Walter B. Cooke, Inc. *and* **J. Tara Kluge.** Case 2-CA-16979

June 30, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On November 30, 1981, Administrative Law Judge Steven B. Fish issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Respondent filed cross-exceptions, a supporting brief, and a brief in answer to the General Counsel and the Charging Party.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We correct a minor error by the Administrative Law Judge. The Administrative Law Judge erroneously stated that the General Counsel and the Charging Party had alleged joint-employer status between Cooke and the trade houses of Pyramid and Ruggiero only with respect to those employees at Pyramid and Ruggiero who had been formerly employed at Cooke. In fact, the General Counsel and the Charging Party claimed that the entire operations of Pyramid and Ruggiero were conducted as joint employers with Respondent Cooke. They limited, however, the application of their requested remedy to former Cooke employees at the Pyramid and Ruggiero establishments.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge: Pursuant to charges filed on December 28, 1979,[1] by J. Tara Kluge, herein called the Charging Party, the Regional Director for Region 2, issued a complaint and notice of hearing on May 27, 1980. The complaint alleges, *inter alia*, that Walter B. Cooke, Inc., herein called Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act as amended, herein called the Act by laying off some 19 employees, and subcontracting work formerly performed by these employees, in order to obtain economic relief from the obligations of the collective-bargaining agreement then in effect between Respondent and Division 100, Local 144, Hotel, Hospital, Nursing Home and Allied Health Service Union, Service Employees International Union, AFL-CIO, herein called the Union or Local 144, thereby engaging in conduct inherently destructive of employee rights.

On December 31, 1980, the Regional Director issued an order amending complaint, alleging various individuals employed by Respondent to be supervisors and agents within the meaning of the Act, and alleging that Respondent subcontracted the work formerly done by its employees to funeral trade houses.

The hearing was opened before me on January 19, 1981. During opening statements the General Counsel alleged that he intended to prove that two of the trade houses, to whom Respondent subcontracted certain of its work, were in fact joint employers with Respondent of these employees.[2] Respondent objected to proceeding further with the hearing of the case, on the grounds that the General Counsel failed to serve or otherwise notify either Pyramid or Ruggiero of these proceedings, and that these parties should be notified in order to be able to protect whatever interest they may have in the outcome of the hearing.

Both the General Counsel and the Charging Party responded by waiving any claim of any kind of relief or finding of liability against Pyramid or Ruggiero as a result of their alleged joint employer status with Respondent. In view of that position, I denied Respondent's request to adjourn the hearing in order to serve these alleged joint employers. The hearing then proceeded, and was heard on January 19-23 and on March 2-3, 1981.[3]

Briefs have been received from Respondent, the General Counsel, and the Charging Party, and have been duly considered. Upon consideration of the entire record and my observation of the demeanor of witnesses, I make the following:

[1] All dates hereinafter referred to, unless otherwise indicated, refer to 1979.

[2] These trade houses are Pyramid and Ruggiero Funeral Services, herein called Pyramid and Ruggiero respectively.

[3] Insofar as Respondent contended that it was prejudiced by the failure to serve Pyramid and Ruggiero, I find that the 6-week interval between January 23 and March 2, when Respondent presented its case, was more than sufficient time for them to have contacted officials of Pyramid or Ruggiero, if it felt it was necessary to dispute any testimony of the General Counsel's witnesses pertaining to the joint employer issue. In fact, as will be seen below, George Amato, Respondent's Vice President who did testify to this issue essentially confirmed the testimony of the General Counsel's witnesses with respect to factual matters bearing on the joint employer status of Respondent and Pyramid and Ruggiero. Thus Respondent was not deprived of due process by the failure to serve Pyramid or Ruggiero.

FINDING OF FACT

I. JURISDICTION

Respondent, a New York corporation, is engaged in the business of providing funeral and related services, with an office and place of business in New York, New York. Annually, Respondent derives gross revenues from its operations in excess of $500,000, and purchases goods and materials valued in excess of $50,000 directly from sources located outside the State of New York. Respondent admits and I so find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is also admitted and I so find that Local 144 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

A. *Prior Charges*

On July 6, 1979, Local 144 filed charges against Respondent in Case 2-CA-16572, alleging in substance that Respondent violated Section 8(a)(1), (3), and (5) of the Act by terminating the employment of its employees on or about June 29, 1979, because of their membership and activities on behalf of Local 144, and by refusing to bargain collectively with the Union. On the same day, Charging Party Kluge filed a charge in Case 2-CA-16571, alleging that Respondent violated Section 8(a)(1) and (3) of the Act by laying off 19 named employees because they are members of Local 144.

There is no dispute that these prior charges dealt with the same matters involved in the current charge heard before me.

On August 31, the Acting Regional Director for Region 2 issued a letter refusing to issue complaint on Local 144's charge, reading as follows:

> Dear Sir:
>
> The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.
>
> As a result of the investigation it does not appear that further proceedings on the charge are warranted.
>
> The evidence does not tend to establish that the above-named Employer violated the National Labor Relations Act as alleged by you. It appears from the evidence adduced in the investigation that Walter B. Cooke, Inc., (hereinafter, Cooke) in or about May 1979 determined to reduce its work force and to subcontract out certain work to the funeral trade services. It further appears that this decision was based on economic conditions and not because of any discriminatory motives which could be deemed to be violative of the Act. It further appears that, in or about May 1979, Cooke notified and had discussions with the Union concerning the above decision. Thereafter, on June 29, 1979, Cooke reduced its work force by laying off about 18 of its employees. It appears that in implementing its decision Cooke complied with the seniority and subcontracting provisions of its collective-bargaining agreement with the Union. No evidence was adduced to establish that the layoffs were motivated because of the employees' membership in and activities on behalf of the Union. Further, the evidence does not tend to establish that Cooke or any other Employer involved herein violated the Act in any other manner encompassed by your charge. I therefore am refusing to issue a complaint in this matter.

No appeal was filed by Local 144 of this action by the Region.

Also on August 31, the Region approved the withdrawal of the charge filed by Kluge in Case 2-CA-16571.[4]

B. *Respondent's Operations*

Respondent, a subsidiary of Service Corporation International, herein called SCI, owns and operates 10 funeral chapels in New York City.[5] Each chapel is supervised by a manager who reports to George Amato, vice president of Respondent. Donald Campbell was at the time of the events in question vice president of SCI's eastern region, with responsibility for overseeing the operations of 50 SCI corporations in the eastern portion of the country, involved in various aspects of the funeral industry.

Respondent is a member of the Metropolitan Funeral Director's Association, Inc., herein called MFDA, an employer association. For a number of years, Respondent through MFDA has recognized Local 144 as the collective-bargaining representative of certain of its employees at all 10 of its locations. A collective-bargaining agreement effective from October 9, 1976, to October 9, 1979, between MFDA and Local 144, provides for recognition of all licensed funeral directors, embalmers, undertakers, registered residents and registered trainee funeral directors who perform duties encompassed by their licenses, excluding supervisors, proprietors, corporate officers, and principal stockholders of funeral establishments, their close family relatives, and all other employees.

On June 28, Respondent employed 36 licensed funeral directors and 6 registered residents at its various chapels.[6]

---

[4] Although the record does not reflect the reason for the withdrawal of Kluge's charge, I take judicial notice of Regional Office practice of permitting a charging party to withdraw charges in lieu of having said charges dismissed.

[5] Three chapels are located in Manhattan: 1504 Third Avenue (85th Street), 117 West 72d Street (72d Street), 234 8th Avenue (Chelsea). Three are in the Bronx: 1 West 190th Street (190th Street), 2135 Westchester Avenue (Parkchester), and 165 E. Tremont Avenue (Concourse). Two chapels are located in Queens: Hillside Avenue in Jamaica (Jamaica) and Roosevelt Avenue in Jackson Heights (Jackson Heights). And two chapels are in Brooklyn: 20 Snyder Avenue (Snyder Avenue), and 6900 4th Avenue (Bay Ridge).

[6] At its 85th Street chapel, Respondent employed 11 funeral directors (C. Arnold, C. Ekholm, G. Astazadour, S. Walkoczy, T. Kluge, J. Joyce, E. Cahill, J. Franza, R. Anderson, M. Kenny, and C. Killeen), and 2 residents, J. Kassan and E. Mevec. At 72d Street, Respondent employed three funeral directors (B. Kymick, J. McPhillips, and J. D'Errico), and

Continued

The work performed by funeral directors consisted of taking first calls which consists of both phone calls and visits from persons requiring information about funeral services provided by Respondent; making removals of bodies from the place of death to the chapels; embalming, which encompasses the injection into the corpse of embalming fluid, and generally includes also the dressing and casketing of the bodies; and directing, which includes the supervision of the funeral service and the burial. The funeral directors also performed arrangements which refers to discussions with the families where the details of the funeral are finalized as well as the making of the necessary calls to the cemetery, florist, newspapers, and churches.[7]

Of these responsibilities, removals, embalmings, arrangements, and directions were all duties encompassed within the license of a funeral director.

The registered residents were unlicensed, and were basically apprentices, training to become licensed funeral directors, who would assist and learn from the funeral directors in their various functions. As noted, the residents were covered by the collective-bargaining agreement.

The collective-bargaining agreement provides for a basic workday of 8 hours and workweek of 40 hours, for which employees are paid weekly salaries.

Articles III and V of the collective-bargaining agreement, the interpretation and reconciliation of which constitutes a substantial disagreement between the parties, and significant issues herein, are set forth below in pertinent part:

ARTICLE III

Management Rights—Duties of Employees—Subcontracting—Private Arrangements—No Diminution—Trainee Ratio

Section 1. Except as otherwise provided herein, nothing in this Agreement is intended or shall be interpreted to limit, restrict or circumscribe management's exclusive right to designate, assign and schedule work or to limit, restrict or circumscribe any other management prerogative of the Employer whether the same were exercised heretofore or not. Every employee shall be required to perform all duties presently being performed and in addition, all other duties related to the operations of funeral establishments. In emergencies, employees may be required to perform other duties.

Section 2. Except as provided in Article XVIII, Section 2 and subject to Article V, the Union recognizes the right of the Employer to change its method of operation, including a change to or from the use of independent contractors or subcontractors.

Section 3. No independent contractor or subcontractor will be engaged for work for which a license is required within the Employer's normal geographical service area—unless the work to be performed by him has first been made available to the Employer's remaining employees, as provided for in Article V.

Section 4. (a) No Employer which has an employee on layoff with recall rights may engage a non-related employer to have the latter's employees perform work for which a license is required for the former Employer in connection with a funeral being conducted by or for the former unless the work to be performed has first been made available to the Employer's employees, as provided for in Article V.

(b) In the event of an alleged violation, employees shall perform as directed and the Union shall be limited to raising a grievance, which will be subject to arbitration, against the Employer which it claimed has failed to utilize its recall list.

(c) As used herein, "non-related employer" shall not include employers presently involved in reciprocal or ongoing rental and/or service arrangements, or covered funeral establishments owned or operated by the same person, persons or corporation or parent company.

ARTICLE V

Overtime Hours and Rates—Pyramiding—Meal Time and Payment

Section 1. The Employer may require an employee to work additional hours beyond eight (8) hours per day and forty (40) hours per week, and in that event the employee shall be paid at the hourly overtime rate for all work after eight (8) hours daily or forty (40) hours weekly. An employee who is required to work a seventh day in any work week shall, if he consents to work, be paid at the rate of double his regular hourly pay for all work on such seventh work day. No employee shall be entitled to overtime for working a sixth or seventh successive day so long as such sixth or seventh day shall be in a different payroll period from the preceding five work days. It is specifically understood and agreed that there is to be no pyramiding of overtime.

Section 2. Recall overtime work pursuant to Article III, Section 3 shall be made available pursuant to subparagraphs (a) through (h) hereof to the following persons in the order set forth in 1. through 3. below:

1. The Employer's regular employees.

---

one resident, A. Tafuri. At Chelsea there was one funeral director (G. Marschner) and no residents. At 190th Street Respondent employed six funeral directors (V. Harry, L. Tillot, L. Micewicz, C. Marschena, V. Agostinelli, and N. Stone) and no residents. At Concourse, Respondent had two funeral directors (K. Mack and C. Towe) and no residents. At Parkchester there were four funeral directors (C. Bonura, R. Davis, R. Winn, and J. Marcoux) and two residents, T, Liberati and F. Basile. At its Jamaica chapel Respondent employed two funeral directors (J. Harris and B. Dowd) and no residents. At Jackson Heights there were four funeral directors (P. Tedesco, E. Duda, P. Stenzel, and B. Hults) and no residents. At Bay Ridge Respondent employed two funeral directors (R. Snopkoski and P. Nicosia) and one resident, J. Falzarano. At its Snyder Avenue chapel Respondent employed one funeral director (M. Qualantone) and no residents.

[7] Arrangements were also frequently made by managers and assistant managers at the various chapels, who are supervisors and were not covered by the collective-bargaining agreement.

2. Other persons, including laid-off employees, whom the employer allows to sign-up for recall work.

3. Any other person suitable to the Employer, including independent contractors or sub-contractors.

(a) It is the essence of this provision that the Employer must be able to achieve coverage and efficiency by the use of independent contractors or sub-contractors.

(b) Persons desiring overtime hereunder must specify the days for which they will be available during the following month, no later than the twentieth day of the preceding month. As used hereunder, "day" shall be deemed to include the period of time commencing with the expiration of their regular shift and the commencement of their next regular shift. In the event that there is a calendar day or days intervening between shifts, the employee may also designate such day or days. In the event sufficient employees do not indicate availability to cover all days, weekends and holidays, the Employer shall have the option of using the employees on the days designated by them and supplementing them with independent contractors or sub-contractors, or of using independent contractors or sub-contractors for the entire month.

(c) Once having indicated his availability, an employee will be required to perform the work requested of him as assigned during the day in question. Failure by an employee to work as directed on a day for which he had indicated his availability, shall subject him to disciplinary action unless his failure is based upon justifiable excuse.

(d) In the event an employee fails or refuses to perform the work requested of him, as assigned, on a day for which he has indicated his availability, the Employer shall be under no obligation to seek other regular employees to do same beyond those who have registered their availability for that particular day, but may utilize whatever means are deemed necessary in order to have the work accomplished.

(e) In the event more than one person is required, the Employer may designate the second person from any source whatsoever, in keeping with his usual practice.

(f) In the event the employees do not designate sufficient coverage as provided for in (b) above for two (2) successive months, the Employer shall be free to utilize independent contractors or subcontractors thereafter indefinitely, subject to a request by the Union for a meeting to effect the reinstatement of the use of the priority list.

(g) Employees shall be compensated for all work performed hereunder at the rate of time and one-half their regular hourly rate of pay, notwithstanding the provisions of Section 1 hereof, provided that there shall be a two (2) hour minimum guarantee per recall for employees under subsections 1. and 2. above, provided however that the minumum shall not apply to overtime contiguous with an employee's regular shift which shall be paid as regular overtime. Each employee will be required to maintain and submit detailed time records for such work and with regard to his use of service vehicles on forms to be made available by his Employer. There shall be no compensation except as provided for herein.

(h) Where the work required to be performed is outside of the normal geographical area serviced by the Employer, or in the event employees designating their availability live too remote from the place of the removal or other work to allow for expeditious handling thereof, the Employer shall be free to utilize an independent contractor or subcontractor.

Article XVIII which is referred to in article III, section 2, provides as follows:

ARTICLE XVIII

New Members of the Division

Section 1. Any Employer who shall be admitted to membership in the Association or to its Labor Relations Division subsequent to the execution of this Agreement, may elect to accept the terms and become a party hereto, and when notice of his admission and such elections have been given by the Association to the Union, this collective Agreement shall supersede any individual Agreement with the Union which the member may have made before he is admitted to membership in the Association or to its Labor Relations Division.

Section 2. An Employer who was not a party to the collective bargaining agreement which expired October 9, 1976 may not avail himself of the subcontracting option provided in Article III, Section 2 for a period of six (6) months after the date of his acceptance of this Agreement.

In article III, section 2, of the contract, the designation "independent contractors or subcontractors," is commonly referred to by the parties and in the industry as "trade." Both Pyramid and Ruggiero, the two employers alleged by the General Counsel to be joint employers with Respondent are considered part of trade. The use of trade by various employers in the industry is not uncommon. At Respondent the use of trade houses has been a longstanding practice in certain situations. Respondent's chapels are opened for visitation from 8 a.m. to 9:30 p.m. It's employees worked five 8-hour shifts, either 8 a.m. to 5 p.m. or from 1 p.m. to 10 p.m.

Respondent's use of trade during these hours arose primarily with respect to removals and embalmings. If a need for these services became apparent, Respondent's personnel at the chapel where the call was received would be utilized if they were available. If not, other chapels in the area would be contacted to see if they had any available personnel on duty to perform these func-

tions. Trade would be called only if there were no funeral directors on duty and available to do the removals and embalmings.

The function of assigning this work was performed between the hours of 8 a.m. to 4 p.m., by Jeannie Quinn, Respondent's dispatcher at its central office located at 85th Street. Between 4 p.m. and 10 p.m., these functions were performed in the same fashion by the manager, assistant manager, or even by a rank-and-file employee[8] employed at the particular chapel where the call was initially taken.

The hours from 10 p.m. to 8 a.m. are known as the midnight shift. Prior to 1974 or 1975, Respondent employed four licensed funeral directors on this shift, who worked at 190th Street and 85th Street. During this period of time, these four employees performed all the removals and embalmings for Respondent's chapels that were necessary on this shift. Trade was not used on this shift prior to 1974 or 1975.

Sometime in 1974 and 1975 Respondent eliminated the midnight shift, and began to use trade for most of its removals and embalmings that arose during the midnight shift. The record does not reveal whether or not any employees were laid off at the time, but it does reveal that Charles Eckholm, one of these four employees was transferred to the day shift for 9 months. The record does not reveal who if anyone worked on the midnight shift for this 9-month period, but Eckholm, after 9 months on the day shift, was transferred back to the midnight shift. He was the only funeral director employed on this shift, and his function was essentially to dispatch trade for all of Respondent's chapels. Eckholm had a list of the various trade houses used by Respondent covering the various locations of its chapels and would call the appropriate trade house where removals and embalmings were required.[9]

Prior to the June 28 layoffs, Sinkowski was the trade house used by Respondent to service its Bronx chapels. Its Brooklyn and Manhattan chapels were serviced by Pyramid. Other trade houses used by Respondent prior to the layoff included New York Funeral Service, Gallaher, and Bresher.

In 1978, trade houses performed from 500–1,000 embalmings for Respondent out of a total of some 4,000 embalmings performed for Respondent. During the same period of time, trade performed from 1,000–1,200 removals for Respondent.[10]

Many of these trade houses used Respondent's facilities for embalming prior to the June 28 layoff. Sinkowski used Respondent's Bronx chapels on a fairly regular basis. Pyramid would utilize Respondent's Chelsea chapel when it was servicing a Chelsea call,[11] which was approximately once a week. New York Funeral Service would use Respondent's Snyder Avenue facility for an embalming, also about once a week.

None of these trade houses was charged by Respondent for the use of Respondent's facilities.

None of the trade houses had an office or a desk at any of Respondent's chapels, nor did the trades houses have employees regularly stationed at any of these chapels. In addition, there was no utilization of Respondent's vehicles by trade houses prior to the June 28 layoff.

Overtime was provided for in the contract in article V, and called for the payment at time and a half. There are two types of overtime, contiguous and recall. Contiguous overtime, which is overtime contiguous to or in other words immediately before or after an employee's regular shift, was a fairly common practice at Respondent prior to the layoffs.

Recall overtime is overtime which is not contiguous to an employee's regular shift, and involves situations where an employee is called in to perform overtime on his day off or at other times not immediately before or after his regular shift.

Recall overtime as provided for in the collective-bargaining agreement, in article V, calls for an involved system of an employee's signing up on a list specifying his availability, requiring the employee to perform the overtime if requested at such time, subject to discipline if he does not, guaranteeing the employee a minimum of 2 hours per recall, and permitting Respondent to utilize trade in the event that employees do not designate sufficient coverage for 2 successive months. It is not disputed that recall overtime as defined in the contract has not been used by Respondent at any of its chapels. There was some testimony that some employees signed a list in 1976 or 1977, but there is no evidence that any such list was ever used to set in motion the provisions of the contract. It appears that the employees did not sign up in sufficient numbers to provide adequate coverage, and Respondent simply did not use the contractual provisions dealing with recall overtime.

There was some evidence that some employees were called to perform overtime on occasion at times not contiguous to their regular shifts. It is clear however that these situations were not pursuant to any list, they were purely voluntary by the employee, and pursuant to private arrangements between the person on duty[12] making the call to the employee notifying him of the overtime being available.

In March 1979, a labor management meeting was held with various officials of Respondent and the Union, including some of Respondent's employees being present. At this time written grievances filed by employee and assistant steward Davis complaining about trade houses, Sinkowski and Riverside, allegedly performing removals when he (Davis) and other of Respondent's personnel

[8] The record reveals that at Parkchester and 190th Street on rare occasions employees who were not on duty were called at home by various supervisors or employees to perform removals and embalmings before trade was utilized. However, I find this to have been an isolated and infrequent occurrence, and that the well-known, dominant, and established procedure at Respondent was to call trade when there were no on-duty personnel available.

[9] On rare occasions, Eckholm would call employee Joe Franza and permit him to make a removal or an embalming, where Franza had informed Eckholm that he would be available for any such work at Snyder Avenue or Bay Ridge that might arise during the midnight shift hours.

[10] Usually whoever performs the removal will also perform the embalming. Not all bodies are embalmed, however, and in some situations only the removal will be necessary.

[11] Pyramid at that time operated out of the Ponce Funeral Home in Brooklyn.

[12] This person was either another licensed funeral director or a manager or assistant manager.

were available for the work were brought up by union officials and/or Davis. Respondent's representative, Scott, responded that management had the right to move the body any way they wanted to. Davis was also informed by Scott not to harass his manager.[13]

At this meeting Union Representative Benson requested that the recall overtime procedure be reinstituted. Scott replied that Respondent had tried it in the past and that it did not work out.

Neither of these issues was resolved at the meeting,[14] and no further action was taken by the Union with respect to these matters.

Aside from the above, there is no evidence in the record that the Union has ever protested or grieved Respondent's use of trade houses to perform unit work. It is undisputed that no arbitrations were ever filed for by the Union in protest of Respondent's use of trade. As noted above, Respondent eliminated the night shift in approximately 1975 and proceeded to assign the bulk of this former unit work to trade houses, and, insofar as the record discloses, no protest or grievance was filed by the Union at the time.[15]

C. *Respondent's Decision To Lay Off Employees*

Donald Campbell was transferred to New York by SCI to attempt to improve the profitability of various of SCI's companies located in the eastern region. SCI was of the opinion that the contribution to overall corporate profits were not being made by this group of companies, and dispatched Campbell to assess the problem and make changes that would improve the operating margins of these firms.

Campbell noticed a decline in business volume of the various companies under his direction, and from 1975 to 1979 instituted a number of operational changes in many of SCI's subsidiaries, such as eliminating equipment and vehicles, reducing staff including some management positions by attrition and/or layoffs and closing offices.

In January 1975, Respondent employed 54 bargaining unit employees. As of June 28, 1979, Respondent employed 36 such employees. The reduction of these 18 employees was accomplished through attrition.

In early 1979, upon reviewing Respondent's records, Campbell noticed decreasing volume of business and revenues was resulting in a decline in profitability. He instructed Amato to study the situation and to develop a plan to improve Respondent's profit situation.

Amato studied Respondent's case volume statistics, which revealed 6,537 cases in the fiscal year 1973–74 (ending April 10, 1974), 5,744 cases in the fiscal year 1977–78 (ending April 1978), and 5,248 cases in fiscal year 1978–79 (ending April 30, 1979). Gross sales had decreased $350,000 from fiscal year 1978 to 1979. In fiscal year 1978, Respondent's income before taxes was $221,611. In 1979 Respondent's records demonstrated a loss of $4,938 of income before taxes.[16]

Amato, after studying these figures and observing Respondent's operations, concluded that there was insufficient work to justify retention of its present complement of employees for full 8-hour days. Amato therefore recommended that Respondent subcontract a larger portion of its work to the trade and lay-off a number of employees. As Amato explained, "By doing this, we would pay the trades only for the actual service or services performed. We thought this would be more economical than retaining regular employees for a full eight hour shift when we did not regularly have eight hours of work for them."

Amato calculated the amounts of money that he expected to save by his plan, which would also result in saving money on equipment, vehicles, and other materials. It is admitted that the largest part of the savings to Respondent by its decision to subcontract to trade, came from the elimination of salaries, overtime, and fringe benefits paid to the employees laid off. Amato concluded substantially all of its embalming and removal work should be subcontracted to the trade, which would result in the layoff of 20 employees.

Amato discussed his plan[17] with Campbell during the months of May and June. Amato had previously discussed the proposed changes with Allan Gallay, Respondent's attorney, and asked Gallay if the layoffs were permitted by the contract. Gallay responded that he did not see any problem and that Respondent had a right under the contract to institute the changes Amato was contemplating. Gallay reminded Amato that other firms such as Parkside and Parkwest with the same contract and the same union had implemented similar plans and no grievances were filed. Campbell had been informed by various officials of Parkside and Boulevard West that they had laid-off employees and subcontracted to trade embalming work, and this had resulted in substantial savings for these companies.

As a result of these discussions Campbell authorized Amato to implement his proposals. In mid-June, Amato began contacting the various trade houses used by Respondent at that time, as well as other trade houses which Respondent had not used prior thereto. He discussed with them the possibility of handling Respondent's removal and embalming work, and negotiated with them prices and other items concerning their potential and ability to perform the work. He reached agreement with four trade houses to handle the work previously performed by the unit employees who were to be laid off. He retained Pyramid to cover Respondent's Manhattan chapels, Ruggiero in the Bronx, Gallaher in Queens, and Cafaro to handle its Brooklyn chapels. He also made changes with respect to Respondent's vehicles and worked out a schedule of employees to be laid off. Amato called Gallay and asked him to notify the Union of Respondent's decision.

[13] Apparently Davis had previously engaged in a heated argument with his manager, which arose as a result of Davis' complaint to the manager about trade performing unit work.

[14] A number of other issues unrelated to areas pertinent herein were resolved at this meeting.

[15] As noted also above, the record does not disclose whether any employees were laid off as a result of this action of Respondent.

[16] SCI files a joint tax return covering all of its subsidiaries.

[17] The plan also included the promotion of six bargaining unit employees to assistant managers, a position not covered by the contract.

On Wednesday, June 27, Gallay called Peter Ottley, the president of Local 144. Gallay informed Ottley that Respondent had determined that a layoff of 20 employees was necessary, and that Respondent would thereafter exercise its right to use trade to handle the removal and embalming work previously performed by these employees. Ottley asked how many employees were in the unit and was told about 32. Ottley expressed shock concerning the magnitude of the layoff. Gallay responded that the contract allows Respondent to change its method of operation and reminded Ottley of a discussion of this subject during the 1976 negotiations.[18]

Ottley then asked when the layoffs will be effective. Gallay replied the next day. Ottley asked why so soon and Gallay answered that Respondent was concerned over the detrimental effect of giving employees too much notice. Gallay in response to another question from Ottley informed him that the layoffs would be in order of seniority and employees would be paid severance pursuant to the contract. Ottley asked if there were any chance that the number laid off could be reduced to less than 20 and Gallay said that he did not think so.

On Thursday, June 28, 20 employees were laid off. The next day after a call from the Union, the number was reduced to 19, since Carlo Bonura who had been laid off was entitled to superseniority by virtue of his being shop steward. Thus his layoff was rescinded.

The 19 employees who were laid off[19] were read a letter by supervisors which notified them in pertinent part, "regretfully, I must advise that for economic reasons the Company feels that it must change to the use of trade embalmers to increase efficiency in order to survive. As a result you are being laid off effective today."

Severance checks were issued to the laid-off employees. Eleven of the 19 checks were cashed by October 1, 1979, and all of them were cashed by the date of the hearing herein.

On Friday, June 29, Ottley contacted Gallay and requested a meeting with Respondent's officials to discuss the layoffs. A meeting was arranged for Monday, July 2, at the Union's offices. Present were Gallay, Amato, Scott, Ottley, and Benson. Ottley began by asking why Respondent had to lay off 20 people. Scott responded on behalf of Respondent by addressing himself to the changes taking place in the industry, including changes in the nature of services requested by families, changes in the nature of the population in New York, and that use of its licensed personnel was not the same as it had been years ago. He continued that Respondent could not keep going the same way and that its action was a response it felt it must make to these changes.

Gallay then interjected that Respondent had a right under the contract to change its operations in this fashion, and reminded Ottley of their prior phone call on June 27 when Gallay had referred to the contractual rights of Respondent. No one from the Union challenged or disputed Gally's assertion that the contract gave Respondent the right to subcontract the work to the trade.

Benson then argued that the use of trade would not save Respondent any money, and that using its own employees with overtime would be as economical and no one need be laid off. Amato replied that this was not so, that he had studied the matter, and that based on Respondent's prior use of trade, and the declining case volume and revenues, management was convinced that this action would be more economical and that there was no alternative.

Ottley asked if there were any way for Respondent to lay off fewer employees. Amato responded that he could not see any way to do so, but that if the Union had any ideas on how to avoid the problem or accomplish the same goal or anything he felt he wanted to discuss further to let Respondent know. Ottley replied that he would be in touch and the meeting concluded.

At no time during this meeting did anyone from the Union question Respondent's right under the contract to subcontract and or to lay off its employees. In addition it is also clear that at no time during this meeting did any union representatives consent to or agree with Respondent's decision.

A letter dated June 29 was sent to Gallay, written by Stephen Kahn, attorney for Local 144. The letter states that it is the position of Local 144 that Respondent's unilateral action of laying off employees, reassigning employees to new job classifications, and subcontracting out work formerly done by union members is in violation of the collective-bargaining agreement then in force.

The letter then requests immediate recission of these actions, restoration of the status quo, as well as the opportunity to bargain concerning any changes which Respondent may desire to make.[20]

On July 5, the Union notified Amato and the American Arbitration Association that it was demanding arbitration, alleging that Respondent was in violation of the contract by its layoff of June 28. None of the Union's letters specify the specific contractual provision or provisions allegedly violated by Respondent.

As noted above, the Union also filed unfair labor practices with Region 2 of the National Labor Relations Board on July 6.

On July 18, the AAA submitted a list of potential arbitrators to the parties. Subsequently, Respondent filed a motion in Supreme Court of New York County for a stay of the arbitration. After extensive delay, the court denied the motion to stay the arbitration. In the interim, Local 1034, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 1034, was certified as the collective-

[18] This discussion will be more fully set forth below.

[19] Those laid off included Robert Anderson, Girard Astazadour, Michael Kenny, John Joyce, Edward Cahill, Tara Kluge, Jeffrey Kassan, Steven Walkoczy, and Joseph Franza, who worked at Respondent 85th Street chapel; Joseph D'Errico from 72d Street; Lamont Tillot and Leon Micewicz who worked at 190th Street; Kevin Mack from Concourse; Roger Davis and Richard Winn who worked at Parkchester; Peter Tedesco from Jackson Heights; Phillip Nicosia who worked at Bay Ridge; and Martin Qualantone from Respondent's Snyder Avenue chapel. All of the employees laid off except for Kassan were licensed funeral directors. Kassan was a resident.

[20] The record does not reflect when this letter was received by Gallay or whether it was before or after the July 2 meeting discussed above.

bargaining representative of the unit employees employed by Respondent.[21]

Local 1034 at some point not specified in the record requested that Local 144 furnish it with the files pertaining to the arbitration so it could consider proceeding with the hearing. Local 144 did not forward the files to Local 1034 as requested. Thereafter the instant complaint issued, and Local 1034 decided to permit the NLRB to determine the issue herein. The arbitration proceeding has not been withdrawn. Respondent specifically disclaims any contention that the instant complaint be deferred to the arbitral process.

D. *The 1976 Negotiations*

Article III of the collective-bargaining agreement was first negotiated in either 1970 or 1973. No testimony was adduced from any party as to the substance of the negotiations when this contractual provision and or its interrelationship with other contractual provisions were agreed on.

However, Gallay, Respondent's attorney, who was the chief negotiator for the MFDA since at least 1970, testified as to the 1976 negotiations. His testimony which is uncontradicted[22] and therefore credited establishes that in 1976 Ottley, the Union's president, entered negotiations for the first time. In fact, the present Union, Local 144, resulted from a merger in 1974 between Local 100 and Local 144 of the Service Employees Union, AFL–CIO. Local 100 was the collective-bargaining representative and the contracting party with MFDA when the clauses in dispute were negotiated. Thus 1976 was the first negotiation that Ottley, who had been president of Local 144 and became president of the new Union, attended with the MFDA. Since Ottley was unfamiliar with the funeral industry, Gallay endeavored to acquaint him with the collective-bargaining agreement and the meaning of various clauses included therein.

Present during the 1976 negotiations in addition to Ottley were various officials and/or attorneys of Local 144, who had been involved in the negotiation and/or the interpretation of the various clauses in dispute while they were associated with Local 100. These individuals included William O'Keefe, former president of Local 100, and William Pitassy, attorney for Local 100 and for Local 144 as well, and Sustero, a business agent for both Local 100 and Local 144. In addition there were a number of employees present who were members of the Union's bargaining committee. One of those members, who was present at both the 1973 and 1976 negotiations, was Mary DeLouise, an employee of Respondent.[23] The record also revealed that O'Keefe died sometime in 1977, and that Sustero was not employed by the Union at the time of the hearing.

At the second or third negotiation session in 1976, after a discussion of the various proposals submitted by the Union, it became evident to Gallay that Ottley was not fully conversant with the contract. Thus, he felt it necessary to go over the entire contract explaining in detail the clauses which needed explanations of what the mutual understandings had been between the parties.

Gallay explained that article III, section 2, gave the right to the Employer to modify its operations and to go to trade. He went through the exceptions referred to in this clause, and the reasons for them. With respect to article XVIII, section 2, Gallay explained that this limitation on new members availing themselves of the subcontracting option for 6 months was put in at the behest of the Union some years ago, because the Union was concerned that it could organize a new shop, which would then join the Association and, by reason of article III, immediately terminate employees and go to trade. Thus the Union was able to prevent such an occurrence for new members of the Association for 6 months. The second limitation on an employer's right to go to trade was article V, which as explained by Gallay referred to situations where an employer goes to trade, and its remaining employees would be entitled to recall overtime on a priority basis, assuming that gave the employer the kind of coverage article V requires. Gallay went into some detail as to why such a lengthy complex article had been worked out. He explained that the problem in the past had been that employees would accept recall overtime only when it was convenient for them, and would leave an employer without adequate coverage on such nights as Christmas Eve and Thanksgiving, and that the Employer would be unable to utilize trade for these times unless trade was getting regular work as well. Thus the Employer wanted full coverage with an employee obligated to work if necessary, and if the employees were not going to give coverage for 2 successive months, then the employer could go to trade and not worry about it. He also stated that he did not know of any funeral establishment where the recall list was working and that full coverage was provided. When Gallay completed his explanation of the interrelationship between these clauses and their meaning as set forth above, no one present from the Union challenged or disputed his statements. The only comment made on Gallay's completion of his recitation with respect to these clauses was made by Ottley, who said, "I understand."

There were certain areas in the contract discussed by Gallay where his interpretation was questioned by union officials, but not in these areas. Pitassy on a couple of cases helped Gallay explain certain items to Ottley, but again there was no challenge made or questions asked concerning Gallay's discussion of articles III and V as set forth above.

---

[21] Pursuant to a petition filed by Local 1034 in Case 2–CA–18452 and an election held on March 6, 1980, Local 1034 was certified as the collective-bargaining representative of the employees employed by the MFDA, formerly represented by Local 144. In July 1980 a contract was entered into between Local 1034 and MFDA, which covered and has been applied to the employees of Respondent.

[22] The General Counsel and the Charging Party objected at the hearing to Gallay being permitted to testify, since he acted as attorney for Respondent at the hearing, and his testifying violated the canons of ethics. The Charging Party reviews this objection in her brief. I reaffirm the ruling that I made at the hearing, permitting Gallay to testify. It is well settled that the Board will not pass on the ethical propriety of a decision by counsel to testify. *Local Union No. 9, International Union of Operating Engineers (Fountain Sand & Gravel Co.)*, 210 NLRB 129, fn. 1 (1974); *Adolph Coors Company*, 235 NLRB 271, 273 (1978).

[23] DeLouise was an assistant manager of Respondent at the time of the layoff.

In addition there were no proposals made by the Union or the Employer during these negotiations to change, alter, or modify these clauses.

E. *Respondent's Operations After June 28*

As noted above, as part of Amato's plan to improve profits, six unit employees were promoted to assistant managers.[24] Thus, as a result of the changes instituted by Amato, 11 employees remained covered by the contract. After the layoff there were no licensed funeral directors assigned to the Chelsea, Bay Ridge, and Snyder Avenue chapels. The 11 unit employees who remained employed by Respondent primarily performed arrangements and directions, and few if any embalmings or removals. These employees received all the benefits under the contract to which they were entitled.

Pyramid as indicated was retained to service Respondent's three Manhattan chapels. Amato was asked by Joe Mule, one of the two principals of Pyramid, for recommendations on which employees of Respondent to consider hiring. Amato recommended to Mule certain employees for hire whose work Amato felt was "such that it would be up to what we wanted to have done, up to our standards." Amato recommended according to his testimony which is not disputed and is credited, quite a few[25] individuals for hire by Pyramid. Some of those whom he recommended were hired by Pyramid and others were not. Pyramid hired on a regular basis five former Cooke employees, all of whom were recommended by either Amato and/or Quinn. They were Cahill, D'Errico, Franza, Mack, and Nicosia. These employees shortly after or on the same day as their layoffs were notified by Quinn or their respective supervisors that if they were interested in employment to contact Pyramid.[26] In addition, during the next several months, Pyramid hired several employees who were not formerly employed by Cooke. They were Bob Donlan, Tony Carbo, Larry Hoey, and James Donofrio. The Pyramid employees performed all of Respondent's embalmings and removals at its Manhattan chapels which included dressing and casketing, as well as an occasional direction or arrangement.

While employed by Pyramid, these employees worked a combination of 12-hour day and night shifts so that there was trade service available on a 24-hour-a-day basis. During the first week of employment at Pyramid, they were paid a weekly salary. The next week, Mule informed the employees that thereafter they were to be paid on a per-call basis. They were paid $15 for a removal, $20 for an embalming, $40 for a direction, and $20 for an arrangement. They received no overtime pay or any fringe benefits.[27]

For the first week or two, after the layoff, Pyramid operated out of the Ponce Funeral Home in Brooklyn, New York, as it had done prior to the layoff, which would necessitate transporting the remains back and forth from Brooklyn to the various Manhattan chapels. This proved to be inefficient and time consuming, particularly since the bulk of Respondent's work arose out of its 85th St. chapel. Pyramid intended to use Respondent's Chelsea chapel on occasion to perform embalmings as it had done in the past,[28] but this location proved to be too small a facility. Thus one of Pyramid's representatives suggested to Amato that Pyramid move their base of operations to Respondent's 85th Street chapel, so that employees could use the facility for embalming and be closer to or in the chapels where they would be required to work. Amato agreed and thereafter Pyramid moved into the basement of Respondent's 85th Street chapel. Pyramid had a desk, a telephone, and filing cabinets in one section of the basement.

For the use of Respondent's premises in this fashion, Amato negotiated a price reduction with Pyramid's representatives of about 20 percent of the price charged Respondent for Pyramid's embalming and removal services.[29]

It is undisputed and in fact admitted by one of the General Counsel's witnesses that the move of Pyramid from Brooklyn to Respondent's 85th Street chapel benefitted the employees as well as Pyramid, since they could make more removals and embalmings.

Mule and Zunno arrived at the 85th Street chapel around 9:30 a.m. and generally remained until 5 p.m. During this period of time they dispatched their employees to the various jobs. Between 5 p.m. and 9:30 a.m., the employees were dispatched by Respondent's personnel.[30]

The dispatching that was conducted by either Mule or Zunno or by Respondent's personnel encompassed very little discretion or judgment on their part. For the large majority of situations it made no difference to Respondent who performed the particular job. Either Quinn or Respondent's employee on duty would call down to Pyramid and request an employee for an embalming, a removal, and/or a direction. Very rarely would Respondent make any requests concerning who would be assigned, although occasionally they would request a "former Cooke employee" be furnished for a job,[31] or a specific person be selected. These requests would gener-

[24] They were employees C. Killeen, J. McPhillips, Carl Marchena, C. Towe, Steven Mack, and R. Snopkoski.

[25] He could not recall how many he recommended.

[26] Joseph Franza in fact was told by Quinn that she was trying to line up jobs for the men with the trade houses that were coming in. She gave him the phone number of Pyramid as well as the number of Caffaro, the trade house that was to service Brooklyn. Franza called Pyramid first, spoke to Pete Zunno (the other principal of Pyramid), and arranged to be hired.

[27] Pyramid had its own payroll and the employees were paid with Pyramid checks prepared by Pyramid's clerical employee.

[28] The record reveals that, prior to the layoff when Pyramid serviced Respondent in Brooklyn and Manhattan, it used Respondent's Chelsea chapel for embalming on the average of once a week.

[29] No written agreement was entered into between Respondent and Pyramid with respect to the reduction in price or in fact the original agreement, which provided for payment by Respondent to Pyramid on a per-call basis.

[30] By either Jeannne Quinn or after control was closed by Respondent's employee or supervisor on duty in the 85th Street chapel. It was estimated by employee Franza that 90 percent of his assignments were given to him by either Mule or Zunno. The remaining 10 percent were assigned by Quinn or other of Respondent's employees.

[31] As noted, Pyramid employed four individuals not previously employed by Respondent, in addition to Franza, Nicosia, D'Errico, Cahill, and Kevin Mack, who had been in Respondent's employ.

ally involve directions, where Quinn "liked the way" that certain former employees directed a funeral.[32]

A rotation system was established among Pyramid's employees whereby assignments were generally made on the basis of who had received the last assignment, in an attempt to equalize the work as much as possible. If a second man was needed for a removal, a second Pyramid man would be used. In these circumstances, the second Pyramid employee would not be paid for the call.

Pyramid employees used Respondent's embalming tables, and some of Respondent's supplies until the supply was exhausted by the end of the summer, when for the most part Pyramid used its own supplies.

Pyramid for the large majority of its work used its own vehicles, but on occasion, in an emergency situation, it would be permitted to use Respondent's vehicles to perform removals.[33]

The record contained one incident wherein Respondent's officials became involved in a disciplinary incident concerning a Pyramid employee. In late July or early August, Ed Cahill received a phone call at home, on his day off, from Quinn. She asked him if he would come in and do some removals and embalmings. Cahill replied yes and reported to Respondent's basement at 85th Street. While he was talking with Mule, Quinn came down and informed Cahill that he had to make an arrangement. Cahill replied that he did not want to make an arrangement and that he did not have to do it. He added that when he was hired, he had told Pyramid that he would not make arrangements.[34] Quinn did not respond, but Mule ordered Cahill to make the arrangement. Cahill answered, "I refuse, I told you this." Mule told Cahill that he was fired. It is undisputed that Quinn made no request of Mule that he terminate or otherwise discipline Cahill for his refusal to perform the assignment.

Franza testified that while he was employed by Pyramid, Leo Denny, Respondent's manager at 85th Street asked him to keep an eye on resident and sort of take Schroeder "under his wing." In this connection, Franza was present in the embalming room while Schroeder embalmed a body,[35] from three to five times during the 13 months that Franza worked for Pyramid. The record does not reflect whether or by whom Franza was paid for being present when Schroeder embalmed on these occasions. The record also does not establish how or when Franza other than these three to five occasions "kept an eye on or took Schroeder under his wing."

In addition, the record reveals that D'Errico, Nicosia, and Franza, at the request of Mule, filled in for Respondent's employees and covered Respondent's chapels in Manhattan as a license on Thanksgiving, Christmas, and New Year's day.

Pyramid, in addition to servicing Respondent, performed work for four or five other accounts.[36] About 85 percent of Pyramid's work however was performed for Respondent. When Pyramid serviced these other accounts, Pyramid's employees serviced them in the same manner and pursuant to the same essential procedures as they did when they serviced Respondent. On some occasions, the employees would use the facilities of these other accounts including their equipment and supplies to embalm bodies. On other occasions, they would use Respondent's 85th Street facility to perform embalmings for Pyramid's other accounts. At times Pyramid employees also embalmed bodies using Respondent's 72d Street and Chelsea facilities while servicing Respondent's funerals which arose out of these locations. Three to 4 months after Pyramid began to service Respondent in Manhattan on a regular basis, it lost two of its other accounts, Ponce and Barone.

Lamont Tillot, who had been employed at Respondent's 190th Street location prior to the layoff, after being notified of his layoff by his manager, was told to call Quinn. He did so, and was told by Quinn to call Ruggiero and that "they will have a job for you." Tillot immediately called Ruggiero, spoke to Robert Ruggiero, and was given a job.

Tillot while employed by Ruggiero worked whatever hours he wanted, and averaged 12 hours a day. He was paid on a per-call basis, performing embalmings, removals, dressing, and casketing. He serviced Respondent's three Bronx chapels, and performed 95 percent of the embalmings at these three locations, and 5 percent of them at Ruggiero's chapel. Tillot was paid by Ruggiero's check and used Ruggiero's vehicles for removals. Ruggiero had other accounts, but Tillot did not perform any work servicing these firms. Ruggiero utilized family members (two brothers) as well as an employee named Andrews to service these other accounts and to service Respondent's chapels during the hours that Tillot was off.

Tillot ordinarily did not report to Ruggiero's chapel, but would be dispatched by Robert Ruggiero to do removals and embalmings at Respondent's Bronx chapels. Tillot carried a beeper with him and would be beeped by Ruggiero and would call Ruggiero's office to receive an assignment. Ordinarily, after Tillot completed a job at one of Respondent's chapels, he would report to the manager of Respondent's chapel and inform him that the job was completed. At that point, on some occasions, the manager would inform Tillot that Respondent had another removal and/or embalming for him to perform. Tillot would either call Ruggiero to report that he was going out on the assignment or, on some occasions, the manager would instruct Tillot to go out on the job, and he would call Ruggiero to so report.

[32] For instance D'Errico, who testified that Quinn specifically requested that he be assigned a particular job, usually a direction, in less than 1 out of 100 calls. D'Errico further testified that this occurred from 5 to 10 times during his employment at Pyramid, which lasted some 13 months. Nicosia testified that he could not recall Quinn ever asking for a particular Pyramid employee to perform a job. Franza testified that Quinn would on occasion request that he or a former Cooke employee perform a certain job.

[33] The vehicles involved are station wagons used to transport the remains.

[34] Cahill testified that he had informed Pyramid at hire that he would not perform arrangements, because $20 was in his judgment insufficient renumeration for this service.

[35] The law requires that a licensed funeral director be present when a resident performs embalmings.

[36] These were Ponce, Barone, Andrette, Canza, and Vanella Funeral Service.

Martin Qualantone had been employed as funeral director for Respondent at Snyder Avenue prior to the layoff. After the layoff he received calls from John Gallaher Funeral Service and Zunno or Mule of Pyramid, and was told that they had been given Qualantone's name, and asked him to come to work for them. After some discussions with these individuals as well as a representative from Caffaro, Qualantone arranged to perform only directions and hairdressing for these firms on a per-call basis.[37] He did not report to any particular trade house and used his home as an office taking calls on a first-come-first-served basis, Qualantone performed such work at Respondent's chapels in Manhattan, Brooklyn, and Queens for these trade houses, as well as performing some services for accounts of these trade houses other than Respondent, such as Andrette and Ponce. He also performed some services for several other trade houses not associated with Respondent's chapels. These included Cionin Funeral Service, Each Funeral Service, and Greenwood Funeral Service. Qualantone's work for all of these trade houses was essentially the same, in terms of procedure and performance whether or not it was performed at Respondent's chapels or at chapels of other funeral establishments.

As noted above, on March 14, 1980, Local 1034, IBT, was certified as the collective-bargaining representative of the employees employed by MFDA the members including Respondent. In July 1980, a contract was executed, which provided that members of MFDA could only use trade services whose employees are covered by the Local 1034 contract. Pyramid could not afford the terms of the Local 1034 contract, and, since Respondent provided the bulk of its business, was forced to close sometime in July 1980.

Around the same time Respondent decided to assign the majority of its embalming and removals to West Side Funeral Service, a trade house which is a subsidiary of SCI. A letter dated June 25, 1980, sent by SCI and signed by Amato to all former laid-off employees, stated that management was considering the possibility of providing employment for certain previously laid-off employees. The letter requested that the former employees return a form indicating whether they were interested in employment as well as their earliest date of availability.

As a result of this letter, sometime in July 1980, West Side hired the employees who had previously performed most of the work on Respondent's accounts while working for Pyramid and Ruggiero.[38] These employees did not retain their Walter B. Cooke seniority when they were employed by West Side.[39]

The procedure utilized by Respondent in making its assignments is and has been since August 1980 to assign its own employees first to all work including embalmings and removals if possible. When the supply of Respondent's own employees is exhausted, West Side's employees are utilized.[40] When West Side is unable to perform the necessary work, Respondent then uses Ruggiero and Gallaher.[41]

[37] As noted above, Gallaher serviced Respondent's chapels in Queens and Caffaro Respondent's chapels in Brooklyn.

[38] Cahill, Franza, Qualantone, Tillot, D'Errico, and Nicosia.

[39] West Side, which as noted was a subsidiary of SCI, had a collective-bargaining agreement with Local 1034. Pyramid did not and as noted went out of business as a result of losing Respondent's account. Gallaher and Ruggiero did not have a collective-bargaining agreement with Local 1034 in July 1980, but at some subsequent time did enter into such an agreement.

III. ANALYSIS

A. *The Prior Charges*

Respondent argues that the previous dismissal of Local 144's charge in Case 2-CA-16572, and the approval of the withdrawal of Kluge's previously filed charge in Case 2-CA-16571, by the Region which admittedly were based on the same conduct attacked herein mandate dismissal of the instant complaint.

However it is well settled that a prior charge which is withdrawn without prejudice, or a dismissal by a Regional Director of a prior charge, even where the identical conduct is involved, does not constitute an adjudication on the merits, and no *res judicata* effect can be given to these actions.[42]

The cases cited by Respondent in its brief in support of its position on this issue are either clearly inapplicable and distinguishable[43] or merely unsupported dicta by an administrative law judge. *Quality Transport Inc.*, 211 NLRB 198, 201 (1974).

The only case cited by Respondent which in my judgment provides any support for Respondent's position is APA Transport Corp., 239 NLRB 1407 (1979). However, although this case does give some effect to a prior Regional Director's dismissal, I find it to also be distinguishable from and not controlling on the instant case. In APA, the Board considered the prior dismissal letter, only insofar as it contained factual evidence sufficient to meet Respondent's burden of rebutting the presumption of illegality of a bidding provision of a superseniority clause under Dairylea Cooperative Inc., 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976). This finding was necessary only to deny the General Counsel's motion for summary judgment, and was not an adjudication on the merits of this issue.[44]

Accordingly, I find that the Board's well-established refusal to give *res judicata* effect to prior withdrawals or dismissals is controlling herein, and that the Region's prior dismissal and approval of the withdrawal of the prior charges do not mandate dismissal of the instant complaint.

[40] The bulk of Respondent's removals and embalmings have been performed by West Side since that date.

[41] As noted, Ruggiero and Gallaher are now signatories to a Local 1034 contract.

[42] *Fanet Inc.*, 202 NLRB 409 (1973); *Omico Plastics Inc.*, 184 NLRB 767 (1970); *Cone Bros. Contract Co.*, 158 NLRB 86 (1966); *W. Ralston & Co. Inc.*, 131 NLRB (1961); *Swanson's Inc.*, 125 NLRB 407 (1959).

[43] *Mosher Steel Co.* v. *N.L.R.B.*, 568 F.2d 436 (5th Cir. 1978); *Gulf State Manufacturers Inc.* v. *N.L.R.B.*, 598 F.2d 896 (5th Cir. 1979).

[44] I would note that in another portion of the decision, the Board in *APA, supra*, granted summary judgment with respect to the maintenance of the superseniority clause extending beyond layoff, where the respondents had not presented any factual evidence to rebut the presumption of illegality.

B. *Was Respondent's Layoff of 19 Employees on June 28, 1979, "Inherently Destructive of Employee Rights"?*

The General Counsel and the Charging Party argue that Respondent's conduct in laying off its employees on June 28 and thereafter subcontracting out the work to the trade is conduct "inherently destructive of employee rights" and thereby violates Section 8(a)(1) and (3) of the Act. They place principal reliance on *Los Angeles Marine Hardware Co.*, 235 NLRB 720 (1978), enfd. F.2d 1302 (9th Cir. 1979), as well as other cases both prior and subsequent[45] to *Los Angeles*, which find 8(a)(3) violations on a similar theory.[46] In *Los Angeles, supra*, a single employer consisting of three corporations relocated its recreational sales operation from one plant in San Pedro, California, to two other plants in other cities in California, in the midst of a collective-bargaining agreement with a labor organization. Respondent therein took the position that the contract did not cover the plants to which the work was transferred, and did not apply the contract's terms to the employees at the new plants. This action resulted in the terminations of the employees who were employed at San Pedro.

The Administrative Law Judge, affirmed by the Board, found that the decision to move was an economic one, based on the loss of profits and an anticipated loss, and not based on hostility or animus to the Union.[47] In fact an allegation that the relocation was utilized as a means of getting rid of the union was not established by the evidence.

However, he also found that the contract did apply (in view of the simple employer finding) to the other two plants, and Section 8(d) of the Act precludes a party from making a midterm modification in said agreement without the consent of the other party. Therefore Respondent modified the contract in midterm without the consent of the union, by removing the work to another plant, reducing the wages, and hiring new employees to replace the employees who had worked at San Pedro. It was further found that since the terminations of the employees resulted from the efforts of respondents to escape the economic obligations imposed by the contract, these terminations were unlawful, since they were part of a plan to escape such obligations and were "inherently destructive of employee interests."

The first question to be determined herein is whether or not Respondent's actions constituted a midterm modification of the contract. The General Counsel and the Charging Party contend that the contract between Respondent and the Union prohibits subcontracting of work to the trade in these circumstances. Respondent on the other hand contends that the agreement expressly permits its actions.

The parties disagree as to the meaning of and interrelationship between article III, section 2, and section 3. The General Counsel and the Charging Party argue that section III restricts section II and limits the right of Respondent to engage a subcontractor to perform work within its normal geographic area, and that Respondent by section II retains only the right to use trade when overtime work becomes available and when the normal compliment of employees cannot handle the work and the priorities in article V have been complied with.

Respondent on the other hand argues that section II gives it the unlimited right to go to trade, subject only to article XVII (which involves new members of the Association) and article V which deals only with recall overtime, and details an involved procedure dealing with assignments for this type of work. Thus, since the record is clear that the procedures dealing with recall overtime in article V[48] have not been in use for some time at Respondent, article III, section 2, applies, and Respondent supports its right to change its operations to use of trade for part of its unit work.

The General Counsel and the Charging Party adduced no probative evidence[49] in support of their interpretation of the agreement. They called no officials of Local 144 or employees who were members of Local 144's bargaining committee to testify in support of such an interpretation. They rely primarily on statements made in cases dealing with construction of contracts generally, indicating that a fair and customary rather than an inequitable construction of a contract should be preferred,[50] that a contract should not be interpreted in a way as to lead to harsh or absurd results,[51] and that a construction which "will result in a contract the parties probably and normally would enter into, rather than one which is improbable and unusual," is preferred.[52]

They contend that is inherently illogical, improbable, and unusual for a contract to provide detailed and specific limitations on the right of the employer to subcontract recall overtime work, and then to allow the unfettered right to subcontract out the normal work of employees. This would permit the employer to obliterate the entire unit at any time.

These arguments do have some logic and some persuasiveness, but in my judgment a careful reading of all the sections of the disputed articles support the interpretation of the contract advanced by Respondent.

---

[45] *Am-Del Co. Inc. and Compton Service Co.*, 225 NLRB 698 (1979); *Rushton & Mercier Woodworking Co.*, 203 NLBR 123 (1973).

[46] *Brown Company*, 243 NLRB 769 (1979); *Big Bear Supermarkets No. 3*, 239 NLRB 179 (1978).

[47] It was found that respondent's labor costs in the contract was a significant factor in its decision to relocate. However, it was found that the fact that high labor costs resulting from bargaining with a union had been the source of economic straits does not render the decision other than economic.

[48] Such as employees signing up on a list indicating their availability for this kind of work.

[49] They contend that past practice supports their interpretation of the agreement. I do not agree. Although the record reveals that, prior to the layoff, Respondent attempted to assign work to unit employees before utilizing trade, the record also reveals that frequently trade was used without offering the job to unit employees, particularly during the evenings. In addition the record revealed that at one point Respondent eliminated the night shift, which had formerly performed embalmings and removals at night, and gave the work to the trade, without protest from the Union.

[50] *Bank of North Carolina N.A.* v. *Rock Island Bank*, 570 F.2d 202, 207 (7th Cir. 1978).

[51] *Rothlein* v. *Armour & Co.*, 87 LRRM 2319 (W.D. Pa. 1974).

[52] *Continental Bus Systems* v. *N.L.R.B.*, 325 F. 2d 267, 273 (10 Cir. 1963).

Article III, section 2, gives Respondent the right to subcontract subject only to article XVIII and article V. Similarly article III, section 3, the provision relied on most heavily by the General Counsel and the Charging Party, prohibits subcontracting, unless the work has first been made available to the Employer's remaining employees, as provided for in article V. When one reads article V, section 2, it specifically refers back to article III, by providing that "recall overtime work pursuant to Article III, Section 3" shall be made available to the employees as in the priorities specified therein. Thus, these priorities seem only to apply in the case of recall overtime and not to any other type of work. This conclusion is reinforced by the other provisions of section 2. Subdivision 1 provides that the essence of this provision is that the employer be able to achieve coverage by the use of its regular employees equivalent to that obtainable through the use of trade. This is made clear by the other provisions therein, which require employees to sign up on a list for coverage, specify the dates of their availability; which require them to work on these days, subject to disciplinary action if they do not; and which allow Respondent to go to trade immediately and indefinitely, if sufficient coverage is not provided by an employee list for 2 successive months. In addition, the list of priorities for assignments provides that after regular employees comes laid-off employees whom the Employer allows to sign up for recall overtime. This demonstrates that the contract contemplated layoffs of employees and that recall overtime be made available to the remaining employees of the Employer after such a layoff.

Although in some circumstances it might seem illogical or inequitable for a union to allow subcontracting of normal work, and only restrict overtime work, it is obvious that in this situation that is not the case. The use of trade in the industry as well as at Respondent is not unusual and is in fact commonplace. The provisions dealing with recall overtime clearly provide for obligations and committments from both sides in order to enable the Employer to service its business adequately. Therefore I conclude that the Employer by limiting its otherwise unqualified right to subcontract in recall overtime situations has agreed to do so only where the employees can demonstrate the ability to adequately service the Employer during these hours.

My conclusion is fortified by examining the other exception to article III, section 2, article XVIII, section 2. This provides that for the first 6 months after an employer becomes a member of the Association, it cannot avail itself of the subcontracting option in article III, section 2. It is clear that this provision as explained by Gallay was inserted to prevent an employer from joining the Association and then immediately subcontracting out all of his work.

I am therefore persuaded that, although the contract is somewhat ambiguous, Respondent's interpretation of the agreement is the correct one and that a fair reading of the agreement establishes that Respondent is permitted to subcontract out to the trade, subject only to the two exceptions set forth above. (Recall overtime work, where sufficient coverage has been provided by the employees, and for new Association members.)

Although I make this finding based on my reading of the contract, I also rely on the testimony of Gallay that in 1976, when he provided the union negotiators who were parties to the contract with this long prevailing interpretation of the contract, no union officials present challenged or objected to such an interpretation.[53]

The Federal Rules of Evidence, Section 801(d)(2)(B), permits the admission of evidence against a party, where the party has manifested his adoption or belief in its truth. It is clear that silence can be relied on as such a manifestation. The Advisory Committee's notes concerning this rule sums up the rationale as follows: "When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if true. The decision in each case calls for an evaluation of probable human behavior."[54]

The record discloses that Gallay explained the prevailing interpretation of a contract negotiated in the past to Ottley, a new negotiator, in the presence of O'Keefe, Pitassy, and Sustero, all of whom had knowledge of the truth of Gallay's statements. I find under these circumstances that, if Gallay's interpretation were incorrect, one of these union officials and attorneys, particularly O'Keefe, would have challenged Gallay's assertions. The clauses involved are not minor or insignificant provisions. They permit, if Gallay is credited, the Employer the right to subcontract out all of its work, subject to two limited exceptions. It is certainly reasonable to believe that, if this were not so or if the Union believed it not to be so its officials would have made its position clear at that time. They did not do so, and I deem it appropriate to conclude, which I do, that their failure to so protest is supportive of Respondent's interpretation, and the fact that the Union believed that Gallay was correct in his analysis of the contract's terms and its provisions.

I note additionally that when Gallay informed Ottley of this layoff on June 27, and on July 2 when Respondent's representatives met with union officials, Gallay reminded Ottley of his previous comments regarding Respondent's rights under the contract. In neither of these occasions did any union officials dispute Gallay's statements, challenge the right of Respondent to take the action it did under the contract, or assert that the contract prohibited the subcontracting, as contended by the General Counsel and the Charging Party. They merely requested that the scope of the layoff be diminished.

Therefore I find that, contrary to the position of the General Counsel and the Charging Party, the contract

[53] I note that those union officials present included O'Keefe, the prior president who negotiated the agreement, the Union's attorney Pitassy, Business Agent Sustero, and employee negotiators who were also present when the clauses were negotiated.

[54] Fed. R. Evid. 801(d)(2)(B) Advisory Committee's Notes 1975. See also *United States* v. *Hoosier*, 542 F.2d 687, 688 (6th Cir, 1976); *Hellenic Lines Ltd.* v. *Gulf Oil Corp.*, 340 F.2d 398, 401 (2d Cir. 1965).

does not prohibit subcontracting in the circumstances herein,[55] but in fact permits Respondent to do so.[56]

The General Counsel and the Charging Party assert that the evidence establishes that Respondent unilaterally subcontracted bargaining unit work to the trade, without affording the Union the opportunity to bargain concerning such action, in violation of Section 8(a)(1) and (5) of the Act.[57]

I find it both unnecessary and inappropriate to make such a determination on this record.

Preliminarily, I note that the complaint contains no 8(a)(5) allegation, nor any allegation as to a refusal to bargain concerning the decision to subcontract to the trade. Moreover, although there were extensive discussions and comments made by the General Counsel and the Charging Party throughout the course of the hearing, in opening statements, in opposition to a motion to dismiss, and otherwise, concerning the theory and rationale supporting a violation, no mention was made of a *Fibreboard* violation.[58] Therefore, Respondent was not at any time during the hearing made aware of or put on notice that its alleged failure to notify and/or bargain with the Union concerning its decision to subcontract was in issue. The matter was not fully litigated,[59] and I find that Respondent would not be afforded due process, if a violation of Section 8(a)(3) of the Act, were to be found in whole or in part based on a *Fibreboard* theory.

Additionally, I am somewhat puzzled by the General Counsel and the Charging Party's reliance on such a *Fibreboard* violation to establish that the layoffs and subcontracting were "inherently destructive of employee rights," and violative of Section 8(a)(3) of the Act. Although it is not entirely clear, they seem to be equating the phrase unilateral subcontracting in *Fibreboard* to a unilateral midterm modification in violation of Section 8(d), and argue that therefore even if the subcontracting is permitted under the contract, Respondent's failure to notify and bargain with the Union prior to its implementation, automatically translates into an 8(a)(3) as well as an 8(a)(5) violation. This is quite an interesting extension of *Fibreboard*, which is I believe unsupported by any cases. As *Los Angeles*, and *Brown, supra*, the cases most heavily relied on by the General Counsel and the Charging Party make clear, the finding of an 8(d) modification is independent of and irrelevant to whether the parties have bargained about the issue. In fact in *Los Angeles, supra*, a *Fibreboard* type violation was alleged but dismissed. However, the violations of Section 8(a)(5) and (3) were found in any event, since a modification can be implemented only with the consent of the other party. In *Big Bear* and *Rushton, supra*, no *Fibreboard* violations were alleged. Although in *Pay 'N' Save* and *Clevenger, supra*, 8(a)(3) violations were found, along with a *Fibreboard* violation, it is clear that other evidence in addition to the *Fibreboard* violation was relied on to establish the 8(a)(3) violation.[60]

In the instant case there is no evidence of animus, hostility to the Union, or any other evidence tending to establish a discriminatory motivation by Respondent. The General Counsel and the Charging Party place much significance on Amato's testimony that in deciding to subcontract and to lay off the employees, he was motivated by a desire to reduce costs and improve profitability. In that connection Amato conceded that the contract's provision calling for 8 hours of work per employee was a problem that he sought to address, since Respondent did not regularly have 8 hours of work for all of its employees. Thus, by having work performed by the trade on a per-call basis, Respondent would no longer be obligated to provide 8 hours of work per day to its employees and also would save money on the salaries and benefits under the contract that it no longer would have to pay to employees being laid off. The General Counsel and the Charging Party triumphantly point to this testimony as establishing that Respondent's motivation was to avoid the economic obligations of the contract and was therefore inherently destructive of employee rights.

However, a close examination of Amato's testimony established no more than would the testimony of any employer justifying any decision to subcontract or indeed to even lay off its employees. Thus, anytime an employer decides to subcontract, he expects to save money, and obviously it will do so frequently if not predominantly from savings that result from its not having to pay the wages and benefits and/or to guarantee a full day's work to employees guaranteed under a collective-bargaining agreement, if one is in existence. Indeed when an employer decides to simply lay off employees for economic reasons, it is not uncommon to determine whether there is sufficient work to keep such employees occupied for a full day, to justify an employer paying contractually agreed-upon wages, benefits, and guarantees of hours. It seems to me that this is all that Amato's alleged admis-

[55] I note that the recall overtime provisions of the contract had not been in effect at Respondent's premises for many years, and the parties had not agreed to the reinstatement of the list and the recall overtime priorities. Thus Respondent was free under the contract to subcontract to the trade.

[56] In this connection, I note that where a contract clause is ambiguous the burden is on the General Counsel to bring forth evidence to explain the ambiguity and establish that the contract has been violated. *Motor Car Dealers Association of Greater Kansas City*, 225 NLRB 1110 (1976).

[57] *Fibreboard Paper Products Corporation* v. *N.L.R.B.*, 279 U.S. 203 (1964); *Clevenger Logging, Inc.*, 220 NLRB 768 (1975); *Syufy Enterprise, a Limited Partnership*, 220 NLRB 738 (1975); *Pay 'N' Save Corporation*, 210 NLRB 311 (1974).

[58] While it is true that the complaint does not mention that Respondent's acts constituted a midterm modification of the agreement, it is clear from the comments made on the record that this was the basis for the assertion that Respondent's actions were taken in order to escape the obligations of the contract and therefore inherently destructive of employee rights. Thus, Respondent was put on notice that this was in issue.

[59] I note that Respondent's counsel did not cross examine on, nor present witnesses with respect to, this issue.

[60] Thus in *Pay 'N' Save*, the record revealed various 8(a)(1) threats which permitted a finding that Respondent's actions were motivated by a desire to disparage and undermine the Union. In *Clevenger* the record revealed an 8(d) violation, in that the contract specifically prohibited the subcontracting engaged in by the employer therein, as well as evidence of unlawful threats by the employer to shut down its own trucks if the Union persisted in fighting the employer's unilateral institution of a pay system. In *Am-Del Co., supra*, no *Fibreboard* violation was found but only a violation on effects bargaining. Indeed in *Town & Country Manufacturing Co., Inc.*, 136 NLRB 1022 (1962), the case often cited for finding 8(a)(3) violations in such situations, the Board relied on factors other than the refusal to bargain, such as threats made and hostility to the Union shown by the Employer's officials, to find discriminatory terminations by its subcontracting.

sions amounted to herein. Clearly, Respondent's business was faltering, and its profits were decreasing. Thus, to avoid continuing its operations in such a fashion, it made some decisions which it felt were necessary to reverse the trend of lost profits. In doing so it concluded that the changes in the industry had created a situation whereby Respondent was paying employees a weekly salary, and guaranteeing them 8 hours of work, where the work available was insufficient to keep them busy. Thus, it concluded that a change to a subcontractor whom it could pay on a per-call basis was more economical. I find nothing discriminatory in such a decision by Respondent, even where it may have failed to notify or consult with the Union prior to implementing its actions.

This brings me to a theory propounded by the General Counsel and the Charging Party as either alternative or complementary to their allegation that the subcontracting violated the contract. They argue that the evidence establishes that Respondent, after the layoff, became a joint employer with Pyramid over the terms and conditions of employment of Nicosia, Cahill, Mack, Franza, and D'Errico and with Ruggiero of Tillot. They argue that at least with respect to these employees, Respondent did not really subcontract at all, since they remained in the bargaining unit at all times, except that they did not receive the wages and benefits provided for in the contract.

My reading of the relevant cases indicates that this theory may in fact be an essential ingredient to establishing that Respondent's conduct was violative of the Act, and may very well be so regardless of whether the contract prohibits, permits, or is silent about Respondent's right to subcontract to the trade in the circumstances herein.

Indeed, an examination of the cases wherein the Board has found conduct motivated by a desire to escape the obligations of a collective-bargaining agreement to be inherently destructive, contain a common thread and include a single-employer finding. Thus, in each case, an employer by varying mechanisms or devices, such as relocation of a plant,[61] subcontracting,[62] converting employees to independent contractors and subcontracting,[63] closing a plant and reopening at another location,[64] and franchising one store of a multistore chain,[65] effectuated a transfer of work from a company with a union contract to another company, either without a union or with a less expensive union contract. In each case the company where the bargaining unit was transferred to was found to be an alter ego of or a single employer with the company which originally employed employees and were a party to a union contract. It is in these circumstances, where the Board finds conduct motivated by a desire to escape the obligations of a contract to be inherently destructive of employee rights, since it would permit an employer to achieve by indirection (the transfer of work to its alter ego), what he cannot achieve by direct means (i.e., the reduction of or elimination of contractual obligations). In such cases terminations resulting from such efforts of an Employer are inherently destructive of employee rights.[66]

I note that the facts herein do not come close to establishing an *alter ego* or single-employer relationship as found in the cases cited above, wherein a violation was found. Indeed such is not even alleged by the General Counsel or the Charging Party, who instead argue for a joint-employer finding.

While the Board considers joint- and single-employer situations interchangeable in terms of various issues such as jurisdiction, obligation to bargain or to remedy unfair labor practices, and appropriate unit, it is uncertain whether a joint-employer finding would be sufficient to establish inherently destructive conduct. The *alter ego* or single-employer findings which are made in the cited cases imply a lack of an arm's length transaction with the other company, thereby in effect finding that an employer subcontracted or otherwise transferred work to itself. In joint-employer situations no such lack of an arm's length transaction is required, and the basis of the finding is that one employer while subcontracting in good faith to an otherwise independent company has retained sufficient control for itself of the terms and conditions of employment of the employees employed by the subcontractor, to permit a finding that it is a coemployer over those employees.

The finding herein would have to be that Respondent, although in good-faith subcontracting to Pyramid and Ruggiero, by retaining for itself sufficient control over the conditions of employment of these employees, has in effect subcontracted out to itself at least with respect to these employees. However, I need not decide whether this argument has merit since I find, as set forth below, that no joint-employer relationship has been established between Respondent and either Pyramid or Ruggiero with respect to any employees.

I note preliminarily that the General Counsel and the Charging Party do not contend that a joint employer exists between Respondent and Gallaher or Caffaro, although employees of these firms serviced Respondent's chapels in Brooklyn and Queens after the layoff, performing the work previously performed by Respondent's employees employed at these chapels. A number of these employees of Respondent who worked in its Brooklyn and Queens chapels were laid off as a result of Respondent's actions, and are includable as discriminatees herein. No theory has been advanced by either the General Counsel or the Charging Party as to how the layoffs of these employees should be found unlawful, absent a joint-employer finding with respect to Gallaher or Caffaro, which firms were assigned the subcontract for this work.

More significantly, however, the General Counsel and the Charging Party allege joint-employer status only with respect to five of Pyramids nine employees, and of one of three or four of Ruggiero's employees. With respect to Pyramid, although the record was not fully de-

[61] *Los Angeles, supra.*
[62] *Brown, supra.*
[63] *Am-Del, supra.*
[64] *Rushton & Mercier, supra; Helrose Bindery, Inc. and Graphic Arts Finishing, Inc.*, 204 NLRB 499 (1973).
[65] *Big Bear, supra.*
[66] *Los Angeles, supra; Brown, supra; Rushton, supra.*

veloped with respect to the four employees employed by Pyramid who were not former employees of Respondent, it did indicate that at least for some portion of the 13-month period in question these four employees were stationed at Respondent's premises along with the former Cooke employees, and performed embalmings and removals on a similar basis with said former Cooke employees. As for Ruggiero, the record disclosed then, when Tillot was off, employee Andrews or other Ruggiero relatives performed work for Respondent.

I note that the record discloses that both Pyramid and Ruggiero serviced accounts other than Respondent during this period, and that all Pyramid's employees including the five former Cooke employees performed work servicing these other accounts. Thus, a joint-employer finding limited to the former employees of Respondent, whose main distinction between themselves and other employees of the subcontractors seems to be the fact that they formerly were employed by Respondent appears to me to be a highly doubtful conclusion to make.

Even apart from the above-cited factors, I find the record insufficient to establish a joint-employer relationship herein. "The Board has long held that the critical factor in determining whether a joint employer relationship exists is the control which one party exercises over the labor relations policy of the other."[67] In the instant case, Pyramid and Ruggiero were responsible for their own hiring,[68] disciplining, and discharging[69] its employees. The employees are paid by the subcontractors from a separate payroll, and their hours of work are regulated by these Employers.[70] There is no evidence of any joint ownership or joint management, and no evidence of a prior relationship between the parties which persuades me that their dealings were at less than arm's length. In fact, as noted, Pyramid was used by Respondent along with numerous other trade houses, both before and after the layoffs, in essentially the same fashion, with the post-layoff procedures and work performed essentially the same, except for the fact that additional work was being performed by Pyramid and Ruggiero.

In this connection the alleged "supervision" of Pyramid and Ruggiero employees, by Respondent's personnel giving limited instructions about work performance and informing employees of jobs to be performed was in most respects similar to pre- and postlayoff conduct involving trade houses in the industry in general, as well as with Respondent in particular.

The only significant difference in the pre- and post-layoff relationship between Pyramid and Respondent concerns Pyramid having moved its office into Respondent's premises at 85th Street. This resulted in substantial periods of time where Mule and Zunno were not present and where Respondent's officials or employees would either call up or walk down to the basement office at 85th Street to dispatch Pyramid's employees. However, a close examination of the facts reveals that the amount of control exercised by officials and/or employees of Respondent over the terms and conditions of employment of Pyramid's employees in these circumstances is quite minimal and unsubstantial. In fact the record reveals that the employees of Pyramid had formulated their own system of work assignments in which they would try to equalize the work as much as possible. In most cases a call would come down or a visit made to the office by a Cooke employee, and a request would be made for any employee to perform a particular job, and it made no difference to Respondent which employee was selected.[71] The fact that Pyramid moved its office from the Ponce Funeral Home in Brooklyn to Respondent's 85th Street chapel, I find to be even less probative of a joint-employer relationship.[72] I note that the move was made primarily for the convenience of Pyramid and Pyramid's employees, and at the request and behest of Pyramid's officials.[73] In addition, the price paid to Pyramid by Respondent was reduced by 20 percent as a result of the move.[74]

The record also revealed that Respondent permitted Pyramid to use Respondent's vehicles in emergency situations, and that on a few occasions Franza, pursuant to a request by a supervisor of Respondent, engaged in some limited supervision over a registered resident employed by Respondent by staying in a room with the resident, as requested by law, while he was performing embalmings.

[67] *O'Sullivan, Muckle, Kron Mortuary*, 246 NLRB 164, 165 (1979); *The Southland Corporation d/b/a Speedee 7-Eleven*, 170 NLRB 1332, 1334 (1968).

[68] The fact that Respondent recommended that Pyramid and Ruggiero hire certain employees including those actually hired is of minimal significance. There was no requirement that these companies hire anyone and in fact they did not hire all those recommended by Respondent. In this connection, see *John Breuner Company*, 248 NLRB 983 (1980), where the Board found the fact that an Employer required a subcontractor to hire its former employees and to apply the seniority provisions of the employer's contract *vis a vis* these employees, was insufficient to establish a joint-employer relationship.

[69] I attach even less significance to the single incident testified to by Cahill concerning his discharge from Pyramid. I note that although his discharge resulted indirectly from his failure to obey Quinn's instruction to perform an arrangement, in fact he was terminated only after Mule gave him the same order and he failed to comply. Moreover, it is undisputed that at no time did Quinn or any other official of Respondent request, order, or even suggest that Cahill be discharged or disciplined in any way for this conduct.

[70] It is true as pointed out by the General Counsel that since the employees are paid on a per-call basis, their wages and to some extent their hours are controlled indirectly by Respondent. However, this is true with respect to all of the trade houses in the industry, both before and after the layoffs. In the instant case Pyramid for the first week paid its employees on a weekly salary, but then decided that it would be more profitable to switch to a per-call basis. This decision was made without any consultation with Respondent, insofar as the record discloses. It would be anomalous indeed to base a joint-employer finding on such a unilateral decision made by a subcontractor. In any event I find such indirect control over wages and hours to be insufficient to establish a joint-employer relationship.

[71] The instances disclosed by the record, where Respondent would request that a "former Cooke employee" or a particular former Cooke employee be assigned for certain jobs, usually directions, were infrequent and would not be sufficient to establish a joint-employer relationship. See *O'Sullivan Muckle, supra.*

[72] *California Labor Industries, Inc.*, 249 NLRB 600 (1980); *John Breuner, supra.*

[73] This action therefore can be considered merely an example of Respondent and Pyramid engaging in management coordination in the best interests of both companies. *Furniture Distribution Center Inc.*, 234 NLRB 751 (1978).

[74] Note that in *California* and *John Breuner, supra*, there was no reduction in price as a result of the subcontractor using the premises of the Employer as its office, and still no joint-employer relationship was found.

While these facts do tend to support a joint-employer finding,[75] I find them, as well as some other factors cited above, which similarly support such a finding, such as the indirect control of wages and hours, to constitute limited instances of participation in the management of Pyramid and Ruggiero by Respondent, set against an otherwise complete absence of participation in its labor relations. (*California, supra.*) The minimal amount of control exercised by Respondent in the context of the entire relationship between Respondent and Pyramid and Ruggiero, I regard as insufficient to warrant the conclusion that Respondent was a joint employer of any of the employees of these trade houses.[76]

The General Counsel and the Charging Party have cited a number of cases supporting their contentions that a joint-employer relationship exists herein.[77] I have carefully read these cases and conclude that the facts in these and other cases cited reveal much more extensive and substantial control over the labor relations of the employees of the subcontractors therein, than were present in the instant case.

Having found that no joint-employer relationship existed between Respondent and any of the employees employed by Pyramid or Ruggiero, and that the collective-bargaining agreement permitted Respondent to subcontract work to the trade, in the circumstances present herein, there is very little left supportive of the General Counsel and the Charging Party's case. There remains only the testimony of Amato that he was motivated in part in his decision to lay off and subcontract by the fact that the contract then in existence guaranteed 8 hours of work a day for its employees. I have already concluded, as discussed more fully *infra*, that such an admission hardly qualifies as establishing a "desire to avoid the obligations of a collective bargaining agreement," sufficient to establish that Respondent's actions were inherently destructive of employee rights.

Accordingly, I find that the General Counsel has not established by a preponderance of the evidence that Respondent's conduct in laying off some of its employees and thereafter subcontracting the work previously performed by these employees to various subcontractors was violative of the Act. Therefore, I shall recommend dismissal of the complaint in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Local 144 is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not violated the Act as alleged.

Upon the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommendation:

ORDER[78]

The complaint is hereby dismissed in its entirety.

[75] I attach little or no significance to the testimony that Pyramid employees were asked by Mule, their own supervisor, to fill in for Respondent's employees on a few holidays. This appears to me to be no more than an extension of their functions as employees of a subcontractor, to do work that Respondent's employees are unable for one reason or another to perform.

[76] *O'Sullivan, Muckle, supra*; *California, supra*; *John Breuner, supra*; *Furniture, supra*; *The Southland Corp., supra.*

[77] *Sun-Maid Growers of California*, 239 NLRB 346 (1978), enfd. 104 LRRM 2543 (9th Cir. 1980); *Clayton B. Metcalf and C. B. Construction Co.*, 223 NLRB 642 (1976); *Cycle Cleaning Corp. and Maurice Gershman d/b/a Queens Nassau Nursing Home, Joint Employers*, 218 NLRB 1213 (1970); *Floyd Epperson and United Dairy Farmers Inc.*, 202 NLRB 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974).

[78] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 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.