Contee Sand and Gravel Company, Inc. and Its Alter Egos Calan Concrete Corp. and Tycon, Inc. *and* Drivers, Chauffeurs, and Helpers Local Union No. 639, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Tycon, Inc. *and* Drivers, Chauffeurs, and Helpers Local Union No. 639, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Contee Sand and Gravel Company, Inc. *and* Drivers, Chauffeurs, and Helpers Local Union No. 639, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Calan Concrete Corp. *and* Drivers, Chauffeurs, and Helpers Local Union No. 639, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 5-CA-13661, 5-CA-13722, 5-CA-13971, 5-CA-14254-1, 5-CA-14254-2, and 5-CA-14254-3

28 February 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 7 May 1984 Administrative Law Judge James M. Fitzpatrick issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,[1] findings, and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondents, Contee Sand and Gravel Company, Inc., Laurel, Maryland; Calan Concrete Corp., Kensington and Beltsville, Maryland; Tycon, Inc., Beltsville, Maryland, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain with Drivers, Chauffeurs and Helpers Local Union No. 639, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of the Respondent's employees in the bargaining unit described below, by failing or refusing to abide by the terms of the collective-bargaining agreement effective 16 May 1979 through 15 May 1982 between Contee Sand and Gravel Company, Inc. and the Union. The appropriate bargaining unit is:

> All ready-mix truck drivers, ready-mix mechanics, ready-mix mechanics' helpers and partsmen, yard helpers, dump truck drivers, tractor-trailer truck drivers, dump truck and tractor-trailer mechanics, and mechanics' helpers employed by Respondents Contee Sand

[1] We agree with the judge's ruling, for the reasons stated by him, to exclude the General Counsel's evidence regarding alleged collective-bargaining agreements which the Respondents allegedly refused to execute in violation of Sec 8(a)(5) and (1) of the Act In response to our colleague's partial dissent, we note that the alleged unfair labor practices which the parties were attempting to settle during September and October 1981 involved, inter alia, the Respondents' failure to abide by Respondent Contee's collective-bargaining agreement with the Union According to the General Counsel's offer of proof, an understanding was reached at those settlement negotiations that the Respondents would execute new collective-bargaining agreements with the Union Moreover, those alleged new agreements were purportedly appended to the "Release and Settlement Agreement" subsequently prepared by the Union As the General Counsel has acknowledged, the complaint allegation that the Respondents violated Sec. 8(a)(5) by refusing to sign the alleged new collective-bargaining agreements necessarily involves consideration of conduct or statements made during the settlement negotiations The General Counsel argues, however, and the dissent agrees, that the evidence deemed inadmissible by the judge "was not offered to prove the validity of a claim which was being discussed during these negotiations, but rather was offered 'for another purpose'" To the contrary, we find that the alleged new collective-bargaining agreements were so closely intertwined with the unfair labor practices then under discussion that they cannot be separated therefrom We further note that Rule 408 of the Federal Rules of Evidence specifically states, "Evidence of conduct or statements made in compromise negotiations is *likewise* not admissible" (Emphasis added) Thus, where, as here, the alleged unfair labor practice can be proven only with evidence that otherwise is inadmissible under Rule 408, we do not agree with the dissent that the "for another purpose" exception to Rule 408 encompasses the exception sought by the General Counsel here

[2] In adopting the judge's conclusions, we note that no exceptions were filed to the 8(a)(5) and (1) violations found by the judge, and that the General Counsel filed exceptions limited to the judge's exclusion of certain evidence, referred to above in fn 1, regarding alleged agreements which the Respondents refused to execute and his failure to find an additional violation of Sec 8(a)(5) based thereon

[3] The judge's recommended Order requires the Respondents to cease and desist from failing or refusing to recognize and bargain with the Union and further includes a corresponding affirmative order provision We note, however, that the consolidated complaint did not allege—and the judge did not specifically find—that the Respondents generally refused to recognize and bargain with the Union Accordingly, we shall modify the Order and notice to conform to the actual violations found Additionally, because it appears that the Respondents are no longer actively engaged in operations, we shall order the Respondents to mail to the Union and to each of the employees employed on the dates the Respondents ceased operations copies of the attached notice signed by the Respondents We also note, in clarification of the judge's remedy, that backpay is to be computed in a manner consistent with Board policy as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970).

Chairman Dotson and Member Dennis, as indicated in her partial dissent, shall modify the judge's Order, consistent with the Supreme Court's opinion in *NLRB v Bildisco & Bildisco*, 104 S Ct 1188 (1984), to provide that the Respondents' liability under the order provisions shall terminate on 24 August 1982, the date Respondent Contee filed its Chapter 7 petition in bankruptcy See *Edward Cooper Painting*, 273 NLRB 1768 (1985) Member Hunter, for the reasons set forth in his dissent in *Edward Cooper Painting*, disagrees with terminating the remedy as of 24 August 1982 because all of the violations found herein preceded the filing of the bankruptcy petition

and Gravel Company, Inc., Calan Concrete Corp., and Tycon, Inc., excluding dispatchers, supervisory and managerial personnel, owner-operators, employees of owner-operators, independent contractors and employees of independent contractors.

(b) Unilaterally altering the terms and conditions of employment of employees in the above-described bargaining unit without notice to, or consultation with, the Union.

(c) Failing or refusing to furnish the Union with information it requests which is relevant to its function as representative of employees in the above-described bargaining unit.

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

2. Take the following affirmative action which will effectuate the policies of the Act.

(a) Abide by the terms of the collective-bargaining agreement effective 16 May 1979 through 15 May 1982 between the Union and Contee Sand and Gravel Company, Inc., except that the Respondents' liability under this provision shall terminate as of 24 August 1982, the date Contee filed its petition in bankruptcy.

(b) Make whole the employees in the above-described bargaining unit for any loss of pay or benefits suffered by reason of the unfair labor practices found herein, and make whole the Teamsters Health and Welfare and Pension Funds for contributions which have not been paid for the benefit of those employees in the manner described in the section of the judge's decision entitled "Remedy," except that the Respondents' liability under this provision shall terminate as of 24 August 1982, the date Contee filed its petition in bankruptcy.

(c) On request by the Union, furnish it information relevant to the performance of its obligations as bargaining representative of employees in the above-described bargaining unit.

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

(e) Mail a copy of the attached notice marked "Appendix"[4] to the Union and to all employees who were employed by the Respondents immediately prior to their cessation of operations. Such notice shall be mailed to the last known address of each employee. Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondents' authorized representative, shall be mailed immediately upon receipt, as directed above.

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

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations not specifically found herein.

MEMBER DENNIS, dissenting in part.

Contrary to my colleagues, I would reverse the judge's ruling excluding certain evidence that the General Counsel offered. The General Counsel sought to prove that the Respondents refused to execute a collective-bargaining agreement and a release the parties had agreed on during settlement negotiations. I would find the General Counsel's evidence admissible, and I would remand this case to the judge to take evidence about whether the parties actually reached agreement and to make findings about the Respondents' admitted refusal to execute the written contract and release.

The facts in this case can be stated briefly. During September and October 1981, the Union and the Respondents held a number of negotiating sessions to discuss settlement of two pending unfair labor practice charges and a pending grievance. The unfair labor practice charges had been filed during the summer of 1981 and involved alter ego status, repudiation of the existing contract, and failure to provide information. The grievance had been filed in November 1980 and involved the Respondents' failure to make contributions to fringe benefit funds under the contract. The complaint alleges, inter alia, that on 27 October 1981 the Union and the Respondents reached complete agreement regarding the terms and conditions of employment for unit employees; that the parties agreed to incorporate their agreement in a collective-bargaining agreement and a release settling the pending claims; but that on 17 December 1981 the Respondents refused to execute the written agreements the Union requested they sign. On 30 December 1981 the Union filed an unfair labor practice charge alleging that the Respondents' failure to execute the agreed-upon contract and release violated Section 8(a)(1) and (5) of the Act. Because the Respondents never executed the agreement to settle the other unfair labor practice charges, all

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

the pending charges were consolidated for hearing in this case.

At the hearing, the judge refused to admit any evidence, either testimony or documents, offered to prove that the parties reached an agreement, relying on Rule 408 of the Federal Rules of Evidence. Rule 408 states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

In his decision, the judge reaffirmed his ruling excluding the General Counsel's evidence as evidence of conduct or statements made in compromise negotiations. The judge noted that there was no dispute that the Respondents had refused to execute the written agreements when requested to do so by the Union, but also noted that the Respondents denied the parties had reached an agreement. In the absence of any admissible evidence to support a finding that the Respondents refused to execute an agreed-upon contract, the judge dismissed the allegation. Based on independent evidence, however, the judge found that the Respondents committed the other unfair labor practice violations which the parties were attempting to settle during the negotiations in September and October 1981.

The General Counsel argues that, even though the rejected evidence clearly involves conduct or statements made in settlement negotiations, this evidence was not offered to prove the validity of a claim which was being discussed during these negotiations, but rather was offered "for another purpose," i.e., to show merely that the Respondents made an agreement that they later refused to sign. The General Counsel distinguishes *Philadelphia Building Trades Council (Altemose Construction)*, 222 NLRB 1276 at fn. 1 (1976), cited in the judge's decision, because that case involved an attempt to use evidence of settlement discussions to prove the same unfair labor practice that the parties were trying to settle.

I agree with the General Counsel that the rejected evidence is admissible under Rule 408 because it was offered for a purpose other than to show that the Respondents committed the unfair labor practices the parties were trying to settle. The refusal-to-execute allegation could not possibly have been involved in the settlement discussions, because the unfair labor practice charge containing the allegation was not filed until over 2 months later. Further, such evidence was certainly not needed to prove the other unfair labor practices being discussed, because the judge found those violations occurred based on independent evidence without considering the settlement negotiations. I would find that the General Counsel's evidence was offered to show simply that the parties actually reached an agreement that the Respondents then refused to execute. Section 8(d) of the Act requires the Board at least to consider such evidence about whether the parties reached agreement where there is an allegation that one party refused to execute a written contract incorporating that agreement.[1] A party should not be allowed to renege on a contract with impunity because agreement was reached during settlement negotiations.

Thus, I would reverse the judge's ruling excluding this evidence and would remand this case to the judge for further proceedings. Accordingly, I dissent from my colleagues' adoption of the judge's decision on this point. I agree with my colleagues' decision in all other respects, except as to the appropriate remedy for the violations found. Chairman Dotson and I agree that the affirmative remedy for the unilateral change violations should end as of 24 August 1982, the date when Respondent Contee filed a bankruptcy petition, pursuant to the Supreme Court's rationale in *Bildisco*.[2] Contrary to my colleagues, I would not delete the general provision in the judge's recommended Order requiring the Respondents to recognize and bargain with the Union, in light of the Respondents' general repudiation of the collective-bargaining agreement as well as the other 8(a)(5) violations found in this case.

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[1] Sec 8(d) defines the duty to bargain as including the obligation to "execut[e] a written contract incorporating any agreement reached if requested by either party"

[2] *NLRB v Bildisco & Bildisco*, 104 S Ct 1188 (1984) See *Edward Cooper Painting*, 273 NLRB 1768 (1985)

APPENDIX

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

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

WE WILL NOT fail or refuse to bargain with Drivers, Chauffeurs, and Helpers Local Union No. 639, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of our employees in the bargaining unit described below, by failing or refusing to abide by the terms of the collective-bargaining agreement effective 16 May 1979 through 15 May 1982, between the Union and Contee Sand and Gravel Company, Inc. The appropriate bargaining unit is:

> All ready-mix truck drivers, ready-mix mechanics, ready-mix mechanics' helpers and partsmen, yard helpers, dump truck drivers, tractor-trailer truck drivers, dump truck and tractor-trailer mechanics, and mechanics' helpers employed by Respondents Contee Sand and Gravel Company, Inc., Calan Concrete Corp., and Tycon, Inc., excluding dispatchers, supervisory and managerial personnel, owner-operators, employees of owner-operators, independent contractors and employees of independent contractors.

WE WILL NOT unilaterally change the terms and conditions of employment of employees in the above bargaining unit without notice to and consultation with the Union.

WE WILL NOT fail or refuse to furnish the Union relevant information it requests for use as the employees' bargaining representative.

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

WE WILL abide by the terms of the collective-bargaining agreement effective 16 May 1979 through 15 May 1982 between Contee Sand and Gravel Company, Inc. and the Union, except that any liability under this provision shall terminate as of 24 August 1982.

WE WILL make whole our employees in the bargaining unit for any loss of pay or other benefits they may have suffered by reason of our unfair labor practices, with interest, and also make whole the Union Health and Welfare and Pension Funds for contributions we failed to make, except that any liability under this provision shall terminate as of 24 August 1982.

WE WILL, on request by the Union, furnish it any information relevant to its bargaining obligations on behalf of our employees in the bargaining unit.

CONTEE SAND AND GRAVEL COMPANY INC.; CALAN CONCRETE CORP.; AND TYCON, INC.

DECISION

STATEMENT OF THE CASE

JAMES M. FITZPATRICK, Administrative Law Judge. This case[1] concerns a financially troubled corporation that fell into serious default with its creditors, including the health and welfare and pension trust funds of the Union with which it had a collective-bargaining agreement In a partial reorganization, two other corporations not previously in business took over fractions of the troubled concern's operations. A year later the prior company petitioned for voluntary bankruptcy and ceased operations. The basic question is whether the two new companies are bound by the collective-bargaining agreement between the prior company and the Union. As set out below, I find they are. One of the additional issues is whether the new companies reached agreement with the Union on new collective-bargaining agreements and then refused to sign. I find the admissible evidence fails to establish that such agreements were reached.

These proceedings, consolidated for hearing and decision, began August 28, 1981 when Drivers, Chauffeurs and Helpers Local Union No. 639, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 639 or the Union) filed charges (Case 5-CA-13661) of unfair labor practices under Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) against Contee Sand and Gravel Company, Inc., and its alter egos Calan Concrete Corp. and Tycon, Inc (Contee Sand, Calan, and Tycon, respectively, and collectively as Respondents). Thereafter the Union filed additional charges under Section 8(a)(1) and (5), all of which were consolidated with the initial charges and form the basis for the present proceedings.[2] Based on these charges the Gener-

[1] The caption has been amended to delete Contee Concrete Company as a respondent After the hearing the General Counsel moved to delete that name and withdraw allegations that that respondent is an alter ego of the other Respondents There being no evidence adduced regarding Contee Concrete Company, the motion is granted

[2] On September 16, 1981, the Union filed 8(a)(1) and (5) charges in Case 5-CA-13722 against Contee Sand, Calan, and Tycon, on December 30, 1981, 8(a)(1), (3), and (5) charges in Case 5-CA-13971 against Contee Sand, Calan and Tycon, on March 5, 1982, amended 8(a)(1) and (5) charges in Cases 5-CA-13661 and 5-CA-13971 against Contee Sand, Calan and Tycon, and on April 13, 1982, 8(a)(1) and (5) charges as follows, in Case 5-CA-14254-1 against Tycon, in Case 5-CA-14254-2 against Contee Sand, and in Case 5-CA-14254-3 against Calan Concrete

al Counsel for the National Labor Relations Board (the Board) issued a series of complaints alleging violations of Section 8(a)(1) and (5) by the Respondents.[3] All of the complaints and amendments have been consolidated.

A variety of issues are presented, the basic issue being, as noted above, whether either Calan or Tycon is an alter ego of Contee Sand. Whether there is an issue respecting appropriate unit for collective bargaining is unclear. The complaint alleges first that all employees of Respondent Companies constitute an appropriate unit. Contee Sand admits the appropriateness of such a unit until July 1981 but not thereafter. The other answering Respondents deny the appropriateness of that general unit as to their employees. The complaint also alleges as alternative and successor appropriate units three segments of the above general unit, one segment being made up of Contee Sand employees, another of Calan employees, and a third of Tycon employees. The complaint further alleges that these units were agreed to between the Union and Respondents. The applicable answers admit the appropriateness of the described units but deny they were agreed to. The complaint alleges further that since June 29, 1981, the Union has been the exclusive representative of the employees described in these successor bargaining units, that Respondents have recognized the Union, and that such recognition is embodied in recognition agreements of September 10, 1981. Respondents deny recognition occurred Also at issue is whether the Union is entitled to information it requested but was not furnished. Additional issues are as follows: whether since June 29, 1981, Calan and Tycon have violated collective-bargaining agreements to which they were obligated; whether on October 27, 1981, Respondents and the Union reached agreements which Respondents unlawfully refuse to execute; and whether in December 1981 Contee Sand subcontracted dump truck operations to Maryland Equipment, Inc., in violation of a duty to first give the Union an opportunity to bargain respecting the subcontracting.

The consolidated cases were heard at Washington, D.C., on August 24, October 25 and 26, and December 14, 1982, and January 25, 1983, at which times all parties were afforded an opportunity to appear in person and by counsel and present evidence and arguments.[4]

Based on the entire record, including my observation of the witnesses and consideration of the briefs filed by the General Counsel and by Calan and Tycon, I make the following

FINDINGS OF FACT

I. THE EMPLOYERS INVOLVED

Contee Sand is a Maryland corporation which at times material to this case maintained its principal office at Laurel, Maryland, and engaged in Maryland in the mining and processing of sand and gravel, and the production in Maryland and distribution within and without Maryland of ready-mix concrete and of asphalt. In these businesses it annually purchased goods and services valued over $50,000 directly from suppliers outside Maryland and sold and delivered goods, materials, products, and services valued over $50,000 directly to buyers in the District of Columbia and other places outside Maryland. At times material to this case, it has been an employer as defined in Section 2(2) of the Act engaged in commerce and in operations affecting commerce as defined in Section 2(6) and (7) of the Act.

Calan, a Maryland corporation with its principal office initially at Kensington, Maryland, and subsequently at Beltsville, Maryland, began operations June 29, 1981 in the production and distribution in the building and construction industry in Washington, D.C. and surrounding area, of ready-mix concrete. During the calendar year preceding August 10, 1982, Calan did business in the District of Columbia, purchased goods and services valued over $50,000 directly from suppliers outside Maryland, and also sold and shipped goods and services valued over $50,000 directly to purchasers outside Maryland. At times material to the issues in this case, Calan has been an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Tycon, a Maryland corporation, began operations at Beltsville, Maryland, about July 29, 1981, performing tractor-trailer services for Contee Sand. The amended complaint alleges that during the 12 months preceding August 10, 1982, Tycon purchased goods and services valued over $50,000 directly and indirectly from sources outside Maryland and also sold and delivered goods and services valued over $50,000 directly and indirectly to purchasers outside Maryland, including Contee Sand, which purchasers were engaged in commerce within the

[3] A complaint issued October 30, 1981 against Contee Sand in Case 5-CA-3722 which Contee Sand answered November 9, 1981 On March 29, 1982, Cases 5-CA-13661 and 5-CA-13971 were consolidated with Case 5-CA-13722 and an amended consolidated complaint issued against Contee Sand and against Calan and Tycon as alter egos of Contee Sand. These Respondents answered that complaint April 23, 1982, and amended that answer June 14, 1982 On July 15, 1982, an amended consolidated complaint issued in the three cases (Cases 5-CA-13661, 5-CA-13722, and 5-CA-13971) and a further amendment to that consolidated complaint issued August 10, 1982 On August 12, 1982, Calan answered the complaint issued July 15 and on August 23 answered the amendment to that complaint. In the meantime, 8(a)(1) and (5) complaints issued on May 26, 1982 in Case 5-CA-14254-1 against Tycon, in Case 5-CA-14254-2 against Contee Sand, and in Case 5-CA-14254-3 against Calan, and on June 7, 1982, the complaints against Tycon and Calan were amended On June 14, 1982, each of these Respondents separately answered the complaint against it. On August 10, 1982, additional amendments issued in all three of these cases but no further written answers have been filed

[4] Warren Davison, Esq, and Eric Hemmendinger, Esq, are the only Respondent counsel of record appearing on and after December 14, 1982 Prior thereto various defending counsel entered, and subsequently withdrew, their appearances At the opening of the hearing on August 24, 1982, Norman Buchsbaum, Esq, and Douglas Koteen, Esq (Jackson, Lewis, Schnitzler, and Krupman), Baltimore, Maryland, entered an appearance for Calan, and Steven Loewy, Esq (Constable, Alexander, Daneker, and Skeen), Baltimore, Maryland, entered an appearance for Contee Sand These appearances were withdrawn October 12, 1982, and since then Contee Sand has been unrepresented On October 25, 1982, David Berg, Esq (Goldstein, Blitz, and Rosenberg, P A), Bethesda, Maryland, entered an appearance on behalf of Calan and Tycon By letter of November 27, 1982, he indicated that other counsel was being sought for these proceedings and implied he would not further represent his clients in this matter, and he has not participated since then When the hearing resumed on December 14, 1982, Davison and Hemmendinger entered their appearances for Calan and Tycon and continue to represent them

meaning of the Act Although Tycon was duly served with these amended complaints, it did not answer them and, accordingly, pursuant to Section 102.20 of the Board's Rules and Regulations, those allegations are deemed admitted. See *SFS Painting & Drywall*, 249 NLRB 111, 112–113 (1980); *Oldwick Materials*, 264 NLRB 1152 (1982). I find Tycon in its operations has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Further, because both Calan and Tycon are alleged to be single employers with, and alter egos of, Contee Sand which is engaged in commerce under the Act, the Board has jurisdiction of Calan and Tycon in addressing those issues.

II. THE LABOR ORGANIZATION INVOLVED

Local 639 is a labor organization within the meaning of Section 2(5) of the Act. It represents employees of Contee Sand, of Calan, and of Tycon. It is party to a 3-year collective-bargaining agreement with Contee Sand covering the period May 16, 1979, through May 15, 1982.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A *The Origins of Contee Sand*

Until 1974, Contee Sand was owned and operated by the Gudelsky family. At that time the family sold a large part of its sand and gravel interests, including 3000 acres of real estate containing sand and gravel deposits, fixed assets on the real estate, mobile equipment, and the right to use the name Contee Sand and Gravel Company, Inc., to Boykin Resources, Inc., the stock of which was owned by a group of investors not identified in this record. This was a sale of assets rather than a transfer of corporate securities. Following the purchase, Boykin Resources, Inc , set up a wholly owned subsidiary corporation with the name Contee Sand and Gravel Company, Inc. The purchase by Boykin Resources, Inc., of the assets was funded by a loan from a group of four insurance companies and a bonding fund secured by a mortgage on the realty and fixed assets as well as a pledge of the stock of the newly formed Contee Sand and Gravel Company, Inc. Subsequently, in late 1974, the "Boykin" investor group sold its stock in Boykin Resources, Inc., to another investor group headed by Roger Malkin and Charles Hall which formed a new corporation called Capitol Resources and Properties, Inc., to make the purchase. The new investors then changed the name of Boykin Resources, Inc , to Contee Resources. Thus, at the end of 1974 the Malkin-Hall group owned Capitol Resources and Properties, Inc., which owned Contee Resources, Inc., which, in turn, owned Contee Sand and Gravel Company, Inc. (Contee Sand), subject to the underlying secured debt owed the insurance group lenders

Richard Ecroyd, the principal management official at the time of the events discussed hereinafter, was hired in February 1975 to be the salaried financial officer for Contee Sand [5] He had no ownership interest in the Company. As financial officer he reviewed its financial condition and concluded its debts could not be reconciled with a reasonable estimate of its earnings power. He informed the investors in the Company of his conclusions. Eventually a change of management occurred in 1977 and Richard Ecroyd was made president of Contee Sand, and in 1978 longtime employee James Payne, who had been with the earlier Contee Sand and had moved with the sale of assets to Boykin Resources, Inc., was made vice president of operations. Richard Ecroyd remained president of Contee Sand from 1977 until June or July 1982 when he was replaced. During his tenure he basically reported to Levey and to some extent Malkin. His duties as president were an extension of his function as financial officer in that his primary purpose was to move the Company from its untenable financial situation toward a healthy financial posture and to liquidate its debts. Working capital for Contee Sand during this period was provided chiefly through a line of credit from the Union Trust Company of Maryland. To secure this credit Contee Sand pledged to the bank its rolling stock, that is, the trucks and equipment titled in its name. Unlike the insurance group creditors which did not become involved in management of the Company, the bank in its surveillance of the line of credit, necessarily did, and as the financial condition of the Company progressively deteriorated, bank surveillance increased, ultimately involving the bank in day-to-day management decisions

B. *The Operations of Contee Sand*

The main office of Contee Sand was in Laurel, Maryland. The keystone of its operation was the extraction, processing, and distribution of sand and gravel. It performed this mining with heavy equipment on the property of Contee Resources, Inc., paying a royalty for the privilege. The construction aggregates thus produced were sold in the Washington, D.C., Maryland, Pennsylvania, and Virginia markets to a variety of customers, including many ready-mix and asphalt enterprises In addition, Contee Sand enjoyed internal markets in its own ready-mix and asphalt paving divisions. The ready-mix operation involved production and delivery of ready-mix concrete chiefly to construction sites in the Baltimore-Washington area. Ready-mix facilities were located at Kensington, Rockville, Laurel, and Curtis Bay, Maryland. Materials for concrete were stored at these locations and dispensed to ready-mix trucks which delivered the concrete to the construction sites. The asphalt operation produced asphalt for roads and parking lots and also engaged as a general contractor in the installation of asphalt surfaces.

These three basic operations required use of fixed equipment leased from Contee Resources, Inc., including equipment for processing sand and gravel, for handling ready-mix ingredients, and for producing asphalt. Various types of rolling stock were also required, including

[5] At that time the syndicate of investors controlling the parent corporation, Capitol Resources and Properties, Inc , included Roger Malkin, Hugh Levey, and Charles Hall (who apparently until then was president of Contee Sand) as well as various other investors including two law firms

front-end loaders, graders and asphalt spreaders, dump trucks, tractor-trailers, and ready-mix trucks Construction equipment was used in the sand and gravel extraction and in the asphalt operation. Dump trucks were used in the sand and gravel operation to deliver material to the asphalt and to the ready-mix operations. Ready-mix trucks were used solely in the distribution of ready-mix concrete. Tractor-trailers were used to haul dry cement from suppliers to the ready-mix operation, liquid asphalt from suppliers to the asphalt operation, and also at times to move heavy equipment and materials. In general employees of Contee Sand specialized in particular work and did not move from one operation to another. However, there were exceptions such as the dump truck drivers and tractor trailer drivers who served the various operations and the few mechanics, including tiremen, who serviced all the trucks and occasionally other equipment. Contee Sand used 6 or 7 truck tractors to haul about 15 trailers including low bed trailers for heavy equipment, dry tank trailers for cement, and liquid tank trailers for liquid asphalt The Company owned four or five dump trucks and leased others as needed or subcontracted the work. In the ready-mix operation it owned about half of the ready-mix trucks used and leased the others

C *Contee Sand Labor Relations*

Throughout the period involved here Local 639 has represented the Contee Sand drivers operating ready-mix trucks, dump trucks, and tractor trailers, and the mechanics and tiremen. It has not represented employees operating the plants in the sand and gravel, asphalt, and ready-mix divisions. As noted earlier Contee Sand and Local 639 are parties to a 3-year collective-bargaining agreement effective from May 16, 1979, through May 15, 1982. This agreement covered ready-mix drivers, ready-mix mechanics, ready-mix mechanics' helpers and partsmen, yard helpers, dump truck drivers, tractor trailer truck drivers, dump truck and tractor trailer mechanics, and mechanics' helpers," which contract language describes a unit appropriate for collective bargaining.

The agreement also contains valid union security provisions requiring union membership as a condition of employment. The evidence shows this provision was enforced by the parties and that virtually all employees covered by the agreement belonged to Local 639. It is undisputed that Local 639 has been the majority representative of the employees in the contract unit. The agreement also requires Contee Sand to check off from its employees' wages periodic union dues and remit such amounts to Local 639. Contee Sand continued to check off dues and remit to the Union for all covered employees so long as they were employed by that corporate entity and for 1 month thereafter for those who transferred to Calan or Tycon. The agreement also provides for regular contributions by Contee Sand to the Teamsters Health and Welfare Fund and the Pension Fund. Contee Sand made contributions but fell into serious arrears.

D *The Financial Troubles of Contee Sand*

The early apprehensions of Richard Ecroyd regarding the economic viability of Contee Sand proved well founded. As time passed the Company's financial straits increased until its creditors forced the issue by acting to protect their interests. By the time Ecroyd became president in 1977, company debts totaled about $50 million It became increasingly delinquent in its payments to the Teamsters trust funds as required by the collective-bargaining agreement until in June 1980 the trustees of the health and welfare fund canceled their insurance coverage for Contee Sand employees The health and welfare fund and the pension fund made a variety of efforts, including civil law suits, to recover the delinquencies owed, which at the time of the hearing amounted to about $80,000. The largest creditors were the insurance companies to whom Contee Sand owed between $30 and $35 million. The next largest was the Union Trust Company of Maryland which was owed about $9 million. In September 1980 the insurance companies foreclosed the mortgage on the real estate and fixed assets and purchased that property at the foreclosure sale. Contee Sand was permitted to continue using the facilities under an indirect leasing arrangement running from October 1980 to November 1981 [6]

The Union Trust Company initially extended working capital to Contee Sand based on its general credit. But as the Company's financial condition worsened, the bank insisted on having its position secured by a pledge of company personal property and intangibles, including inventory, receivables, and equipment. The bank thereafter increasingly involved itself in the management of the Company until eventually it was monitoring company requests for credit on a daily basis.

In the meantime, in 1979 or 1980, in connection with efforts to work out a plan for handling Contee Sand debt problems, the stockholders of Capitol Resources and Properties, Inc., including Hugh Levey, Roger Malkin, and by then Richard Ecroyd, funded a new corporation called Contee Financial Corporation which, in agreement with an informal committee of other creditors, purchased certain debts of Contee Sand at 10 cents on the dollar. In effect Contee Financial became a partial replacement creditor of Contee Sand Although the investors in Contee Financial included Levey, Malkin, and Richard Ecroyd, the extent of their interests is not apparent.

By April 1981 it had become common knowledge that Contee Sand was in serious financial trouble. About that time it discontinued sand and gravel operations at its Annapolis Junction site, leaving only its Laurel sand and gravel facilities in operation. The Union Trust Company continued its efforts begun in 1980 to limit its financing of the Company and, as set out hereinafter, negotiated for the spinoff of ready-mix operations to Calan and tractor-trailer operations to Tycon during the period May to July 1981 In August 1981 the bank began pressuring Contee Sand management to cease operations entirely

[6] The details of this leasing arrangement are spelled out in the record but are not material to the issues here

The lease arrangement under which Contee Sand mined sand and gravel at Laurel was due to expire in November 1981 and, about October of that year, the investors in Contee Resources, Inc, Levey, Malkin, and Richard Ecroyd, attempted to negotiate a renewal of that lease arrangement. However, they only succeeded in achieving two short extensions of the arrangement, apparently because another investor group headed by Kingdon Gould was interested in purchasing the property In December 1981, the pace of Contee Sand operations lessened considerably because of weather conditions, a normal seasonal condition for the industry. As a result, the employees, including dump truck drivers, were laid off. In the meantime the Gould group purchased the real estate involved and in early January 1982 evicted Contee Sand and all subtenants from the properties. At that point Contee Sand had no access to sand and gravel facilities and it ceased operations permanently. Richard Ecroyd testified that at the time of eviction the assets of Contee Sand consisted chiefly of personalty to which it held title but which was pledged to the Union Trust Company as security for its loans. According to him the Company was insolvent. Thereafter the Gould group launched a new sand and gravel enterprise under the name of Laurel Sand and Gravel, using the premises previously used by Contee Sand.

On August 24, 1982, Contee Sand filed a Chapter 7 petition for bankruptcy with the United States District Court for the District of Maryland. By letter of August 27, 1982, counsel for Contee Sand urged that the present proceedings were automatically stayed pursuant to the automatic stay provisions of the bankruptcy code, and on September 13, 1982, he formally moved for a stay. On September 14, 1982, I issued an order to show cause why the present proceeding should not be stayed. Counsel for Contee Sand did not appear further in these proceedings but, in response to the order to show cause, informed me by letter dated October 8, 1982, that the position of Contee Sand was (a) that the Chapter 7 bankruptcy proceedings constituted an automatic stay of the Board proceedings, (b) that in any event enforcement of any Board order was stayed under the bankruptcy statutes, (c) that the officers and directors of Contee Sand had changed completely and the Company as constituted at that time was not the alter ego of any other enterprise involved in the unfair labor practice proceedings, and (d) that Contee Sand would not participate further in the Board proceedings. Whether the bankruptcy court has taken action which affects these proceedings is not apparent. Nothing in the record indicates that Contee Sand at any time took the position it would not abide by its collective-bargaining agreement with Local 639. Cf. *NLRB v. Bildisco & Bildisco*, 104 S.Ct. 1188 (1984).

E. *The Spinoff of Ready-Mix Operations*

1. The creation of Calan

As noted above, during 1980 and early 1981, in its continuing effort to reduce and ultimately eliminate its role as the supplier of working capital to Contee Sand, the Union Trust Company endeavored to work out a sale of the Company's ready-mix and mobile equipment on some basis that would realize funds to pay off the debt to the bank. In June 1981 the bank approved establishment of a new ready-mix operation which would use the equipment of Contee Sand on a basis satisfactory to the bank but without the bank providing other working capital as it had for Contee Sand. The new operation would have to provide its own working capital. In cooperation with this scheme, Hugh Levey, a principal stockholder in Capitol Resources and Properties, Inc, and Richard Ecroyd, president of Contee Sand,[7] raised some working capital on their own and established Calan Concrete Corporation for the purpose of taking over the ready-mix operations of Contee Sand. Calan began operations July 1, 1981, with headquarters at the Kensington facility of Contee Sand Richard Ecroyd became president of Calan, although active management rested with James Payne as vice president and general manager. From early 1978 until then he had been vice president of operations for Contee Sand. Richard Ecroyd testified that Calan operated independently of Contee Sand and that his purpose in involving himself as an investor in Calan was to create a job with income for himself inasmuch as the Union Trust Company, with his cooperation, was liquidating Contee Sand and he was working himself out of a job.

2. The announcement of Calan

No secret was made of the creation of Calan as an entity to take over Contee Sand ready-mix operations. As early as late May 1981, Alan Grodnitsky, as attorney for Contee Sand, informed John Steger, business representative for Local 639, that Contee Sand would shortly be terminating ready-mix operations by selling ready-mix equipment to the newly formed Calan, that the changeover was due within a month, and that he would look forward to meeting with Steger as he hoped for a productive, harmonious relationship with Local 639. He also informed Steger that employment applications would be given Contee Sand ready-mix drivers and mechanics, that Calan expected to hire experienced employees and would consider all Contee Sand drivers and mechanics for employment. Grodnitsky made similar remarks on June 10 at a second meeting with Steger which included John Catlett, secretary-treasurer of Local 639, and Charles Booth, attorney for the Teamsters funds. On this occasion Grodnitsky stated he was acting on behalf of Calan, not Contee Sand. The purpose of this meeting was to discuss the $80,000 debt Contee Sand owed the union funds. Grodnitsky explained that Calan intended only to take over the assets, not the liabilities of Contee Sand. He said Calan would not be operating from the Contee Sand offices but rather from Kensington and that Payne would leave Contee Sand to take charge of the Calan operation He again expressed his hope for good relations between Local 639 and Calan. Grodnitsky met again on June 23 with Catlett, Steger, and also Payne, who announced he had resigned from Contee Sand effec-

[7] Richard Ecroyd does not appear to have had any direct equity position in Contee Sand He did have an equity in Contee Financial and apparently in Capitol Resources and Properties, Inc

tive June 19 and was at that time employed by Calan which would commence operations about June 29 Payne reaffirmed that all Contee Sand ready-mix drivers and mechanics who applied to Calan would be hired. When Catlett said he wanted to discuss Contee Sand employee problems, Payne refused, saying he was only authorized to speak on behalf of Calan. He went on to say that he was optimistic about the prospects for the new company even though startup expenses would be heavy. He indicated Calan would operate from Kensington but that he also was negotiating leases for other facilities in Rockville and Laurel He reaffirmed that Calan would not assume Contee Sand's liabilities.

A further meeting occurred on June 26 with Steger and Catlett present for the Union and Grodnitsky and fellow attorney Steven Boardman representing Calan. Boardman apparently volunteered his opinion that if the question of Calan's legal duty to assume the collective-bargaining agreement of Contee Sand were litigated, the Union probably would prevail, but that he did not think such litigation necessary because Calan was willing to resolve the outstanding health and welfare fund and pension fund issues at the same time as entering into a new collective-bargaining agreement with Local 639 According to him, Calan could live with the terms of the Local 639 agreement with Contee Sand and did not expect the funds to relinquish rights under a court judgment obtained against Contee Sand for the debts owed Catlett stated the union position that Calan and Contee Sand were one and the same, that before any discussions could take place, the $80,000 owed the funds would have to be paid. Boardman responded, speaking for both Contee Sand and Calan, that Contee Sand was willing to negotiate a new accelerated schedule of payments for the $80,000 owed and that Calan would agree to be a guarantor of such an agreement. The union officials inquired as to the identity of the officers of Calan but Boardman declined to give that information unless the Company could have a contract with the Union The union representatives reiterated the union position that Contee Sand and Calan were one and the same, but acknowledged that the primary issue was the money owed the funds.

From these meetings it is apparent that Calan was recognizing Local 639 as the representative of the drivers and mechanics to be employed and also desired a collective-bargaining agreement with the Union. The Union, on the other hand, was unwilling to enter into an agreement unless the $80,000 debt of Contee Sand was paid first. Thus, the question posed is whether or not this successor enterprise is obligated to pay the collective-bargaining debts incurred by its predecessor. I find it is because Calan is not only a successor of Contee Sand, but also, for the reasons discussed hereinafter, its alter ego and a single employer with it.

That same evening, Friday, June 26, Payne called a meeting of Contee Sand ready-mix employees, including 35 ready-mix drivers, 2 dispatchers, 4 plantmen, 1 tireman, and 3 mechanics, and announced the termination of Contee Sand's ready-mix operation which he said had been sold to a new company called Calan He identified himself as the person in charge of Calan and Jack Brooks, who until then had also been one of the management officials of Contee Sand, as his right hand He promised jobs at Calan for all who applied, saying he wanted the same setup as Contee Sand insofar as the Union was concerned and that he would honor the same pay scale and benefits.

3 Calan trucks and materials

In taking over the Contee Sand ready-mix operation, Calan took over not only its personnel but also use of all its ready-mix rolling stock and the mixing facilities available to it The fleet consisted of 47 vehicles, mostly ready-mix trucks, 25 of which were leased from various leasing concerns and the balance titled to Contee Sand but subject to the lien of the Union Trust Company as security for loans. Title to these vehicles was not transferred to Calan but rather left in the name of Contee Sand to save sales taxes and registration fees which otherwise would have been incurred. Calan assumed the leases on the leased trucks But with respect to the old Contee Sand trucks under lien to the bank, no payments were made because Calan and the bank were then negotiating for assumption of all remaining Contee Sand assets. To this extent the bank appears to have silently funded part of Calan's ready-mix fleet

Although Contee Sand became one of many suppliers of materials to Calan, it did not supply any concrete Instead, the concrete preparation facilities previously available to Contee Sand were made available to Calan. These included the batch plants and equipment previously used by Contee Sand which were owned by the insurance group which had foreclosed on them and which following foreclosure were available to Contee Sand under a lease arrangement through Contee Resources. They were made available to Calan on the same basis, even to use of the same switchboard, although the telephone number changed. Although the Calan office was initially set up at the Kensington batch plant, Calan also enjoyed the use of the Contee Sand batch plant and truck repair facilities at Laurel, as well as the batch plants at Rockville and Curtis Bay.

4. Calan operations

When Calan started up on July 1, 1981, the employees of the Contee Sand ready-mix division went to work for Calan. As Payne had promised, all who applied were hired. However, there was really no need to apply because the Company had insufficient application forms available, and all who reported were put to work without further ado. The Contee Sand employees who went to work for Calan included ready-mix drivers, mechanics, tiremen, and batchmen. So far as this record shows, all employees in the division made the transfer. They went to work for Calan performing precisely the same work as they performed for Contee Sand and at or out of the same locations.

Although the Calan offices were in Kensington while the Contee Sand offices remained in Laurel, the Contee Sand personnel office in Laurel continued to handle the personnel matters of Calan employees. At the time it ceased ready-mix operations on July 1, 1981, Contee Sand was supplying concrete to a number of large con-

struction projects pursuant to contracts providing substantial penalties for nonperformance. As an arrangement to complete the performance contracted for, Contee Sand agreed to pay the Calan payroll for 30 days after its establishment, and to permit Calan the use of its plant facilities and ready-mix trucks without charge until completion of those contracts. Thereafter Calan was to compete in the open market for business

During the first month of Calan operations, employee paychecks were checks of Contee Sand and thereafter were checks of Calan. Contee Sand also continued through August 1981 to check off and remit to Local 639 the union dues of ready-mix employees pursuant to the collective-bargaining agreement According to Business Representative Steger, when Calan went into operation on July 1, 1981, it followed the terms and conditions of the collective-bargaining agreement and, I infer, this included the checkoff of union dues after Contee Sand ceased doing so The Union did not bill Calan for dues checked off after employees transferred but only billed Contee Sand which ceased remitting dues for ready-mix employees after August 1981 [8] One exception to Calan's adherence to the collective-bargaining agreement, according to Steger, was its failure to make periodic contributions for employees to the union health and welfare and pension funds. Whether the funds would have extended coverage in return for such contributions is not clear inasmuch as the ongoing negotiations respecting the outstanding Contee Sand debt of $80,000 to the funds turned on whether Calan would accept responsibility for that debt in return for the Union's entering into a collective-bargaining agreement.

As noted above, Calan began operations using the equipment previously used by Contee Sand to process the aggregate which Contee Sand continued to mine pursuant to the lease arrangement due to terminate November 30, 1981. Thereafter there were two short extensions of that arrangement but it finally was terminated by lessor Kingdon Gould in January 1982, thereby eliminating Calan's regular source for sand and gravel In addition, Gould evicted Contee Sand from the property on which the processing equipment and offices were located. By this action Contee Sand was totally closed down Calan was affected in that it lost its use of those facilities At that point Calan relocated in Beltsville, Maryland, and continued to operate by purchasing concrete from other sources. Not long thereafter Gould sued to obtain possession of the trucks titled to Contee Sand, including those being used by Calan. Because of what the Union Trust Company perceived as a conflict of interest, Calan then ceased using those trucks and continued operating with only the leased ready-mix trucks. Meanwhile Richard Ecroyd, on behalf of Calan, continued negotiating with the Union Trust Company for the remaining assets of Contee Sand but they never were able to work out an arrangement due to the eviction brought about by Gould Calan finally went out of business in August 1982.

[8] Contee Sand continued to remit checked-off dues of tractor-trailer drivers through September 1981

F. *The Spinoff of Tractor-Trailer Operations*

Prior to the creation of Calan, Tycon was a corporate shell owned by Capitol Resources and Properties, Inc. In late July 1981 Tycon was activated with Richard Ecroyd as its president and Dennis McGrath, another management official of Contee Sand, as its vice president Along with Calan it was involved in the arrangements for a continuation of portions of the Contee Sand business pursuant to the continuing program of the Union Trust Company to liquidate Contee Sand debts.

In the spring of 1981 Contee Sand employed four tractor-trailer drivers, one of whom was on workmen's compensation and not working. It was rumored among the employees at that time that tractor-trailer operations would be transferred to a company called Tycon in which Richard Ecroyd would be an investor. When the tractor-trailer drivers received their paychecks on July 28, 1981, they found included a notice from Richard Ecroyd that Contee Sand would cease tractor-trailer operations on July 31, that those operations would be taken over by Tycon, and that if the drivers wished to work for Tycon they could obtain employment applications at the Contee Sand switchboard. All three working drivers reported at Tycon the following Monday, August 3, although two of them did not fill out employment applications until a week or two later. Whether the driver on workmen's compensation applied does not appear but it is clear that the entire active work force transferred from Contee Sand to Tycon with no hiatus in service

Tycon began operations August 1, 1981, in Beltsville in the premises of Maryland Equipment Company, a firm controlled by Richard Ecroyd. His brother Kevin Ecroyd, manager of Maryland Equipment, was also made manager and dispatcher for Tycon. The drivers reported to this new location and, except for that difference, the operation continued exactly as it had previously when part of Contee Sand The drivers used the same tractors and trailers which continued to be titled to Contee Sand. Tycon paid nothing to Contee Sand for the use of the tractor-trailers.[9] All of the services performed by Tycon were for Contee Sand. Although Richard Ecroyd hoped to develop new business, that never materialized. The drivers ostensibly were working for Tycon, but were paid during the first month by Contee Sand checks and Contee Sand continued until September 1981 to deduct their union dues and remit those sums to the Union As with Calan, the Union did not bill Tycon but only Contee Sand for employee dues.

On August 11, 1981, when union officials Catlett and Steger met with Attorneys Grodnitsky and Boardman concerning the arrears Contee Sand owed the union funds, Boardman described the activation of Tycon as being similar to the transfer of the ready-mix business to Calan, that is, a selloff of Contee Sand assets for the purpose of satisfying secured creditors. Catlett and Steger asserted that Contee Sand and Tycon were one and the same operation. Boardman informed them that Tycon

[9] The evidence shows that Tycon took over the tractor-trailer fleet of Contee Sand although it apparently did not use the entire fleet The fleet consisted of 7 or 8 tractors and about 15 trailers

would operate from the offices of Maryland Equipment Company in Beltsville, rather than in Laurel where Contee Sand was located, but said he would not disclose the identity of the officers of Tycon until the Company had a contract with Local 639.[10] The union officials, apparently at this same meeting, asked for information concerning the identity of Tycon employees, the type of work performed, wages, and an indication of who would perform the mechanical work. Grodnitsky informed them that Kevin Ecroyd was managing Tycon and agreed to subsequently provide in writing the other information requested

Although Tycon paid the drivers the same hourly rate as Contee Sand, it did not follow the union contract in certain other respects. Like Calan, it made no contributions to the health and welfare and pension funds. Further, according to Steger, it did not pay overtime for work beyond 8 hours in 1 day, nor holiday pay, nor did it honor the seniority requirements as to work opportunity, nor were the vacation provisions of the contract put into effect. Steger took action by meeting with Kevin Ecroyd along with Tycon drivers Charles Jackson, Bernard Mack, and William Brinn on September 15, 1981, to discuss the alleged failures to abide by the contract. Kevin Ecroyd took the position that Tycon had no obligation to honor the Contee Sand agreement, that if he were advised to do so by Attorney Boardman, he would, but until then he would not. He specifically declined to pay time-and-a-half after 8 hours' work in 1 day or to strictly respect the seniority provisions regarding work opportunities. In this latter regard, he stated he intended to rotate work opportunities rather than assign available work to the most senior employee Steger asserted, and Ecroyd disagreed, that Tycon was bound to assume the Contee Sand collective-bargaining agreement and that the Union would prevail on this issue On the issue of seniority for work opportunities, Steger told Kevin Ecroyd that once the company attorney advised him he should follow the contract, the Union would expect a retroactive settlement. Steger testified, "He [Kevin Ecroyd] stated to me if this results in a charge, I will let Brinn [the driver with least seniority] go right now." Apparently "charge" was used in the sense either of an added cost to the employer or an additional problem with the Union. Steger told Ecroyd he did not think it wise for Ecroyd to make retaliatory statements. I find Kevin Ecroyd was not making an illegal threat in the circumstances. The situation was really a bargaining one on the issue of whether or not the collective-bargaining agreement applied. Tycon admittedly had changed the terms of employment to some extent by rotating the work among the three drivers. If this were to result in an unanticipated cost or problem with the Union, elimination of the junior driver could avoid that problem. For Kevin Ecroyd to point this out was not, in my view, an illegal threat. It is apparent from the record there was not much work for Tycon at that time

Although in this meeting Kevin Ecroyd specifically refused to honor all of the terms of the Union's agreement with Contee Sand, he in fact recognized Local 639 as the representative of the tractor-trailer drivers and bargained respecting the grievances, one of which he settled in that he agreed to pay the drivers holiday pay for working on Labor Day. After the September 15 meeting, Tycon did not change its position respecting its obligations under the Contee Sand collective-bargaining agreement.

Prospects for the success of Tycon were never promising. Contee Sand was its only customer and, as early as June 1981, its need for tractor-trailer services had diminished considerably because it was no longer engaged in asphalt contracting nor, with the startup of Calan, in the ready-mix business. The Union Trust Company as lien holder on the tractor-trailer equipment believed that if Tycon could generate outside business, the bank's chances of selling the equipment and thereby liquidating the loans would improve, but that hope for new business did not materialize. Tycon had the use of the equipment without charge because the bank apparently viewed it as part of its program to liquidate debts. Essentially, the only overhead of Tycon was the payroll. Technically it owed rent to Maryland Equipment, Incorporated, but none was ever paid. About January 1982, when it became apparent that Tycon had not succeeded in generating a new clientele and had no realistic prospect of purchasing the tractor-trailers it was using, the Union Trust Company decided to foreclose on the liens it held on that equipment. As a result Tycon ceased doing business. This occurred about 6 months after Tycon had been reactivated which would place it in early 1982. Louis Williams, who did mechanical work for Contee Sand and later for Calan, testified that he was laid off by Calan in December 1981 and recalled in April 1982, at which time Tycon was no longer operating.

G *Analysis of the Relationship of Contee Sand to Calan and Tycon*

1. The legal principles

The General Counsel and the Union contend that Calan and Tycon are bound to the terms of the collective-bargaining agreement even as Contee Sand. The General Counsel cites legal precedents applicable to successors, single employers, and alter egos Calan and Tycon contend none of these principles saddles them with the burdens of the collective-bargaining agreement.

In determining whether an employer is a successor of another employer, the Board has used the following criteria: (1) whether there has been a substantial continuity of the same business operations; (2) whether the new employer uses the same facilities; (3) whether the new employer has the same or substantially the same work force; (4) whether the same jobs exist under the same working

[10] The management of Tycon was headed by Richard Ecroyd as president, as he was of Maryland Equipment, Contee Sand, and Calan His brother Kevin Ecroyd managed Maryland Equipment and also Tycon from the commencement of its operations until sometime in the autumn of 1981 when he was moved to the main office of Contee Sand in Laurel and was replaced in Beltsville by Dennis McGrath as manager of Maryland Equipment, of another firm called Solvents, and of Tycon McGrath had previously worked for Contee Sand at Laurel. From this and other evidence it is apparent that historically managers and supervisors have been moved about in the operations of Contee Sand and enterprises associated with it financially or through managerial relationships

conditions, (5) whether the alleged successor employs the same supervisors; (6) whether the same machinery, equipment, and processes are used; and (7) whether the same product or services are offered *J-P Mfg.*, 194 NLRB 965, 968 (1972), *Miami Industrial Trucks*, 221 NLRB 1223, 1224 (1975). The Board does not require that all of these factors be present to find successorship, but only enough to warrant a finding that no basic change has occurred in the employing industry. *Lincoln Private Police*, 189 NLRB 717, 720 (1971) Nor does the Board require that the entire business of the predecessor be taken over by the successor, it being sufficient if a part of the old operation survives in the successor *Miami Industrial Trucks*, supra; *Avenue Meat Center*, 184 NLRB 826 (1970). The Board finds more than one enterprise to be a single employer where there is common ownership and financial control which is actual rather than potential, common management, interrelation of operations, and centralized control of labor relations. *Electrical Workers IBEW Local 1264 v. Broadcast Service of Mobile*, 380 U S. 255 (1965); *Don Burgess Construction Corp.*, 227 NLRB 765 (1977); *Western Union Corp.*, 224 NLRB 274 (1976). But it is not essential that all of these elements be present *Malcolm Boring Co.*, 259 NLRB 597, 601 (1981). As to whether an enterprise is the alter ego of another, the Board looks to a greater number of factors such as whether the enterprises have substantially identical ownership, management, business purpose, operation, equipment, customers, and supervision of employees. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Again not all of these factors need be satisfied for a finding of alter ego In *H. S. Brooks Electric*, 233 NLRB 889 (1977), and also in *American Pacific Concrete Pipe Co.*, 262 NLRB 1223 (1982), enterprises were found to be alter egos in the absence of common ownership. There is also an additional factor which the Fifth Circuit describes in *Carpenters Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 508 (5th Cir. 1982), in the following words:

> However, the focus of the alter ego doctrine, unlike that of the single-employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective-bargaining agreement through a sham transaction or technical change in operations E g., *Amalgamated Meat Cutters v. NLRB*, 663 F.2d 223. 227 (D.C. Cir. 1980).

2 Before and after

As the predecessor enterprise here, Contee Sand included both the ready-mix operations and tractor-trailer operations as well as others. It is a wholly owned corporate subsidiary of Contee Resources, Inc , which in turn is a subsidiary of Capitol Resources and Properties, Inc., the principal stockholders of which included Hugh Levey, Roger Malkin, and apparently Charles Hall and two law firms. Although the size of the stockholders' investment is not apparent in this record, it is clear that their equity afforded them too little effective control to guide the destinies of the enterprise. The real financial power rested with those who provided the debt capital, the insurance group on the one hand and the Union Trust Company on the other These creditors do not appear to have intervened in the management of the Company until the increasingly precarious financial condition of Contee Sand required that they take action to protect their interests The insurance companies foreclosed on the real estate, the source of the sand and gravel so important to the operation, and the realty ultimately passed into the hands of the Kingdon Gould group. In the meantime, Contee Sand's rights to the sand and gravel continued only on an impermanent lease arrangement which ultimately was not renewed and the Company was evicted For its part the Union Trust Company, which at first did not interfere in the management of the Company, increasingly involved itself until in the latter stages it was monitoring on a daily basis the company checks written to carry on ordinary business. From the time he became president of Contee Sand in 1977 until he was discharged by Kingdon Gould in June or July 1982, Richard Ecroyd exercised day-to-day managerial authority and in turn reported to the stockholders, particularly Hugh Levey and to some extent to Roger Malkin. How frequently this reporting occurred is not clear but the sense of the evidence as a whole is that such reports were frequent In his relations with the equity holders I find that Richard Ecroyd enjoyed considerable latitude, he being the man at the scene and the stockholders being absentee owners. But his ability on their behalf to control the enterprise progressively diminished. In the period immediately preceding the creation of Calan and the activation of Tycon in the summer of 1981, the fate of Contee Sand lay in the hands of its large creditors, one group having the power to cut off the source of sand and gravel and the other controlling the flow of working capital and the use of rolling stock and equipment Both were looking to liquidate their positions. In this context, the managers of Contee Sand as well as the stockholders had little real control of the fate of the enterprise because they lacked control of the essential capital and finances on even a relatively short-term basis. Management did maintain immediate control of the products and services supplied customers, the day-to-day use of equipment, the work of employees, and the labor relations, but even this authority was subject to the daily financial monitoring of the bank

With the startup of Calan, it too was dependent on the source of sand and gravel and the use of processing facilities in the same way as Contee Sand Similarly, both Calan and Tycon enjoyed, at the pleasure of the bank, use of the rolling stock titled to Contee Sand But neither Calan nor Tycon was generally obligated on the debts which Contee Sand owed, and to some extent each presented a new financial picture. The equity capital in Calan was supplied by Richard Ecroyd and Hugh Levey, although Ecroyd apparently had not had a significant ownership in Contee Sand Thus, some change occurred in ownership and financial control from Contee Sand to Calan. In other respects, and except for the change of the office to Kensington, Calan was remarkably similar to the ready-mix division of Contee Sand which preceded it. Richard Ecroyd, the president of Contee Sand, also became president of Calan The imme-

diate management of day-to-day operations became the responsibility of Payne who previously directed operations of Contee Sand. The aggregate for concrete was obtained from the same source and processed in the same facilities. The same rolling stock was used. The same customers were served in that Calan took over performance of Contee Sand contracts, although it also endeavored to obtain new business. Calan used the same employees as Contee Sand, working in the same locations, performing the same work. Under Contee Sand, labor relations were controlled directly by Payne and, above him, by Richard Ecroyd The same was true with Calan. Finally, no hiatus interrupted the continuity of operations as they moved from Contee Sand to Calan.

With Tycon, the situation was similar It was a subsidiary of Capitol Resources and Properties, Inc., as was Contee Sand, Richard Ecroyd was also Tycon's president, Hugh Levey was the director to whom Richard Ecroyd reported, and his brother Kevin Ecroyd was general manager and dispatcher. Kevin Ecroyd also was manager of Maryland Equipment Company which engaged in the business of leasing trucks and was a lessor of ready-mix trucks to Calan Richard Ecroyd was president and in fact controlled Maryland Equipment Company. When Tycon was activated, its office was set up on the premises of Maryland Equipment Company in Beltsville It is apparent that very little change in managerial control occurred with the assumption by Tycon of tractor-trailer operations And there appears to have been no change whatsoever in ownership inasmuch as previously Tycon was a dormant subsidiary of the parent corporation, Capitol Resources and Properties, Inc , of which Contee Sand was also a subsidiary, and after its activation Tycon continued to be such a subsidiary. Thus, the tractor-trailer operations were simply shifted from one subsidiary to another In other respects Tycon continued with tractor-trailer operations in a manner unchanged from operations under Contee Sand and with no hiatus between the Contee Sand phase and the Tycon phase The same employees were used, the same equipment was used, the same services were supplied to Contee Sand, the only customer, and this service filled the same need for Contee Sand as before so that a total interrelation of operations continued I find that labor relations continued to be controlled by Richard Ecroyd as president of both companies Although Kevin Ecroyd was the day-to-day manager of Tycon and the person to whom Business Representative Steger took the grievances of tractor-trailer drivers, Kevin made it clear he was taking orders from his brother. Moreover, he was managing Tycon as an extra duty added to his existing responsibilities for managing Maryland Equipment Company. Although Tycon was set up in Beltsville rather than in Laurel where Contee Sand was located, the work performed by the employees, being entirely for Contee Sand, was for the most part performed in the same locations as previously Thus, the change of the location of the headquarters from Laurel to Beltsville appears less significant than if the work place of the employees also had changed

A signficant aspect of the context in which these spinoffs occurred stems directly from the heavy debt burden of Contee Sand. Continued access to the aggregate mined in Laurel, as well as to the equipment for processing it, was in doubt and at a later point, Kingdon Gould cut off that access entirely. In order to limit its participation, the bank already had forced cessation of the asphalt division of Contee Sand thereby eliminating the need for some tractor-trailer services.[11] The bank was exploring ways of further liquidating the loans secured by the equipment and rolling stock With the cooperation of Richard Ecroyd and Hugh Levey, Calan, and Tycon were set up to carry on these businesses in entities not primarily obligated for the debts of Contee Sand. To facilitate this reorganization the bank allowed them free use of the equipment and rolling stock. The purpose of the reorganizers appears to have been to set up viable enterprises to use and ultimately take over, lease, or purchase that pledged property. Richard Ecroyd testified, and I find, that his own purpose was to create a replacement job, and income, for himself since Contee Sand was being phased out It was apparent that if Calan succeeded as a business, he and Levey probably would prosper because of their investment. Similarly, if Tycon succeeded, the investors in Capitol Resources and Properties, Inc., probably would benefit. What these reorganizations did was to remove the ready-mix and the tractor-trailer operations from Contee Sand into other business forms which had a better chance of surviving by having escaped the debt burden. The $80,000 owed the union funds was part of that debt burden.

The General Counsel characterizes the transfer of the two operations to Calan and Tycon as sham transactions designed to evade legal responsibility under the union agreement. Respondents contend they were arm's-length transactions with no carryover of responsibility for the collective-bargaining agreement. Neither characterization hits the mark These were certainly not arm's-length transactions They were parts of a program of internal reorganization engineered by the interested parties, the most interested and influential of which was the bank. It approved and subsidized the transfer of operations to corporate entities which, although they were not obligated on the notes owed the bank, had some prospects of becoming vehicles for liquidating those debts Thus, these arrangements contemplated that Calan and Tycon would not be bound on those debts in the same way as Contee Sand. If, by analogy, the $80,000 owed the union funds were treated as an ordinary business debt, Calan and Tycon would not be obligors on those debts either. The position taken by Payne, Grodnitsky, and Boardman, as well as the testimony of Richard Ecroyd as a whole, all indicate that the officials of Calan and Tycon were attempting to avoid responsibility for Contee Sand debts, including the debts owed the union funds. There were indications, of course, of a willingness to be obligated to the funds on some lesser basis such as a guarantor. For its part, the Union held firm on the principle that Calan and Tycon owed the debts even as Contee Sand. In sum, the reorganizations resulting in Calan and

[11] The exact date of the termination of the asphalt operation is not apparent in the record

Tycon were in the main attempts to avoid preexisting debts including those owed the union funds. No effort was made to hide what was happening or to engage in a sham transaction even though the reorganization was engineered by insiders. But it is clear that debts owed the union funds intentionally were not assumed, so that one purpose of the reorganizations was to avoid full obligation for collective-bargaining debts, as well as other debts, through the technical changes in operations described above See the language of the Fifth Circuit in *Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, supra, 690 F.2d at 508. Considering this aspect, as well as others noted above in which Calan and Tycon closely resemble their predecessor operations in Contee Sand, it must be concluded that, for labor relations purposes, each is not only the successor but a single employer with, and the alter ego of, that operation of Contee Sand to which it succeeded

Calan and Tycon are successors because substantial continuity of operations carried across to the new corporations. *Lathers Local 104 v. McGlynn Plastering*, 91 LRRM 3000 (W.D. Wash 1976). Where, as here, each made clear in advance the intention to keep all the employees in the respective operation, each at least was obligated to not unilaterally alter terms and conditions of employment. *NLRB v. Backrodt Chevrolet Co.*, 468 F.2d 963 (7th Cir. 1972), and see *NLRB v. Burns Security Service*, 406 U.S. 272 (1972), where the Supreme Court suggested that a successor employer that clearly intends to retain the predecessor's employees may not be free to unilaterally set terms and conditions of employment In circumstances where continuity results in almost all aspects of the operation, as is the case with Calan and Tycon, terms of the predecessor's collective-bargaining agreement bind a successor See *Lathers Local 104 v. McGlynn Plastering*, supra.

Beyond these considerations, the circumstances immediately after the transfer without hiatus of the two operations, while Contee Sand was still in business, Richard Ecroyd was chief executive of all three companies, and the Union Trust Company a dominant financial influence in all three, demonstrate the "presence of a very substantial qualitative degree of centralized control of labor relations," and "a substantial qualitative degree of interrelation of operations and common management—one that . . . would not be found in the arm's length relationship existing among unintegrated companies" *Operating Engineers v. NLRB*, 518 F.2d 1040, 1046, 1047 (D C Cir. 1975). See also *NLRB v Campbell-Harris Electric*, 719 F.2d 292 (8th Cir. 1983). Not only were these not arm's-length transactions, but the principal purpose of the new arrangements was to free these successors from the burdens of preexisting debts, including collective-bargaining debts. Consequently, the successors, Calan and Tycon, are legally alter egos of Contee Sand for labor relations purposes and bound by its collective-bargaining agreement *Bell Co.*, 225 NLRB 474, 481 (1976). The circumstances here are similar to those in *Pension Fund v. Insul-Contractors*, 115 LRRM 2442, 2445 (E.D La. 1983), where the district court applied the alter ego doctrine to bind a successor to the predecessor's collective-bargaining agreement. I find Calan and Tycon are similarly obligated and their failures to fulfill those obligations are unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. *Big Bear Supermarkets No. 3*, 239 NLRB 179 (1978). Because the collective-bargaining agreement applies to Calan and Tycon as well as Contee Sand, their failures to make periodic payments to the union health and welfare and pension funds were further rejections of duties owed. While Calan appears to have followed the union contract in other respects, Tycon refused to do so more generally, and specifically refused to honor the contractual terms respecting job rotation, overtime pay, holiday pay and vacation pay. In addition, neither Calan nor Tycon checked off and remitted union dues as provided in the contract.

H. *Dump Truck Subcontracting to Maryland Equipment, Inc.*

In connection with its mining and processing of sand and gravel, Contee Sand employed four or five dump truck drivers to haul sand and gravel from the pits to the processing facilities. At times when that number of trucks was insufficient, it subcontracted part of that work to others Since 1978 Maryland Equipment, Inc has provided some of the trucks and drivers for this extra work. The understanding with the Union has been that such subcontracting would occur only if the available Contee Sand drivers were fully employed. On at least two occasions the Union had filed grievances claiming Contee Sand had subcontracted such work although its own drivers were available. Both grievances were amicably settled.

In December 1981, Contee Sand laid off all its dump truck drivers. A member of management told one of the mechanics at that time that the Company was ceasing dump truck operations. Richard Ecroyd credibly testified, and I find, that the drivers were laid off because cold weather made it impossible to process sand and gravel and there was no need at that time for their services. Until then Contee Sand had been mining sand and gravel pursuant to extensions of the leasing arrangement referred to above. But that lease arrangement abruptly ended in the first week of January 1982, when Kingdon Gould, who controlled the essential real estate, evicted Contee Sand from the property Contee Sand had no control over this event which effectively terminated its sand and gravel operations. It did not thereafter resume them.[12] I base these findings on the credited testimony of Richard Ecroyd. To the extent that the testimony of Louis Williams indicates Contee Sand engaged in sand and gravel operations in April 1982 using Maryland Equipment dump truck drivers instead of its own, I do not credit him It is not established that it was Contee Sand that was operating at that time or that Williams was in a position to know. Other credible evidence indicates Kingdon Gould set up another sand and gravel operation in the same facility under the name of Laurel Sand and Gravel Company Considering all of the above, I find there is insufficient evidence to establish that in

[12] There is no contention here that Contee Sand unlawfully failed to bargain with the Union regarding partial termination of its business

December 1981 and January 1982, or thereafter, Contee Sand subcontracted dump truck work in lieu of employing its own laid-off dump truck drivers So far as Calan and Tycon are concerned, the evidence shows that neither succeeded to any of the sand and gravel operations, so that even as alter egos of Contee Sand, their alter ego status applies only to the operations transferred, not to operations not transferred. Based on the foregoing I find that the allegations of violations of Section 8(a)(5) and (1) because of the layoff of dump truck drivers in December 1981 and the failure to recall them thereafter should be dismissed

I. *The Failure to Furnish Information*

In letters to Respondents' attorneys on June 23, July 9, and September 3, 1981, the Union requested it be furnished the following information respecting Contee Sand, Calan, and Tycon:

> Corporate charters and bylaws;
> Corporate records and minutes showing stock ownership and officers and directors;
> Financial records reflecting accounts payable and accounts receivable;
> Written agreements between them;
> Registrations of motor vehicles,
> Quarterly federal tax returns showing income taxes withheld from wages and FICA taxes withheld.

I find the information requested was relevant to the Union's performance of its function as representative of the employees. I base this on the evidence that in June 1980 trustees of the union health and welfare fund and of the pension fund notified Contee Sand it would no longer extend coverage to its employees because of its delinquency in contributions to those funds Contee Sand continued its delinquency and on November 18, 1980, Local 639 filed a grievance respecting its failures to make the contributions The Union's September 3, 1981 request for information, which incorporated earlier requests of June 23 and July 9, 1981, came after Calan and Tycon commenced operations under circumstances indicating they were successors to parts of the Contee operation and, arguably, alter egos of, and a single employer with, Contee Sand. The requested information was relevant to those issues.

Although Respondents deny the allegation of relevance to the Union's representative function, no defense has been made on that basis. The defense which is made is that the requested information was later sought by subpoenas in the present matter which were honored by making the information available at the hearing herein. The hearing commenced August 24, 1982, then recessed and resumed again October 25, and 26, 1982, then recessed again to December 14, 1982, at which time the subpoenaed documentation was finally brought to the hearing and for the first time made available to union counsel. Before the December 14 hearing date the information had been available to the General Counsel, but that did not meet the needs of the Union in its labor relations functions prior to December 14, 1982 *Electric Furnace Co.*, 137 NLRB 1077, 1081 (1962); *Utica Observer*, 111 NLRB 58, 63 (1955). Calan and Tycon also argue there is no further use for the documents for bargaining purposes because both Calan and Tycon are now out of business and it would be fruitless to order them to post a notice respecting their failure to furnish information. This, of course, goes to remedy and is no defense on the question of whether or not an unfair labor practice occurred.

It is clear from the above that Contee Sand, Calan, and Tycon all failed to furnish the Union in a timely manner with requested information relevant to its function as the representative of the employees of Contee Sand, Calan, and Tycon. The Union was entitled to this information not only during bargaining, but also at other times and in particular with respect to pending grievances (see *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967)) and with respect to questions regarding the alter ego status of Calan and Tycon (see *Leonard B. Hebert, Jr. & Co*, 259 NLRB 881 (1981)). Accordingly, I find that in failing promptly to provide the information Respondents committed unfair labor practices prohibited by Section 8(a)(5) and (1) of the Act.

J *The Refusal to Sign an Agreement*

The complaint alleges, and Respondents deny, that on October 27, 1981, the Union and Respondents reached full and complete agreement on collective-bargaining agreements between them which the Union at that time requested Respondents to execute but which Respondents on December 17, 1981, refused to do. Although Respondents deny such agreements were reached, there is no dispute that the Union requested them to execute agreements nor, apparently, that Respondents refused to do so. It is clear they have not in fact executed such agreements. Respondents' defense is that there is no admissible evidence to support the allegation that they agreed and, therefore, they should be dismissed.

In his opening statement the General Counsel proposed to show that during the autumn of 1981 Attorneys Grodnitsky and Boardman on behalf of Contee Sand, Tycon, and Calan negotiated with union officials with the result that they agreed on a release and settlement agreement encompassing three separate collective-bargaining agreements, one for each of the three companies and that subsequently the companies refused to execute the agreements. During the presentation of evidence the General Counsel offered to prove that attorneys for the Union and for Respondents conferred on a number of occasions subsequent to September 3, 1981, for the purpose of resolving disputes between their clients over moneys owed the union funds and matters of civil litigation based on those claims including a pending arbitration proceeding, two of the instant Board proceedings, and a civil suit in Federal district court; that a verbal understanding was reached resolving these issues, a part of the understanding being that Calan and Tycon and Local 639 would enter into collective-bargaining agreements; that the union attorney thereafter prepared a document entitled Release and Settlement Agreement to which was

appended a form of collective-bargaining agreements for each company, that following delivery of this packet to Respondents' attorneys, they reneged on the understanding and Respondents have never executed the Release and Settlement Agreement or the appended collective-bargaining agreements This evidence was ruled inadmissible under Rule 408 of the Federal Rules of Evidence as evidence of conduct or statements made in compromise negotiations. In his posthearing brief the General Counsel renews his request that the excluded evidence be received Having reconsidered the matter, I adhere to the ruling made at the hearing that the evidence is inadmissible under Rule 408 of the Federal Rules of Evidence. *Building & Construction Trades Council,* 222 NLRB 1276 fn. 1 (1976), affd sub nom. *Altemose Construction Co. v. NLRB,* 93 LRRM 3085 (3d Cir. 1976). There being no admissible evidence to support the allegation that the Union and Respondents reached agreement on the terms of collective-bargaining agreements which Respondents have refused to execute, those allegations of the complaint should be dismissed. See *NLRB v. H. J. Heinz,* 311 U.S. 514 (1941)

Conclusions of Law

1 Respondents Contee Sand, Calan, and Tycon are

(a) Employers as defined in Section 2(2) of the Act.

(b) A single employer for labor relations purposes.

(c) Alter egos of each other for labor relations purposes

(d) Engaged in commerce and operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

> All ready-mix truck drivers, ready-mix mechanics, ready-mix mechanics' helpers and partsmen, yard helpers, dump truck drivers, tractor-trailer truck drivers, dump truck and tractor-trailer mechanics, and mechanics' helpers employed by Respondents Contee Sand and Gravel Company, Inc., Calan Concrete Corp., and Tycon, Inc., excluding dispatchers, supervisory and managerial personnel, owner-operators, employees of owner-operators, independent contractors and employees of independent contractors

3. Local 639 is a labor organization as defined in Section 2(5) of the Act.

4. Local 639 is the exclusive representative, as defined in Section 9(a) of the Act, of employees in the above-described bargaining unit.

5. Respondents engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) and 8(d) of the Act by

(a) Failing to abide by the collective-bargaining agreement between Contee Sand and Local 639.

(b) Altering the terms and conditions of employment of employees in the above-described bargaining unit unilaterally and without consulting Local 639.

(c) Failing promptly to furnish Local 639 with information it requested which was relevant to its representation of employees in the above-described bargaining unit.

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

The Remedy

Having found that Respondents engaged in unfair labor practices, I recommend they be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act. The recommended order will require that they bargain collectively in good faith with Local 639 as the exclusive collective-bargaining representative of the employees in the unit found appropriate herein, that they apply the terms and conditions of the collective-bargaining agreement between Local 639 and Contee Sand, and that they furnish Local 639 with information relevant to its collective-bargaining function The order will require that Respondents, jointly and severally, make whole the employees for any loss of benefits they may have suffered by reason of the unfair labor practices found herein, including holiday, vacation, and overtime pay for Tycon employees, and make contributions on behalf of all employees in the bargaining unit to the appropriate health and welfare fund and pension fund as required under the terms of the collective-bargaining agreement referred to above. See *Bros. Concrete Cutting of Eugene,* 266 NLRB No 21 (1983) (not reported in Board volumes); *G. T Knight Co.,* 262 NLRB 328 (1982); *Haberman Construction Co.,* 236 NLRB 79 (1978); *Vin James Plastering Co.,* 226 NLRB 125 (1976). The make-whole remedy shall include reimbursing employees for contributions they themselves may have made for the maintenance of their coverage for such benefits after Respondents unlawfully failed to contribute, for any premiums they may have paid to third-party insurance companies for coverage heretofore provided by the union funds, and for any medical bills they have paid to health care providers that the funds would have covered These amounts and any amounts due for loss of wages, overtime pay, holiday pay, and vacation pay, and any other amounts which are easily determined, will be paid with interest thereon computed at the adjusted prime rate used by the Internal Revenue Service for the computation of tax payments *Olympic Medical Corp.,* 250 NLRB 146 (1980); *Florida Steel Corp* , 231 NLRB 651 (1977); *Isis Plumbing Co.,* 138 NLRB 716 (1962). Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments The Board leaves to the compliance stage the question of whether Respondents must pay any additional amounts into the benefit funds in order to satisfy the "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding

action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc, but not collateral losses See *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

I also recommend that Respondents be required to post the usual notice respecting employee rights and provide the Union with a copy thereof for posting if it desires. Even though Contee Sand, Calan, and Tycon are now out of business, a cease-and-desist order and affirmative remedies including a notice are appropriate because Respondent Corporations, as corporate shells, may again, like Tycon, be reactivated. The issuance of a Board order may also have significance for other formal proceedings, including bankruptcy proceedings, and for the employees affected by the unfair labor practices.

[Recommended Order omitted from publication.]