehousemen and helpers employed at its Kearny New Jersey facility for purposes of collective bargaining unless and until said labor organization has been certified by the National Labor Relations Board as the exclusive bargaining representative of such employees

(c) 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) Offer the employees named in Appendix A and all other employees who were similarly situated immedi-

<sup>28</sup> Under *New Horizons* interest is 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 accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

<sup>29</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations the findings, conclusions and recommended Order shall as provided in Sec. 102.48 of the Rules be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ate and full reinstatement to their former positions or, if not available to substantially equivalent positions, with out prejudice to any seniority or other rights and privileges previously enjoyed by them, dismissing, if necessary, any persons hired by Respondent Newport Transportation Co., Inc., on and after 7 February 1986, and jointly and severally with the Respondent Union, make them whole for any loss of earnings they may have suffered as a result of their unlawful discharges in the manner set forth in the remedy section of this decision

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

(c) Post at its facilities at Kearny and North Arlington New Jersey, copies of the attached notices marked Appendix B and Appendix C <sup>30</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, 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

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

B Respondent Truck Drivers Local Union No 807, a/w International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, its officers, agents, and representatives, shall

1 Cease and desist from failing and refusing to fairly represent the employees described in paragraph 1, above or any other employees, by arbitrarily and not in good faith refusing to accept and process their grievances

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

(a) Jointly and severally with the Respondent Employer make whole the employees named in Appendix A and all other employees who were similarly situated for any losses of earnings they may have suffered as a result of their unlawful discharges in the manner set forth in the remedy section of this decision

(b) Post at its business office meeting halls, or other places where it customarily posts notices copies of the attached notice marked Appendix C <sup>31</sup> Copies of said

notices on forms provided by the Regional Director Region 22 after being signed by Respondent Union's authorized representative be posted by Respondent Union immediately upon receipt and maintained for 60 consecutive days Additional copies of said Appendix C shall be signed by an authorized representative of Respondent Union and furnished to the said Regional Director for transmission to Respondent Employer for posting by Respondent Employer in accordance with the Order directed to Respondent Employer above

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

IT IS FURTHER ORDERED that the portions of the consolidated complaint alleging that Respondent Newport Transportation has violated Section 8(a)(1) and (2) of the Act by rendering unlawful assistance and support to Respondent Local 807 and that Respondent Local 807 has violated Section 8(b)(1)(A) of the Act by receiving recognition as exclusive bargaining representative of Respondent Newport Transportation's drivers and warehouse employees and entered into maintained, and enforced a collective bargaining agreement covering the said employees at a time when it did not represent a majority of them are dismissed

#### APPENDIX A

##### *Terminated Employees*

J Berry	M Litvinoff
J Boville	M Rasool
T Brocktus	M Riley
R L Brown	F Rizzo
R Brown	R J Rizzo
S Cohen	F Sanches
J Contreras	L Serafin
V Cook	D Squicciarino
R DeMaise	G Stone
P Galileo	S Van Dyke
R Grady	J Villaro
W Gonzalez	C Walker
J Gorczyca	W Warmbeier
C Lampkin	

#### APPENDIX B

##### 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 discharge or otherwise discriminate against employees with respect to their hire or tenure of employment in order to avoid our collective bargaining obligations and because of their union activities or other exercise of their rights under the act

<sup>30</sup> If this Order is enforced by a judgment of a United States court of appeals the words in the notice reading Posted by Order of the National Labor Relations Board shall read Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board

<sup>31</sup> If this Order is enforced by a judgment of a United States court of appeals the words in the notice reading Posted by Order of the National Labor Relations Board shall read Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board

WE WILL NOT recognize or contract with Local 819, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO as the bargaining representative of our drivers, warehouse men, and helpers employed at our Kearny, New Jersey facility for purposes of collective bargaining, unless and until the said labor organization has been certified by the National Labor Relations Board as the exclusive bargaining representative of such employees

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

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act

WE WILL offer the employees named in Appendix A and all other employees who were similarly situated im

mediate and full reinstatement to their former positions, or, if not available to substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed by them dismissing, if necessary, any persons hired by Respondent Newport Transportation Co, Inc on and after 7 February 1986, and, jointly and severally with the Respondent Union, make them whole for any loss of earnings they may have suffered by reason of their unlawful discharges, with interest

REGIONAL IMPORT AND EXPORT TRUCKING CO INC REGIONAL DISTRIBUTION & WAREHOUSING SERVICE, INC NEWPORT TRANSPORTATION Co, INC