JD–209–97
Louisville, KY

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

DUPONT DOW ELASTOMERS L.L.C., AN ALTER EGO OF E.I. DUPONT DE NEMOURS AND COMPANY

and

Case 9--CA--34028
(Formerly Case 4--CA--24544)

CHEMICAL WORKERS ASSOCIATION, INC., AFFILIATE OF INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS

and

NEOPRENE CRAFTSMEN UNION LOCAL 788

and

Case 9--CA--33536

DOW CHEMICAL COMPANY
Party in Interest

Andrew L. Lang, Esq., Cincinnati, OH, for the General Counsel.
Howard S. Simonoff, Esq., Haddonfield, NJ, for the Chemical Workers Association.
Max J. Goldsmith, Esq., Louisville, KY, for the Neoprene Craftsmen Union.
Barry M. Willoughby, Esq., Wilmington, DE, for Respondent, Dupont Dow Elastomers.
Alan Burton, Esq., Wilmington, DE, for Respondent, Dupont.

DECISION

Statement of the Case

IRWIN H. SOCOLOFF, Administrative Law Judge: Upon charges filed on January 12, and 25, 1996, by, respectively, the Chemical Workers Association, Inc. ("CWA") and the Neoprene Craftsmen Union Local 788 ("NCU"), herein referred to as the Unions, against E. I. Dupont De Nemours and Company (Dupont) and its alleged alter ego, Dupont Dow Elastomers L.L.C. ("DDE"), herein called the Respondents, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued an Order Consolidating Cases and an Amended Consolidated Complaint dated October 29, 1996, alleging violations by

Respondents of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Respondents, by their Answers, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Louisville, Kentucky, on January 7, 8 and 9, 1997, and in Wilmington, Delaware, on January 27, 28, 29 and 30, 1997, at which all parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record in these cases, and from my observations of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, Dupont, a corporation, is engaged in the production of chemical and related products at its Chambers Works, Deepwater, New Jersey, and Louisville, Kentucky, facilities. During the year preceding issuance of the Complaint, Dupont, in conducting its operations at the above-referenced places of business, sold and shipped from those facilities goods valued in excess of $50,000, directly to points outside the States of New Jersey and Kentucky. I find that Respondent, Dupont, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Respondent, DDE, a limited liability company, is engaged in the manufacture of elastomer products at its Chambers Works, Deepwater, New Jersey, and Louisville, Kentucky, facilities. Based upon projections, DDE will, annually, sell and ship from those facilities goods valued in excess of $50,000, directly to points outside the States of New Jersey and Kentucky. I find that Respondent, DDE, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organizations

The Unions are, each, labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. <u>Background</u>

For some 45 years prior to the April 1, 1996, formation of DDE, Dupont recognized and dealt with the NCU as the exclusive collective-bargaining representative of its production and maintenance employees in Louisville, Kentucky, and with the CWA as such representative of separate units of its production and maintenance employees, and its clerical employees, at the Chambers Works, facility, in Deepwater, New Jersey. The most recent contract between Dupont and NCU, at Louisville Works, is effective May 25, 1994, until March 21, 1996, and from year-to-year thereafter unless terminated by either party. At Chambers Works, the latest contracts between Dupont and CWA run from July 18, 1991, until terminated by one party or the other.

DDE is a joint venture formed by two of the world's largest chemical companies, the Dow Chemical Company and Dupont. The venture was formed, on a global scale, to produce and market elastomer (synthetic rubber) products, bringing together, essentially, Dupont's established position as a manufacturer of elastomers, including its production facilities and highly trained work forces, and Dow's patented "Insite" technology. Among the contributions to the venture made by Dupont were its elastomers businesses at Louisville Works, where neoprene is produced, and at Chambers Works, engaged in the production of viton and FMDL. The venture also includes former Dupont facilities located at Beaumont, Texas, Elkton, Maryland, Newark, Delaware and Ponchartrain, Louisiana, and smaller sites contributed by Dow in Freeport, Texas, Plaquemine, Louisiana and Stodd, Germany.

In the instant cases, the General Counsel contends that, at Louisville, and at Chambers Works, DDE is the alter ego of Dupont and, thus, violated Section 8(a)(5) of the Act by failing to honor the existing contract between Dupont and NCU and the contracts of Dupont and CWA. Alternatively, the General Counsel urges, DDE, as the "perfectly clear" successor to Dupont at those sites, failed to fulfill its bargaining obligations under the Act when it unilaterally implemented initial terms and conditions of employment. DDE argues that, as a global enterprise, 50 per cent owned and controlled by the Dow Chemical Company and formed, concededly, for legitimate business reasons, it is not the alter ego of Dupont at the above-referenced locations and, thus, was not obligated to honor the Dupont contracts at those sites. While acknowledging that, at Louisville and at Chambers Works, it is the successor to Dupont, obligated to recognize and bargain with the incumbent unions, DDE denies that it is the "perfectly clear" type of successor, required to bargain about initial terms. Also at issue is whether Respondents, at Louisville, violated the Act by failing timely to provide the NCU with a copy of the venture's formation agreement, as requested.

B. Facts[1]

1. An Overview

In January, 1995, Dupont and Dow announced that they had signed a letter of intent to form DDE. There ensued, over the next 15 months, a complicated process of valuation, negotiation, formation and asset designation leading to the April 1, 1996, start-up of the venture, a limited liability company under Delaware law,[2] with $1 billion in assets and facilities located throughout the world. During the course of the January, 1995, to April, 1996, period, Dupont, concededly, kept the Unions and the Louisville and Chambers Works employees informed of major developments by various means of communication, including many electronic mail announcements.

As finally agreed to, Dupont and Dow are 50-50 co-owners of DDE and share equally in its profits. The venture is governed, globally, by a members committee, the equivalent of a corporate board of directors, composed of 2 representatives from Dow and 2 from Dupont. As there is no tie-breaker, the owners must agree upon the direction of DDE. The senior management team of the venture is made up of 4 former Dow officials and 7 individuals who came to DDE from Dupont. Under terms of the formation agreement, DDE has an initial life of 30 years and, for the first 10 years, neither Dow nor Dupont can leave the venture, except by mutual agreement. After 10 years, if one party decides to leave, the other has the right of first

[1] The fact-findings contained herein are based upon a composite of the documentary and testimonial evidence introduced at trial. The record is generally free of significant testimonial conflict.

[2] Such companies are taxed like a partnership but enjoy the liabiity protection of a corporation.

refusal to buy the departing party's assets. The agreement provides for the recapture of assets contributed by the parents in the event of termination or dissolution.

Preceding the start-up of DDE, and once full accord of the parents was reached, Dow and Dupont went about performance of a massive number of required tasks, including the separation from the parents of assets, equipment, facilities and work forces. Effective with the formation, Dow and Dupont agreed to place their elastomers businesses in the venture,[3] including the patented Dow technology and physical and other assets at the effected sites. At the new DDE locations, its buildings and equipment were titled in its name, but the lands on which its facilities rest were leased from the parent companies at nominal sum, rather than placed in the venture, in order to protect DDE from possible environmental liability stemming from past use. At the various sites, environmental permits and other business licenses were transferred to the venture and DDE set up its own bank accounts and internal accounting functions. Centrally, DDE purchased workers' compensation and other insurance policies, and obtained a federal employer identification number. The venture set up its own headquarters, in Wilmington, Delaware, as well as headquarters abroad in Geneva, Switzerland, and Singapore.

Under the DDE structure, the members committee must approve capital expenditures at any facility in excess of 5 million dollars, and it decides whether existing facilities will continue to operate and if new ones will be built. Senior management works out of the Wilmington headquarters and, globally, DDE has its own finance, operations, marketing, legal, human resources, customer service and other departments. While DDE purchases its own raw materials, and markets its own products, Dupont extends to DDE the advantages of the parent's third party contracts with suppliers. Raw materials bought directly from either parent are at market price, and DDE must purchase from Dupont needed raw materials produced by Dupont so long as they are made available to DDE at competitive prices.

Most or nearly all of the DDE manufacturing facilities are located on sites shared with one of the parents where, formerly, Dow or Dupont conducted elastomers and non-elastomers operations. At those locations, and despite the separate ownership of equipment, buildings and other facilities that accompanied the advent of DDE, many systems, for reasons of economy and efficiency, have remained sitewide and are shared by the parent and DDE. At a global level, and to account for services provided at integrated sites, Dow and Dupont, during the formation process, negotiated service agreements covering, generally, payment for services rendered to DDE by a parent, or by DDE to a parent, at shared locations. Such services are provided at market price, that is, at cost plus a profit, and DDE is not required to buy needed services from a parent. Likewise, both the parent and DDE are free to discontinue the provision of any services no longer desired. At the site level, the specific charges, service by service, were negotiated during the months preceding the venture start-up. Such negotiations, at Louisville and at Chambers Works, were by and between Dupont representative and DDE "designees," that is, individuals still employed by Dupont who had been designated by Dow and Dupont as on-site management officials of the new venture. These "designees" were without independent basis to assess the cost of services. However, the results of those negotiations were reviewed centrally, by Dow as well as Dupont, for fairness to both parties at the site. In practice, there is a net billing, and a transfer of funds from DDE to Dupont, at the central level, on a monthly basis to cover provision of services. DDE has set up a monitoring committee to review the site agreements and, in the Fall of 1996, hired outside auditors to examine their operation.

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[3] Accordingly, concurrent with venture start-up, the parents left this business and neither produces or sells the type products manufactured and marketed by DDE.

While, generally, and prior to start-up, DDE's designated top management officials decided to leave for decision at the local level such matters as the wages and working conditions to be offered to DDE employees, certain labor relation issues were centrally decided. In this latter category, the designees, with the approval of the members committee, instituted a benefit program, "success sharing," providing for the payment each year, to every DDE employee, of 8.3 per cent of salary if certain company-wide goals were achieved for that year. In other respects, it was decided to maintain benefit coverage at "Dupont levels," by continued participation in existing plans, and to establish a new pension plan to "duplicate" the provisions of the Dupont plan.[4] Dow, Dupont and the DDE designees globally adopted a hiring philosophy, that is, the development of strategies designed to keep the skilled and experienced Dow and Dupont elastomer employees at their then current jobs. Left for local decision was whether to offer those employees positions with DDE, or to contract with the parent for their services.

At formation, 95 per cent of the DDE rank-and-file workers were from Dupont, and some 5 per cent were from Dow. Those who became DDE employees were required to sever their relationship with the parent, that is, to resign or retire, "with no strings back." Resigning employees had their pension benefits transferred to the venture. At the Dow sites at Freeport, Texas, Placquemine, Louisiana and Stodd, Germany, it was decided that DDE would contract for, or lease, the total of 120 employees, out of some 10,000 working at those sites, who were, thereafter, to perform their services for DDE. Those 120 individuals remained Dow employees and work for the venture under site service agreements. Similarly, at the Dupont site at Beaumont, Texas, those performing services for the venture do so under contract with Dupont, and not as DDE employees.

2. At Louisville Works

When NCU and Dupont entered into their most recent contract, in the Spring of 1994, it covered some 415 production and maintenance employees at Louisville Works, who worked in 2 separate Dupont business units, producing neoprene, an elastomer, and fluoro products. The contract was locally bargained and has been locally administered. Under the agreement, employees have bidding and bumping rights between business units.

In the Fall of 1995, the venture leadership at Louisville determined that it would make offers of employment to all of the Dupont elastomers employees, and NCU was so informed. On November 30, the Union was advised that those individuals would be offered positions with DDE at the same rate of pay they were receiving from Dupont, with a carryover of their Dupont seniority, continued coverage under the Dupont benefit plans and coverage under a pension plan that duplicated Dupont's plan. At or about this time, the Union was also told that "success sharing" would be part of the offer package. Despite NCU's continuing demand for recognition, and, based upon its alter ego claim, the Union's demands that its contract with Dupont be applied to the venture operations, DDE did not bargain with NCU concerning the initial terms of employment to be offered employees, nor would it adopt the Dupont contract. It advised the Union, only, that, at a future point, it wanted to negotiate a new contract.

[4] DDE became a participant in Dupont's multiple employer benefit plans for employees, administered by Dupont. The DDE pension plan, while the same as Dupont's, is independent of it and separately funded. The Dupont pension fund investment group administers the DDE plan, but Dupont bears no liability for the obligations of that plan.

At the beginning of January, 1996, all of Dupont's elastomer employees received job offers from DDE, and were afforded a period of 30 days to decide whether or not to accept employment. Under terms of the offer, wages and benefits remained the same as they were at Dupont, augmented by the introduction of "success sharing;" pension-eligible employees were given the option to retire from Dupont or to transfer pension credits to the DDE plan; "banked" vacation was to be paid in cash; employees who accepted the offer had to resign or retire from Dupont and were to start at DDE with clean disciplinary records.

The pressures upon the neoprene manufacturing employees to accept the DDE offers were great, as, concurrent with the start-up of DDE, Dupont was leaving the elastomers business. Indeed, there is record evidence that Dupont officials, during the offer period, stressed to these employees that, if they declined offers, they risked being without employment. By the close of the initial offer period, in early February, some 300 of the neoprene employees had accepted offers, and only 9 had declined employment with DDE. The 9 unfilled positions were then offered to suitably skilled fluoro products employees, and 6 of the jobs were filled in that way. At the conclusion of the offer process, the almost 310 new DDE employees constituted a far larger group than the remaining Dupont fluoro products group, which numbered about 80. In addition to the bargaining unit employees, all of the neoprene management people accepted positions with DDE. Effectively, at start-up, DDE became the primary employer at the Louisville, facility, the largest of the DDE production plants. As DDE decided generally to honor the terms of the NCU-Dupont contract, but not the contract itself, the new DDE employees began work with the same terms and conditions of employment as previously enjoyed, plus "success sharing," and minus bidding and bumping rights into fluoro products positions.

At start-up, DDE, at Louisville, engaged in the very same business operation theretofore run by Dupont, producing neoprene in the identical manner, using the same technology. The same rank-and-file work force, working at the same plant, utilized the same equipment and processes to manufacture a product which was shipped to the same customers.[5] Indeed, until the end of 1996, the product was shipped in bags bearing the Dupont name. DDE utilizes the same suppliers who previously serviced Dupont. It is undisputed that Dow's "Insite" technology, its primary contribution to the venture, is not in use at Louisville, nor is there any plan to introduce it. It is not applicable.

With the single exception of the plant manager,[6] the Louisville employees work under the same plant supervisors and managers and, as noted, receive the same compensation and benefits as previously, and their seniority, earned at Dupont, is recognized. When, during 1996, Dupont and NCU negotiated a wage increase, the results of those negotiations were honored and applied by DDE. The new DDE employees kept the same employee identification numbers and passes and they park in the same lots and enter through the same gates, as before. They use the same change houses and lockers, the same work clothes distribution system and laundry services, the same cafeteria, medical facilities, telephone system and computer system, and the same tool room. Under service agreement, DDE employees perform for Dupont, and Dupont employees perform for DDE, certain specialized mechanical and maintenance functions, but, never, production work. DDE employees serve in the same fire and emergency

[5] All of Dupont's back orders were transferred to DDE. Customers were notified in advance of the venture formation and the intended transfer of orders.

[6] Dupont plant manager Don Johnson had been designated DDE plant manager at Louisville, but he died prior to the April 1, 1996, start-up. He was replaced by Mike Sticklen, a Dow official.

brigade with Dupont employees and otherwise cross paths with the Dupont people in the course of daily activities. Dupont and DDE have a common safety awards program. By virtue of the service agreements, DDE pays to Dupont, monthly, a net amount of approximately $4,000,000.00, due, principally, to utility charges. That amount will, presumably, decrease somewhat as beginning January 1, 1997, Dupont no longer provides site accounting services for DDE.

As indicated, DDE's decision, at Louisville, to offer employment to all of Dupont's neoprene employees, and to staff entirely from that group, was made by November, 1995. In that month, and after being advised by the NCU that it considered DDE bound by the contract in effect with Dupont, the DDE designees told the Union that the venture leadership knew DDE would, most likely, be a successor to Dupont. However, and until more than 50 per cent of the Dupont elastomers work force accepted employment with DDE, the Union was advised, the venture would not recognize or bargain with it. Thus, as set forth above, DDE set initial terms and conditions of employment (the contract terms, plus "success sharing" and minus bidding and bumping rights to fluoro products positions) without negotiations. The decision, reached at the local level, to use the contract provisions as initial terms, but not to honor the contract as such, was made, primarily, to prevent inter-company bumping. When, late in November, 1995, and prior to the offer process begun in January, 1996, the Union was told that "success sharing" would be part of the offer package, it voiced no objection.

After NCU filed its charge on January 25, 1996, in Case 9-CA-33536, claiming that DDE at Louisville was the alter ego of Dupont, the venture, in February, after tallying the results of the offer process, offered to bargain a contract with NCU, the negotiations to occur without prejudice to the Union's alter ego position. The Union, maintaining that it already had a contract with DDE, refused to engage in that process. Thus, negotiations did not occur. The venture, since start-up, has, in fact, applied the terms of the Dupont-NCU contract, and grievances have been filed and processed pursuant to contractual provisions.

On January 7, 1996, the president of NCU, Carl Goodman, sent the following letter to Haven Harrington, then Dupont's human resources manager at Louisville, and the DDE designate human resources manager:

> Please provide me within five working days a copy of the contract that has been entered into by Dupont and the Dow Chemical Company to form their new venture/merger that may impact Louisville Works employees.

At trial, Goodman testified that he also verbally requested that information which the Union needed in order to assess what "this thing" was all about.

Ten days later, on January 17, Harrington wrote to Goodman:

> There is currently no signed agreement between the two parent companies, however, we expect there should be an agreement signed in late February. When this agreement is available we will share a copy with you.

The venture formation agreement was, in fact, signed thereafter, on March 12, 1996, was held in escrow until April 1, and was furnished to the Union on April 11. There is no record evidence showing that Goodman, after receiving Harrington's January 17, letter, sought provision of an unexecuted copy, or working draft, of the formation agreement. At trial, Goodman acknowledged that Respondents timely provided NCU with all requested information, except this document.

3. At Chambers Works

The Chambers Works, facility, is much larger than Louisville Works and, prior to the advent of DDE, it comprised some 8 Dupont business units, including the elastomers unit, called polymer products or "PPD." PPD produced viton, FMDL and hytrel, the latter also referred to as engineering polymers. At venture start-up, the viton and FMDL portions of the polymers business passed to DDE, while hytrel remained with Dupont. CWA's contracts with Dupont originally covered some 1,700 production and maintenance employees and about 150 clerical workers at the facility. Of those, only 80, and 9, respectively, became employees of DDE, and some 50 workers remained in the Dupont hytrel operation. Thus, as urged by CWA, as of the April 1, 1996, formation of DDE, "a portion of the former Dupont elastomers unit now operates as a virtual island within a sea of the remaining Dupont operation at the Chambers Works facility," the mirror opposite of the situation in Louisville.

At Chambers Works, serious consideration was given to contracting with Dupont for the necessary labor force, rather than hiring individuals to work as DDE employees. However, in mid-November, the DDE management designees advised the Union that the venture would offer employment to all of Dupont's viton and FMDL employees. At that time, as it had, previously, the Union insisted that its contracts with Dupont would continue to apply to those people, as DDE was the <u>alter</u> <u>ego</u> of Dupont. The designees took the position that the venture would be a successor employer, and it would recognize the Union once it had hired a workforce more than 50 per cent of whom were the union represented elastomers employees.

At the end of November, and, following, the venture management told CWA that existing viton and FMDL employees would receive job offers during the first week in January, at then current wage rates and benefit levels, plus "success sharing" and minus bidding and bumping rights to positions in the hytrel portion of PPD and the other business units. As at Louisville, there would be a carryover of Dupont seniority, continued coverage under the Dupont benefit plans and coverage under a duplicate pension plan. CWA, thereafter, voiced no objection to "success sharing," per se, although, earlier, it stated opposition to that or any other change in contractual terms. Subsequently, in mid-January, after job offers had already been made, the venture leadership announced certain additional changes to existing terms and conditions of employment, as part of its initial offer package, namely: an enhanced severance program, a reduction in the number of crafts for seniority purposes from 6 to 2 and abolition of the practice requiring payment for scheduled overtime not actually worked. The DDE designees refused to bargain with the Union concerning initial terms.

The elastomers employees at Chambers Works were faced not only with the fact that Dupont was leaving the elastomers business but, also, concurrent reductions-in-force at the facility which would impact upon Dupont employees but not upon the new employees of the venture. Thus, the incentives to accept venture employment were great and, by mid-February, 1996, some 98 per cent of the PPD employees offered jobs with DDE had accepted. At that time, the venture designees agreed to recognize CWA and bargain a contract with it. The Union, having re-asserted its alter ego claim in its January 12, 1996, charges filed with the NLRB, giving rise to the instant case, adhered to that position, stating that the new DDE employees were covered by the contract between CWA and Dupont. When the venture leadership agreed to conduct negotiations without prejudice to the charges, limited discussions, on a few issues, occurred. However, the Union refused to negotiate a new contract and, by late March, it had limited the number of items it would talk about at all to three, dues deduction authorization cards, discharge for cause and grievance/arbitration.

At start-up, and since, as at Louisville, DDE has applied the terms of the Dupont contracts, with the noted changes, and grievances may be filed and processed. Primarily to avoid the possibility of inter-company bidding and bumping, DDE has refused to adopt the contracts, as such.

As at Louisville, Dow's "Insite" technology is not in use at Chambers Works, and is inapplicable. At formation, the new DDE employees stayed in the same physical facilities occupied while employed by Dupont, worked under the same supervisors and managers and used the same equipment and technology to produce the same products for the same customers. By virtue of the service agreements, DDE and Dupont facilities are protected by the same security force theretofore utilized by Dupont, and DDE and Dupont employees have continued to use the same tool room, medical facility, change house, laundry and lunch rooms and serve together on the same emergency unit or fire brigade. The two sets of employees use the same electronic time keeping system as before April 1, 1996, receive their paychecks from the same payroll firm,[7] utilize a single telephone and paging system and the same computer system. There is, at Chambers Works, a joint safety committee and Dupont and DDE employees attend joint safety meetings and operate under the same Dupont generated safety manual. Indeed, Dupont's hytrel operations and DDE's elastomer operations have been simultaneously audited for safety and occupational health. Joint training of employees has also occurred.

As noted, most of the site service agreements were negotiated prior to start-up by and between Dupont officials and DDE "designees" who were, still, Dupont employees. These "designees" bargained agreements based upon cost figures brought to the table by Dupont, and they lacked access to independent accountants and consultants. Since start-up, Dupont and DDE have continued to discover areas of service provision not covered by agreement, necessitating the negotiation of further service agreements and calculations and payments for past services rendered. For accounting purposes, under the service agreements, the cost codes assigned by Dupont to DDE, and used by DDE since the joint venture commenced operations, are the same cost codes previously used by Dupont's PPD business unit. The difference, however, is that now more than an accounting allocation function is involved. On a monthly basis, actual dollars, in payment for services, changes hands, including a profit for the service provider. The services provided, as at Louisville, range from utilities, to performance of specialized mechanical and maintenance functions.

[7] DDE contracts with Dupont to provide payroll and other accounting services. Employees are paid on DDE checks.

As at Louisville, Dupont transferred its back orders to DDE at start-up. Customers were advised, with considerable fanfare, of the intended creation and purposes of DDE well in advance of formation, and were also told that orders would be so transferred.

C. Conclusions

1. Alter Ego

The Board will find an alter ego relationship to exist between two nominally separate entities if the two employers concerned have substantially identical management, business purpose, operations, equipment, customers and supervision, as well as ownership.[8] In the absence of an identity of ownership, or an ownership interest demonstrated by the holdings of one company in the other, the Board will examine whether the degree of control exercised by the first entity in the affairs of the second is such "as to obliterate any separation between them."[9] Additionally, the Board assesses whether the new or second company was created so as to allow the old employer to evade responsibilities under the Act, and whether the two entities deal with each other, if at all, at arm's length, with due regard for separateness.[10] However, unlawful motivation is not a necessary element of an alter ego finding.[11] Indeed, the Board has consistently held that no one factor, taken alone, is determinative, a substance-over-form approach approved by the courts. Thus, in Omnitest Inspection Services,[12] the Court, in enforcing the Board's order, stated:

> [The Employer's] challenge to the Board's reliance on actual control suggests that an alter ego finding should turn upon formal ownership alone. This argument ignores the Board's decisions that the substantial identity of formal ownership is not the sine qua non of an alter ego relationship. . . . We are satisfied that the Board's multi-factor test is a reasonable construction of the Act, and that depending on the facts of the case, actual control can be more significant than formal ownership.

Once a finding of alter ego relationship is made, it follows that the collective-bargaining agreement of the one employer is binding upon the second entity.[13]

In applying the above criteria, Board case law also instructs that, in the absence of common ownership, the older company must exercise very substantial control over the new one, in order to support an alter ego finding. Further, the lack of antiunion motivation in the creation of the second entity generally militates against finding a "disguised continuance" of the original organization.

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[8] Advance Electric, Inc., 268 NLRB 1001 (1984).

[9] American Pacific Concrete Pipe Co., 262 NLRB 1223 (1982).

[10] Fugazy Continental Corp., 265 NLRB 1301 (1982), enfd. 725 F. 2d 1416 (D.C. Cir. 1984).

[11] Johnstown Corporation and/or Stardyne, Inc., 313 NLRB 170 (1993), enf. denied and remanded 41 F. 3d 141 (3rd Cir. 1994), supp. dec. 322 NLRB No. 141 (1997).

[12] 297 NLRB 752 (1990), enfd. 937 F. 2d 112 (3rd Cir. 1991).

[13] Watt Electric Co., 273 NLRB 655 (1984).

In this case, the General Counsel and the Charging Parties urge that the alter ego analysis be undertaken without regard to the global status of DDE, that is, that the Louisville and Chambers Works arms of the joint venture be examined in this regard absent consideration of the status of the other DDE sites, world-wide. As there is no controlling authority to the contrary, I am quite willing to take this approach, based upon its inherent logic, and in light of record evidence showing the considerable degree of local autonomy exercised at those sites. The difficulty I have with the arguments of the General Counsel and the Charging Parties lies in the failure of the record evidence to show, at Louisville and at Chambers Works, sufficient commonality of ownership and, or, control, vis-a-vis Dupont and DDE, and the lack of any evidence indicating either an antiunion motivation in the creation of DDE, or questionable dealings between Dupont and the venture.

It is beyond legitimate dispute that, at both of the sites in question, the former Dupont elastomers business units, and the current DDE operations, have had substantially identical management, business purpose, equipment, customers and supervision. But DDE is 50 per cent owned by the Dow Chemical Company, and Dow wields 50 per cent control over centrally made decisions, including such significant business matters as major capital expenditures, and such important labor relations issues as "success sharing" and other benefit programs. Also, there is no evidence whatsoever, indeed, nary a contention, that Dow agreed with Dupont to form this global sized venture in order to aid Dupont in avoiding its collective-bargaining responsibilities at Louisville and at Chambers Works, rather than for bona fide business reasons.

At the local level, at the locations at issue, the remaining Dupont businesses, and DDE, share common sites and facilities and, through the service agreements, perform considerable work for each other, but never production work. Yet, despite the integrated nature of the sites, and the common systems, the businesses are structured as distinct entities, including separate ownership of buildings, equipment and production facilities. Services between the companies are paid for, and performed at a profit. The two entities, Dupont and DDE, do not share common management, nor do they engage in the same business. While, at the site level, the service agreements, initially, were negotiated between Dupont and DDE "designees," who were, still, employed by Dupont, those agreements were subject to review by Dow to insure their fairness to the venture as well as adherence to the standards centrally negotiated between Dow and Dupont. Indeed, this record is replete with evidence of arm's length and hard negotiations between the 2 parents, leading to the venture's formation.

In light of the evidence showing separate ownership and control, and the lack of evidence to suggest that DDE was formed for other than legitimate business reasons, or that there have been inappropriate dealings between Dupont and the venture, I conclude that, at Louisville and at Chambers Works, Dupont and DDE are separate entities. Simply put, too many of the critical factors traditionally relied upon by the Board to support alter ego findings are absent here.

2. "Perfectly Clear" Successor

In the instant cases, the fact of successorship at the subject locations is not at issue. It is conceded. What is in dispute is whether, at Louisville and at Chambers Works, DDE's successorship to the former Dupont operations was "perfectly clear" from the outset, obligating it to bargain with the Unions concerning initial terms and conditions of employment. Thus, in

NLRB v. Burns Security Services,[14] the Supreme Court stated:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit. . . .

Interpreting the Burns "perfectly clear" caveat, the Board, in Spruce Up Corporation,[15] ruled that when an employer who has not yet commenced operations announces new terms before or at the same time he invites the previous work force to accept employment under those terms, it cannot be said that the new employer plans to retain all of the employees in the unit, as referred to in Burns, since the old employees may choose not to accept employment in that situation. The Board held:

> We believe the caveat in Burns, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours or conditions of employment, or at least to circumstances where the new employer. . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. [footnote omitted]

Thereafter, in Canteen Company,[16] a Board plurality found that where a successor employer expressed to the union its desire to have the predecessor employees serve a probationary period, without indication of any changes in employment terms, the new employer "effectively and clearly communicated to the union its plan to retain the predecessor employees" and, since, as of that date it was perfectly clear that the successor planned to keep those employees, it "was not entitled to unilaterally implement new wage rates thereafter." Chairman Gould, concurring, expressed the view that the Spruce Up restrictions should be eliminated entirely. On the other hand, the dissenters urged that:

> . . . the perfectly clear exception should be limited to situations in which the employees have been tendered unconditional offers of hire, with no indication that the predecessor's terms will be changed. The 'perfectly clear' exception should not apply if the employer indicates

[14] 406 U.S. 272 (1972).
[15] 209 NLRB 194 (1974), enfd. on other grounds 529 F. 2d 516 (4th Cir. 1975).
[16] 317 NLRB 1052 (1995), enfd. 103 F. 3d 1355 (7th Cir. 1997).

a change prior to or simultaneously with its offer to employ the predecessor's work force. . . .

DDE argues that, here, however the facts and the law are construed, it was not obligated to bargain with the Unions, at all, until a majority of the predecessor's elastomers employees, at each location, "accepted" offers of employment with the venture. I reject, outright, this contention, as, under any view of the case law, the focus of the "perfectly clear" inquiry is not the acceptance of the offers by the predecessor employees, but, rather, the announced intent to offer them employment, and the terms of the offer.

Nonetheless, I conclude that, in the circumstances of this case, DDE did not violate Section 8(a)(5) of the Act by failing to bargain about initial terms and conditions of employment. At Louisville, and at Chambers Works, NCU, and CWA, respectively, were told in the early to mid-November, 1995, period, of DDE's decision to offer employment to the Dupont elastomers employees. Shortly thereafter, by the end of November, and many weeks before the start of the offer processes, the Unions were advised of the initial terms, that is, a carryover of the prior employment conditions, augmented by "success sharing." The November, 1995, announcements to the Unions, of the intent to hire and of the terms to be offered, were roughly contemporaneous, and both announcements preceded by many months the start-up of venture operations. The offer processes, clearly including "success sharing," did not begin until January, 1996.[17] In February, still substantially before DDE commenced business on April 1, it extended recognition to the Unions and offered to bargain concerning all employment terms. The offers, which were without prejudice to the Unions' alter ego claims, were rejected by both unions.

As, in these cases, the announcements to the Unions concerning the intent to offer employment to the elastomers employees, and the announcements concerning initial terms, including "success sharing," were, essentially, contemporaneous, part of a long and well advertised formation process, and as those announcements occurred long before commencement of the offer processes, and many months before start-up, I conclude that DDE never did effectively communicate an intent to retain the Dupont employees without changes in employment terms. This is not a case in which the new employer has failed clearly to state that it will set new conditions of employment prior to offering jobs to the predecessor employees, thereby misleading them into believing that they will be retained without changes in wages, hours and conditions of employment. Here, both the Unions and the employees knew, long before the offer processes began, that "success sharing" would be part of the employment package. Thus, the requirements of the "perfectly clear" caveat have not been met and, accordingly, the General Counsel has failed to show that DDE was obligated to bargain with the Unions concerning initial employment terms, at Louisville and at Chambers Works. I note, too, that, as neither union interposed objection to the implementation of "success sharing" despite ample time to do so, and as both unions refused to bargain about contractual terms when offered the opportunity to engage in such negotiations long before venture start-up, the Unions, by their total insistence that DDE assume its predecessor's contracts, and their refusal to consider anything else, effectively waived statutory bargaining rights concerning "success sharing" and other terms and conditions of employment to prevail at start-up.

3. Request for Information

[17] As noted, at Chambers Works, shortly after the offer process had begun, DDE announced certain additional, less significant, changes to existing Dupont terms and conditions of employment.

NCU's January 7, 1996, request, that it be furnished a copy of the venture agreement entered into by Dow and Dupont, in order to assess what "this thing" was all about, sought information which was clearly relevant to its statutory responsibility to represent the Louisville bargaining unit employees.[18] However, when the Union learned, 10 days later, by the terms of the reply, that Dupont and DDE interpreted the request as one for a signed agreement between the parents, which was not yet in existence, it made no clarifying demand to see a copy of any existent unsigned draft agreement. Ultimately, the document sought was signed in March, and a copy of it was delivered to the Union in April.

While, as urged by the General Counsel, information requested by the bargaining representative which is relevant and necessary to performance of its statutory duties must be produced without unreasonable delay, here the delay which occurred was attributable, apparently, to a good-faith misunderstanding concerning precisely what was sought. As Respondents otherwise satisfied their obligations to produce relevant information, and as NCU, after receiving Respondents' answer to its request for this particular piece of information failed to supply the needed clarification, I am unwilling to conclude that production of the formation agreement was unreasonably delayed, in violation of the Act.

Conclusions of Law

1. E.I. Dupont De Nemours and Company and Dupont Dow Elastomers L.L.C. are employers engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6) and (7) of the Act.

2. Chemical Workers Association, Inc. and Neoprene Craftsmen Union Local 788 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondents have not violated the Act as alleged in the Complaint.

Upon the foregoing findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[19]

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[18] See <u>Roman Catholic Diocese of Brooklyn</u>, 222 NLRB 1052 (1976), enf. denied on other grounds sub. nom. <u>Nazareth Regional High School v. NLRB</u>, 549 F. 2d 873 (2nd Cir. 1977).

[19] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

The Complaint is dismissed.

Dated, Washington, DC December 17, 1997

Irwin H. Socoloff
Administrative Law Judge