Continental Winding Company and Kelly Services, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and Local Union 189. Cases 7–CA–22770 and 7–CA–23067

Septemeber 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On December 5, 1984, Administrative Law Judge Norman Zankel issued the attached decision. Respondents Continental Winding Company and Kelly Services, Inc. each filed exceptions and supporting briefs. The General Counsel filed cross-exceptions and an answering brief. Respondent Continental Winding Company filed an answering brief to the General Counsel's cross-exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

I. THE JUDGE'S FINDINGS OF FACT AND LAW

In February 1983, the Union began an organizing campaign at Respondent Continental's facility and filed a representation petition on February 28. An election was held on April 6, 1983, and the tally revealed that the Union had won in a unit of 29 full-time and regular part-time laborers[2] Continental filed objections. Within 2 weeks following the election, approximately 10–12 employees resigned. Over the next several months approximately six additional employees also resigned. Rather than hiring new full-time unit employees or calling in temporary employees from a list which Continental had maintained since 1974, Continental contacted Respondent Kelly, a temporary personnel service, as a possible source of replacements[3] On April 27, 1983, Kelly began supplying employees to perform unit work for Continental. On August 26, 1983, the Board certified the Union as the exclusive bargaining representative of ''all full-time and regular part-time laborers'' employed by Continental.

The Union contacted Continental in early October 1983 to initiate collective bargaining. Soon after, Union Representative Lewis Warren learned that Kelly employees were working in unit jobs at Continental. There is no evidence that Continental ever gave the Union prior notification of this personnel policy decision. During a subsequent conversation between Warren and Albert Keatts, Continental's president, both sides recognized that issues surrounding Continental's use of Kelly employees would be part of negotiations for an initial collective-bargaining agreement. Keatts designated Benjamin Morris as Continental's bargaining representative and six formal bargaining sessions were held between November 2, 1983, and January 25, 1984.

Beginning with the first session, the Union informed Continental that it wished the negotiations to encompass the terms and conditions of employment of the Kelly employees performing unit work. It requested on November 2, and again in a letter to Keatts on November 7, the names, wage rates, seniority dates, and job classifications of all employees provided to Continental by Kelly. Keatts consistently maintained that the Kelly employees were outside the bargaining unit. He refused to bargain about them or to provide the information requested about them. Also during discussions of the Union's overall wage and benefit demands, the Union characterized Morris' presentation of Continental's financial condition as a plea of an inability to meet those demands. Accordingly, the Union requested access to Continental's financial records in order to verify that position. Continental refused to provide the information on the Kelly employees as of January 25, 1984, or access to its financial records at any time.

The judge has found that: (1) Respondents Continental and Kelly were joint employers of Kelly employees; (2) Kelly employees were regular part-time employees who belonged in the certified bargaining unit; (3) the Respondents violated Section 8(a)(5) by refusing to bargain about these employees or to provide presumptively relevant information requested by the Union about them; and (4) the Respondents also violated Section 8(a)(3) because their refusal to bargain was motivated by a desire to erode the Union's bargaining position. Having made the foregoing findings,

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

We correct the judge's inadvertent error in the second paragraph of his decision where he referred to the date of filing of the original charge as December 6, 1983. That was the date the amended charge was filed. The original charge was filed on October 31, 1983.

[2] Continental is in the business of cleaning and rewinding parts for the automobile after-market. The general laborer's job includes loading and unloading trucks, shaking copper from parts that have been burned out, and loading and unloading an oven.

[3] The judge found that under the Continental-Kelly agreement, Kelly interviewed, evaluated, and hired these employees, paid them after making the requisite deductions, and provided insurance coverage for them, including workers' compensation and liability insurance.

the judge found it unnecessary to address the General Counsel's alternative theory of violation, that Continental subcontracted unit work to nonunion, nonunit Kelly employees in retaliation for Continental employees' union activities and without providing the Union notice and an opportunity to bargain over the decision to subcontract. With respect to the Union's request for financial information, the judge found that the Respondent had claimed inability to meet the Union's wage demands and had therefore violated Section 8(a)(5) by refusing to permit verification of this claim.

Although we agree with the judge's joint employer finding,[4] for the reasons set forth in section II,A, of this decision, we find that the General Counsel has failed to prove that Kelly employees were regular part-time unit employees at Continental. We therefore do not affirm the judge's finding that Continental unlawfully refused to bargain with respect to the Kelly employees. Further, because Continental correctly relied on its legal privilege to refuse to bargain as to these employees, we do not find that this refusal was motivated by unlawful considerations under Section 8(a)(3). As set forth in section II,B, of this decision, however, we find merit in the General Counsel's alternative ''subcontracting'' theory of 8(a)(3) and (5) violations by Respondent Continental. Furthermore, as set forth in section II,C,1, of this decision, we find that Respondent Continental violated Section 8(a)(5) by refusing to provide requested information about Kelly employees because the General Counsel has established the relevance of this nonunit information to the parties' negotiations. Finally, for the reasons set forth in section II,C,2, of this decision, we agree with the judge that Continental also unlawfully refused the Union's request for verification of bargaining claims about Continental's financial condition.

II. ANALYSIS

A. *The 8(a)(3) and (5) Allegations Under the ''Joint Employer of Unit Employees'' Theory*

Pursuant to their agreement with Continental, Kelly provided employees to supplement Continental's permanent work force from approximately April 27, 1983, until the end of March 1984. During that 11-month period beginning with the first postelection resignations, Continental utilized between 2 and 17 Kelly employees per day.

Keatts, in an effort to demonstrate that the Kelly-supplied employees were casual nonunit employees, testified about the number of different Kelly employees who worked for Continental and their average tenure. The judge, who generally discredited Keatts on a variety of issues, specifically discredited his testimony on the unit placement issue because it was contradicted by the ''only relevant documentary evidence available.'' This latter evidence consisted of two documents, described below, which Continental provided to the Union.

At the sixth negotiating session on January 25, 1984, in a partial response to the Union's request for certain specific information, including the identification of Kelly employees, Continental provided the Union with an undated document, General Counsel's Exhibit 11, listing 22 names and entitled ''All employees presently working at Continental Winding Co.'' The document did not, however, include any of the requested information on wage rates, seniority dates, and job classifications, nor did it indicate which of the listed employees had been supplied by Kelly.

The hearing in this proceeding opened on April 6, 1984, approximately 1 week after the last Kelly employee worked at Continental pursuant to the Continental-Kelly manpower contract. The parties informed the judge of their agreement to resume their collective-bargaining efforts with a session to be held on April 13. Continental agreed on April 6 to deliver in person at that session a ''list of all individuals who are currently performing general laborer's work . . . . [and containing] the necessary information which will be in partial fulfillment of [Continental's] obligation to provide information to the Union.'' The hearing was adjourned to await a possible resolution on April 13 of ''all pending collective bargaining and unfair labor practice issues.''

The list provided on April 13 (G.C. Exh. 13), undated and with the same title as the list provided on January 25, contained the same names as those found on the earlier list. However, General Counsel's Exhibit 13 also included each named employee's status (part-time, full-time, or ''temporary help''), pay rate, job classification, and, for the four part-time and full-time employees, his or her seniority date.

The judge found that the 18 employees on the April 13 list designated as ''temporary help'' had been supplied by Kelly. Because the two lists given to the Union contained identical names and no effort was made to demonstrate that any of those employees has any ''broken service'' over the approximately 2-1/2 month period, he inferred that the Kelly employees' employment tenure with Continental had been continuous for a substantial period of time. Having discred-

[4] The judge correctly found that Continental and Kelly ''share or co-determine'' essential employment conditions of the affected employees. Although Kelly alone hires the employees supplied to Continental and sets and pays their wages, the record supports the judge's finding that Continental exercises sole authority to assign, schedule, and supervise the Kelly employees who work alongside its own employees, under the same workplace conditions, in the performance of unit work. Contrary to the contentions of Continental, the day-to-day supervision by Continental's supervisors over the Kelly employees, essentially identical to that exercised over Continental employees, is more than ''routine'' and is not ''insignificant.'' Cf. *TLI, Inc*., 271 NLRB 798 (1984).

ited Keatts' testimony suggesting otherwise, the judge relied solely on General Counsel's Exhibits 11 and 13 in concluding that the Kelly employees were regular part-time employees and thus included within the certified unit.

The record, however, does not support the judge's reading of the two documents. Union Representative Warren testified that he had understood on April 13 that the list given him that day indicated that the Kelly employees about whom he had been seeking information were classified by Continental as ''temporary help.'' Warren also testified, however, that the April 13 list contained the names of all employees working at Continental as of that date. By then, however, Warren had already been informed by Kelly, pursuant to an agreement reached at the April 6 hearing, that March 30 had been the last day that any Kelly employees had worked at Continental.

Warren, of course, took no part in the preparation of the documents at issue and therefore had no personal knowledge of their true import. The ambiguity revealed by his testimony is a problem not resolvable on the face of the documents themselves, neither of which specified the date for which the ''currently working'' designation applied. The April 13 list, contrary to Continental's promise of a then-current, i.e., post-Kelly, employee roster might be, as now claimed by Continental, merely an amended version of the January 25 list, which had included the names of Kelly employees. The second list would therefore not provide any information about the tenure at Continental of Kelly employees. On the other hand, the April 13 list might in fact be the promised roster of employees working at Continental at a time at least 1 week after the termination of the Continental-Kelly manpower contract. Thus, as claimed by Kelly, no employee whose name appears on the April 13 list could have been a Kelly employee.[5]

The test for determining whether the Kelly employees were employed as regular part-time employees, as alleged by the General Counsel, and thus included in the certified unit, or as casual employees and thus excluded, takes into account factors such as regularity and continuity of employment and similarity of work duties. In *Pat's Blue Ribbons*, 286 NLRB 918 (1987), the Board stated ''[The] individual's relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit.''

Here, although the General Counsel has demonstrated that the Kelly employees worked in unit jobs, he has not met the additional burden of showing that any Kelly employees worked continually and regularly for Continental with expectations of continued employment. Because the General Counsel has not provided an evidentiary basis to choose between equally plausible, but contradictory employment scenarios, only one of which supports her position, the latter prong of the test is not met by General Counsel's Exhibits 11 and 13.

Because we cannot rely on these two documents and in the absence of any other credible evidence relevant to the issue, the General Counsel has not shown that the Kelly employees were within the unit[6] We shall therefore dismiss the 8(a)(3) and (5) allegations that Continental and Kelly, as joint employers of unit employees, refused to bargain over their employees' terms and conditions of employment[7] and did so with a discriminatory intent to erode the bargaining unit.

B. *The 8(a)(3) and (5) Allegations Under the Subcontracting Theory*

As the judge found, from 1974 until some time before the Union's organizing campaign in February 1983, Continental augmented its permanent work force, when necessary, by using employees from an on-call roster. The judge also found that, with respect to the pre-1983 work history of these employees, the ''bulk of [them] had been hired without an established termination date, and worked for substantial periods of time and for such average hours per week as to be properly considered regular part-time employees.''[8]

Between the April 6, 1983 election and the certification of the Union as the collective-bargaining representative on August 26, 1983, Continental, without hiring any permanent replacements for the employees who resigned after the election, began augmenting its work force with employees furnished by Kelly rather than with employees hired directly from its on-call roster. The Union was neither notified in advance of this

[5] With respect to the classification of ''temporary help,'' the record indicates that during the April 1983–March 1984 period Continental used the services of other manpower suppliers in addition to Kelly.

[6] Assuming, arguendo, that the two lists do contain the names of certain Kelly employees working at Continental both on January 25 and on April 13, 1984, such evidence still falls short of establishing regular part-time status. First, neither list shows the number of hours worked by any employee. Second, we would have to infer from the apparent fact that these 18 employees worked on 2 different days separated by approximately 11 weeks that they must have worked enough hours on enough days during that interval to establish regular part-time status. As a purely evidentiary matter, this is too much to ask of the two documents.

Because we rely on the absence of evidence sustaining the General Counsel's burdens, our conclusion does not entail reliance on discredited testimony, i.e., the testimony of Keatts.

[7] We find it unnecessary to decide whether, if the disputed employees had been shown to be in the unit, Joint Employer Kelly would have a bargaining obligation under Sec. 8(a)(5) of the Act. We further find it unnecessary to pass on the employment status of any employees supplied to Continental by any employer other than Kelly.

[8] We adopt this finding in the absence of exceptions.

subcontracting decision nor afforded an opportunity to negotiate the matter.

Although the Union's official certification was still pending at the time the subcontracting began, as a result of objections filed by Continental, Continental made its unilateral change in its method of securing additional employees under the risk that if the Union were to become certified, such a change would be in violation of Section 8(a)(5) of the Act. *Mike O'Connor Chevrolet-Buick-GMS Co*., 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

We agree with the judge's conclusion, for the reasons set forth fully in his decision,[9] that the Respondent's subcontracting of unit work to Kelly was for the discriminatory purpose of retaliating against its employees because of their union activities and thus violated Section 8(a)(3) of the Act. His analysis is consistent with *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). See also *Limestone Apparel Corp*., 255 NLRB 722 (1981).

We further find merit in the General Counsel's contention that Continental violated Section 8(a)(5) by failing to bargain over the decision to subcontract the unit work to Kelly. Where, as here, such a decision is motivated by antiunion reasons, the employer is not exempt from a bargaining obligation under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 687–688 (1981). Discrimination on the basis of union animus cannot serve as a lawful entrepreneurial decision. *Strawsine Mfg. Co*., 280 NLRB 553 (1986).

C. *The 8(a)(5) Allegations Concerning Information Requests*

1. We adopt the judge's 8(a)(5) findings of unlawfully denied wage information requests but only with respect to Respondent Continental. The Union at no relevant time asked Kelly for wage and seniority data on Kelly employees assigned to Continental. Furthermore, as we have found above, Kelly's relationship with Continental does not encompass any bargaining unit employees represented by the Union.

We shall also modify the judge's rationale for the wage information violation because, unlike the judge, we rely on the General Counsel's subcontracting theory. Although information about the terms and conditions of bargaining unit personnel is presumptively relevant, a union has the burden of proving the relevance of information concerning employees outside the bargaining unit. Here, the requests directed to Continental on November 2 and 7, 1983, were relevant to the Union's statutory duty because the wage and seniority data were necessary to the Union's efforts to ascertain whether the Kelly employees were or were not within the unit it represented. *Leland Stanford Junior University*, 288 NLRB 1129 (1988).

2. With respect to the Union's requests to examine Continental's financial books and records, we agree with the judge that Continental went beyond the expression of a mere unwillingness to pay wage increases. We note that the Union made a specific demand for a 20-cent-per-hour increase on November 2, 1983, and later, on January 25, 1984, revised its demand for an increase to 40 cents per hour. Continental, despite protestations to the contrary, effectively conveyed to the Union that it could not at that time afford any increased labor costs. Continental's claim of inability to pay a wage increase was clearly grounded in its then-current financial situation, and its statements during bargaining plainly conveyed its then-inability to pay position. Continental thus triggered an obligation to provide the requested financial information under *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956).

We therefore agree with the judge that, by refusing to allow verification of its asserted financial inability to meet specific wage demands, Continental violated its bargaining obligation under Section 8(a)(5) and (1) of the Act.

AMENDED CONCLUSIONS OF LAW

1. Continental and Kelly are each employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. In the circumstances of this case, Continental and Kelly are joint employers of the employees supplied to Continental by Kelly.

3. The Union (the International and the Local) is a labor organization within the meaning of Section 2(5) of the Act.

4. All full-time and regular part-time general laborers employed by Continental at its facility located at 15890 Common Road, Roseville, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act, constitute an appropriate unit for collective-bargaining purposes within the meaning of Section 9(b) of the Act.

5. Respondent Continental has violated Section 8(a)(3) by subcontracting bargaining unit work in retaliation for its employees' union activities and Section 8(a)(5) by unilaterally subcontracting such unit work beginning about April 27, 1983, without notifying or giving the Union an opportunity to bargain over its decision to do so.

6. Respondent Continental has violated Section 8(a)(5) of the Act by refusing to provide, in a timely fashion, requested information about the terms and conditions of employment of the employees supplied to it by Respondent Kelly and by refusing to provide the Union requested access to financial records necessary to verify Continental's claim of inability to pay bargaining demands for wages for unit employees.

[9] ALJD, sec. III,C,3(a).

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

AMENDED REMEDY

Having found that Respondent Continental has violated Section 8(a)(3) and (5) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Because Continental has discriminatorily subcontracted bargaining unit work and unlawfully refused to bargain with respect to its decision to have such unit work performed by nonunit personnel, we shall require Continental to restore the status quo ante as it existed prior to the unlawful subcontracting of unit work on April 27, 1983, reinstate in its plant the bargaining unit work previously performed by unit employees, and make whole those employees who suffered a loss of wages and benefits as a result of the unlawful subcontracting. *Westinghouse Broadcasting*, 285 NLRB 205, 218–219 (1987); *Griffin-Hope Co*., 275 NLRB 487, 503–504 (1985). Backpay is to be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[10]

We shall also order Continental to furnish to the Union, on request, all relevant information necessary for collective bargaining, including its financial records.[11]

ORDER

The National Labor Relations Board orders that the Respondent, Continental Winding Company, Roseville, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Subcontracting bargaining unit work in retaliation for its employees' union activities.

(b) Subcontracting work performed by employees in the following unit, without prior notice to International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and Local Union 189, and without having afforded it an opportunity to negotiate and bargain with respect to the decision to subcontract:

> All full-time and regular part-time general laborers employed by Continental Winding Company at its facility located at 15890 Common Road, Roseville, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act.

(c) Refusing to provide the Union, in a timely manner, with requested information concerning the terms and conditions of employment for employees supplied by Kelly and by refusing to provide the Union access to its financial records requested to verify Continental's claim of inability to afford the collective-bargaining proposals advanced by the Union.

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

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

(a) Resume its practice of assigning all bargaining unit work to unit employees, including, if necessary, employees carried on its pre-1983 on-call roster and make whole those employees who would have performed unit work but for the unlawful subcontracting, in conformity with the amended remedy section of this decision.

(b) Furnish the Union, on request and within a reasonable time, the financial information and records relevant to the terms and conditions of employment for employees supplied by Kelly and to Continental's claim, advanced from November 1983 through January 1984, that it was unable to pay a wage increase.

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

(d) Post at its facility in Roseville, Michigan, copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) 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 all allegations that Respondent Kelly Services, Inc. violated the Act be dismissed.

[10] The remedy applies to both the 8(a)(3) and 8(a)(5) violations although it is an appropriate remedy for each violation itself.

[11] We will modify the recommended Order and notice language to specify that the Union have access only to information relevant to their requests during the 1983–1984 negotiations. *St. Joseph's Hospital*, 269 NLRB 862 (1984).

[12] 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.''

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 subcontract unit work in retaliation against your union activities.

WE WILL NOT subcontract unit work performed by employees in the following unit, without prior notice to International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local Union 189, and without having afforded it an opportunity to negotiate and bargain with respect to the decision to subcontract. The unit is:

> All full-time and regular part-time general laborers employed by Continental Winding Company at its facility located at 15890 Common Road, Roseville, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to provide the Union, in a timely manner, with information, including access to our financial records, which is relevant and necessary for the Union to fulfill its collective-bargaining obligations.

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 resume our practice of assigning all bargaining unit work to unit employees and WE WILL make whole, with interest, those employees who suffered any loss of pay because of our decision to subcontract unit work in April 1983.

WE WILL furnish the Union, on request and within a reasonable time, the financial information and records relevant to the terms and conditions of employment for employees supplied by Kelly and to our claim, advanced in negotiations from November 1983 through January 1984, that we were unable to pay a wage increase.

CONTINENTAL WINDING COMPANY

Deborah A. Sxy, Esq., for the General Counsel.
John J. Mallon Esq. (Brian M. Smith & Associates P.C.), of Troy, Michigan, for the Continental Winding Company.
Cedric A. Richner Jr., Esq. and *Charles M. McLaughlin, Esq.*, of Troy, Michigan, and *John A. Entenman, Esq.*, and *Michael R. Lied, Esq.*, of Detroit, Michigan, for Kelly Services, Inc.
Lewis Warren, International Representative, of Warren, Michigan, for the Unions.

DECISION

NORMAN ZANKEL, Administrative Law Judge. The above cases were tried before me on April 9, June 11–13, and August 14–15, 1984, at Detroit, Michigan.

The Unions (the Union) filed the original charge in Case 7–CA–22770 on December 6, 1983,[1] and the original charge in Case 7–CA–23067 on January 27, 1984. The original complaint and notice of hearing was issued on December 30 against Continental Winding Company and against Kelly Services, Inc. (Continental, Kelly, or Respondent). On March 2, 1984, the cases were consolidated for hearing, and an amended complaint was issued. The consolidated complaint was further amended on March 22, 1984.

In its final form, the consolidated, amended complaint alleged, in substance, that Continental and Kelly, as joint employers, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by failing and refusing to bargain with the Union concerning the wages, hours, working conditions, and other terms and conditions of employment of full-time and regular part-time general laborers at Continental's facility at 15890 Common Road, Roseville, Michigan, the unit for which the International Union was certified to represent by the National Labor Relations Board (the Board).[2]

Specifically, it was alleged that Continental unilaterally hired certain of Kelly's employees to perform bargaining unit work without consultation with the Union, or affording the Union an opportunity to bargain; that Continental and Kelly refused to furnish the Unions with information necessary and relevant to the performance of the Union's bargaining obligations; and failed and refused to bargain on behalf of Kelly's employees who were performing bargaining unit work on Continental's premises in order to erode the bargaining unit. At the hearing, General Counsel asserted that the alleged unfair labor practices were committed by Continental and Kelly, as joint employers, as the complaint alleges; and, alternatively, that Continental alone violated the Act by unlawfully subcontracting bargaining unit work to Kelly.

On the entire record, including my observation of the demeanor of the witnesses,[3] and after due consideration of the briefs filed by the General Counsel and counsel for Continental and Kelly, I make the following

FINDINGS OF FACT

I. JURISDICTION

Continental, a Michigan corporation, at all material times, has been engaged in the business of cleaning and rewinding automotive parts for the automotive industry. Its sole place of business is located at the aforementioned Roseville, Michigan facility. During the calendar year immediately preceding issuance of the complaint, Continental purchased and caused to be transported and delivered to its Roseville facil-

[1] All dates hereafter are in 1983 unless otherwise stated.
[2] It is unclear how Local 189 became involved. Apparently all parties consider the International and Local as a single party for purposes of this proceeding.
[3] All witnesses were sequestered throughout the hearing.

ity goods and materials in excess of $50,000 in value directly from points outside of Michigan and, in the same time period, reworked, sold, and delivered products exceeding $50,000 from that facility which were shipped directly from there to points outside Michigan.

Kelly, a corporation, at all material times, has maintained its principal office and place of business in Troy, Michigan. It has been engaged in the business of providing personnel to other businesses on a contractual basis. During the calendar year immediately preceding complaint issuance, Kelly performed its services valued in excess of $50,000 for various enterprises located outside Michigan and performed such services, also exceeding $50,000 in value, for other enterprises located within Michigan. Also, in the same time period, Kelly caused to be transported and delivered to its Troy, Michigan facility, goods and materials valued in excess of $50,000, which were delivered to that facility directly from points outside of Michigan.

Based upon the above, and their admissions, I find that at all material times, Continental and Kelly, each, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

All parties admitted, the record reflects, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ANCILLARY ISSUES

Two issues are raised which require resolution at this juncture. The first is the application of the Act's statute of limitations, Section 10(b). The second involves an alleged breach of the order by which the witnesses at the hearing were sequestered.

A. *Section 10(b)*

General Counsel's brief asserts that Kelly claims the complaint may not be prosecuted against it by virtue of the proscriptions of Section 10(b). I am uncertain of the basis upon which General Counsel's assertion is made. Possibly it derives from Continental's argument, discussed immediately below. In any event, and to dispel any misapprehension on my part, I have studied the instant record to determine whether or not a statute of limitations defense, if actually raised by Kelly, is meritorious as to it.

My study reveals the following: (1) Kelly's answer (G.C. Exh. l-g) contains four distinct affirmative defenses.[4] None of those relates to Section 10(b). A subsequently filed answer of Kelly incorporates by reference these four affirmative defenses, but contains no addition of a statute of limitations defense. At the hearing, Kelly's attorneys, though presenting oral argument and opening statement, did not allude to such a defense. Finally, Kelly's posthearing brief does not propound a 10(b) defense.

Section 10(b) defenses must be affirmatively pleaded and raised in timely fashion. *Penn Corp.*, 239 NLRB 45 fn. 1 (1978). In the above-described circumstances, it is clear that Kelly did not at all seek to interpose a 10(b) defense. Accordingly, I conclude such a defense by Kelly is now untimely. Assuming I have incorrectly evaluated the state of the record, and that it would appear Kelly had raised this defense either in its pleadings or during the hearing, the fact remains that such a defense has not been promoted in Kelly's brief. Accordingly, I would conclude that defense has now been abandoned.

Continental, in its posthearing brief, sets forth three 10(b) issues. (1) Continental contends that the allegation that Continental unlawfully eroded the bargaining unit is time-barred. That allegation appeared in the complaint for the first time on March 22, 1984, as newly added paragraph 22(d); (2) Continental also asserts that the allegations of unlawful subcontracting (complaint par. 20(a)–(c)), G.C. Exh. l(c), corresponding to complaint par. 21(a)–(c), G.C. Exh. l(m)) is similarly time-barred and (3) asserts that the prosecution of the complaint allegations against Kelly is improper under Section 10(b).

I find that contentions (1) and (2) lack merit because Section 10(b) does not bar additions to complaints of other unfair labor practices more than 6 months after their commission in situations, as I find exist herein, where those allegations are related to matter timely charged. *Fant Milling Co.*, 360 U.S. 301 fn. 9 (1959); *El Cortez Hotel*, 390 F.2d 127 (9th Cir. 9 1968); *Central Power Light Co.*, 425 F.2d 1318 (5th Cir. 1970).

As to contention (3), I find the allegations involving Kelly are based upon the credited and uncontroverted evidence that the Unions did not become aware of the facts upon which the allegations are based until October 26, 1983. The charges based on those facts were filed on October 31 and January 27, 1984. Each of these dates clearly was within 6 months of the date when the Unions were put on notice of the potential violations. The Board holds that the 10(b) period does not begin to run until the allegedly wronged person has actual, or constructive, notice of the facts allegedly constituting the violation. Accordingly, I find no merit to the third 10(b) contention of Continental. *Alabaster Lime Co.*, 194 NLRB 1116, 1118 (1972); *Florida Steel Corp.*, 235 NLRB 1010 fn. 4 (1978).

In sum, I find none of the complaint allegations is barred from prosecution by Section 10(b) of the Act.

B. *Sequestration and Credibility*

As previously noted, witnesses were sequestered during the course of the hearing.

Benjamin Morris, Continental's bargaining representative and a witness in its behalf who had been sequestered, revealed that he read earlier-provided testimony of Continental's president Albert Keatts. Continental's counsel stated Morris saw several pages of Warren's testimony'' (Tr. 519), referring to Union Representative Lewis Warren. Morris' account of precisely what it is he saw or read from the official transcript was equivocal, and sheds no further light on the subject (Tr. 530).

Counsel for the General Counsel claimed Morris' activity breached the sequestration order and moved to strike the entirety of Morris' testimony. I deferred ruling on that motion. Before closing the hearing, I asked whether General Counsel intended to pursue that motion. General Counsel advised that was her intention. Her posthearing brief renews the motion. The other parties were provided an opportunity to brief the issue. Each did so.

[4] One of the affirmative defense claims that Kelly was denied due process. This particular defense will be resolved later in this decision.

A review of the relevant parts of the record and case citations persuade me the motion to strike should be denied. I conclude the facts do not support the motion. The extent to which Morris read, or was apprised of, Warren's testimony simply is not clear. Continental's counsel admitted only that Morris read ''several pages'' of Warren's testimony. Warren's testimony consumed 139 transcript pages. Though Morris did not expressly deny he had seen any of Warren's testimony, the record does not establish precisely how much of that testimony was either seen, or read, by Morris. The record contains no further indication of Morris' acquaintance with the prior testimony of Warren or any other witness for an opposing party. As to Morris' knowledge of earlier testimony of any witness for Respondent, Morris readily admitted he had seen Keatts' testimony when called as an adverse witness by General Counsel. Keatts' testimony at that time consists of 32 transcript pages, devoted principally to Continental's business and operational structure.

Clearly, whatever portions of prior witnesses' testimony was seen, or read, by Morris, was done as part of his preparation as a witness for Respondent. Though the Board does not generally endorse ''the proposition that showing portions of the transcript to prospective witnesses who have been sequestered is warranted as part of trial preparation,'' *Gossen Co.*, 254 NLRB 339 fn. 1 (1981), there are circumstances under which technical breaches of sequestration orders may be tolerated. In *Gossen*, witnesses were sequestered by the parties' agreement. Thus, the parameters of sequestration were not defined. In the instant case, sequestration occurred as a result of my granting General Counsel's motion. Nevertheless, apart from providing that each party could retain a witness in the hearing room to assist counsel, I developed no parameters for implementation of the sequestration order. Thus, I view the case at bar, in this respect, to be similar to *Gossen*. In this context, I am able to exercise the broad discretionary authority of a trial judge. (See *Holder v. United States*, 150 U.S. 91, 92 (1893); *United States v. Willis*, 525 F.2d 657 (5th Cir. 1976); *Alpert's, Inc.*, 267 NLRB 159 fn. 1 (1983), to determine whether there is sufficient ground to grant General Counsel's motion.)

I am guided by the lesson in *Unga Painting Corp.*, 237 NLRB 1306 (1978), that ''the purpose of exclusion is preventative; it is designed to minimize fabrication and combinations to perjure as well as mere inaccuracy.'' 237 NLRB at 1306–1307. In *Unga*, the Board noted, also, that the process of exclusion consists of preventing a prospective witness from being taught by hearing another's testimony (fn. omitted—237 NLRB at 1036).

All the circumstances herein convince me that the guarantees of witness veracity guarded by the sequestration rule have not been impugned by Morris' actions. As to his review of Warren's testimony as an opposing witness, there are two grounds for this conclusion. First, in the earlier mentioned fact that there is insubstantial evidence of the extent to which Morris became acquainted with Warren's testimony. Morris was not pursued in depth on that matter. Thus, the record is bare of predicate evidence which might tend to reveal that any of Morris' testimony was shaped around that provided by Warren. Second, my examination of the totality of testimony provided by Morris and Warren reveals, in my judgment, that each substantially corroborated the other in his separate narration of the material activity that transpired between them. Thus, my description of facts regarding the collective-bargaining negotiations between those two individuals is derived from the composite of the testimony of both. I found each of them demonstrably strived to accurately portray those events according to his best recollection. Each was generally forthright and candid when addressing what occurred between them. Simply states, there does not appear to be any reflection in the record that Morris' testimony was in any way colored, or altered, by what Warren said as a witness.

Regarding Morris', having seen, or read, any of Keatts' testimony, it is noted that the portions of the latter's testimony which Morris acknowledges seeing generally related to subject matter not addressed by Morris in his testimony. That part of Keatts' testimony related to Continental's operations, whereas Morris' testimony involved a description of the collective-bargaining negotiations between the Respondent and the Union. In this posture, it is difficult, if not impossible, to conclude the purpose of the sequestration rule could have been adversely affected. Ironically, my examination of the record leads me to conclude that it would have been Keatts, not Morris, who had the greater opportunity to adjust his testimony. I can find no example, nor has General Counsel cited any, of such testimonial congruence between Morris and Keatts, on material matters, which reflects actual or constructive, intentional or unwitting, collusion between those two witnesses.

Upon all the foregoing, the General Counsel's motion to strike Morris' testimony is hereby denied.

The posthearing briefs raised witness credibility as a substantial issue. I, too, find it necessary to explicate my impressions of the witnesses' where their testimony relates to critical areas under examination.

As to Warren and Morris, I have already indicated, for the reasons given, that I find each witness worthy of belief on material issues.

Keatts, I found, exhibited a tendency to generalize his responses until pressed for specific answers during cross-examination, and to exaggerate so as to cast his testimony in a light most favorable to Respondent, and was self-contradictory in important areas. For example, Keatts first denied his first contact, on behalf of Continental, with Kelly, was in April 1983. Instead, he claimed it was in November 1982. Later, Keatts acknowledged it, indeed, was in April 1983 that he first contacted Kelly. Moreover, his first oral account at the hearing of that contact was contrary to what he said in his prehearing statement. That issue, in my view, is important to the resolution of the unit and joint-employer issues, to be resolved below.

As an example of couching his testimony toward Respondents' advantage, during his direct examination as a Respondent witness, Keatts first asserted Kelly employees worked at Continental's facility an average of only 2-1/2 weeks. However, during cross-examination, Keatts later admitted it was not unusual for Kelly employees to be employed at Continental for several successive weeks. This point is an important element to be considered in resolution of the applicability of the Board's certification to the so-called temporary employees of Continental. Further, Keatts patently sought to minimize the status of the ''temporary'' employees. He claimed such employees were paid only minimum wage and received no fringe benefits. Later, Keatts conceded that some

of those employees, albeit as the documentary evidence reflects only a few, in fact were recipients of overtime payments, wage increases, bonuses, and paid vacations and holidays. This shift in Keatts' responses is considered an effort to exaggerate, in a negative way, Respondents' contention that the ''temporary'' employees are not properly within the scope of the certified unit description.

The most flagrant testimony which I find impacts adversely upon Keatts' reliability and credibility is his attempted explanation of the genesis of, and need for, hiring Kelly employees to perform bargaining unit work. Keatts first testified that during 1982 and 1983, until shortly after the Board's representation election, Continental operated a warehouse next to its Roseville facility at which employees worked on stored parts during periods when no new shipments were available. Keatts then claimed, during his direct examination as a Respondent witness, that certain customers stopped shipping parts for storage, resulting in Respondent ending its warehouse operation after the election. It was then that Keatts claimed Continental realized it needed a more ''flexible workforce.'' (Apparently this testimony was elicited in support of Respondents' contention that the hiring of Kelly employees constituted a management decision over a matter not a mandatory subject of bargaining within the purview of *Otis Elevator Co.*, 269 NLRB 891 (1984), cited at fn. 6 Continental's br.)[5] Keatts' cross-examination revealed that Keatts had claimed the warehouse operation ended in 1982. Finally, I asked Keatts to clarify when the warehousing had stopped. He responded ''we still have a warehouse, but a lot less . . . . We still have warehousing . . . but not at the quantity that required that many employees before . . . we gave up one of our warehouses. We still have two left.'' (Tr. 439, 440).

As will become more apparent below, within my analysis of the refusal-to-bargain allegations, the facts surrounding the existence of the warehouse are important aids in resolving whether or not Continental's activities were discriminatorily motivated by an intention to erode the bargaining unit.

The confusing nature of Keatts' testimony in this area makes that testimony unreliable and tends to detract from his general credibility. Thus, the findings I shall make regarding the warehouse will be based upon that which can be obtained from documentary evidence and testimony of witnesses deemed more credible and fluent than Keatts.

The following witnesses, though sometimes unsure or imprecise, generally testified in a direct and candid manner. I credit each, and have based my factual findings below upon a composite of their uncontroverted testimony and that which is corroborated by documentary evidence.

Samuel Sanom, Continental's plant manager; Continental's supervisor David Lusczki; former employee Dennis Young. Also, Union organizer Tony Martini, a General Counsel witness, provided testimony concerning when the Union first became aware of the advent of Kelly employees at Continental's facility and whether or not the Union made a separate bargaining demand upon Kelly. Martini's testimony was brief and uncontested in material matters. He appeared forthright, direct and spontaneous in responses. I credit him.[6]

Finally, Michael J. Snow, Continental's supervisor since December 1983, testified as an adverse witness called by General Counsel. The record reflects Snow was called to provide evidence as to when Kelly first provided employees to Continental, why Kelly employees were used, whether they were used to replace full-time employees, and other matters pertaining to the unit issue. Snow was a grossly evasive and equivocal witness. His oral testimony before me is pervaded by blatant evasiveness and self-contradiction. When confronted with his prehearing affidavit, Snow effectively repudiated every material portion of that document. I find his oral testimony at the hearing wholly unreliable, except to the extent he admitted having provided the Board, during its pretrial investigation, with a sworn affidavit, the salient portions of which were read into the record by counsel for the General Counsel during Snow's testimony. General Counsel contends the relevant portions of Snow's pretrial affidavit may be relied upon as proof of their substantive assertions. Respondent did not brief this issue.

This situation parallels that in *Alvin J. Bart & Co.*, 236 NLRB 242 (1978). There, the Board affirmed Judge Max Rosenberg who credited pretrial sworn statements provided the Board by a witness, one of Bart's supervisors, whose oral testimony conflicted with the pretrial statements. In *Bart* the Board held that the pretrial statements could be used as substantive evidence, especially where no objection was made to the document's receipt in evidence. Herein, the General Counsel read portions of Snow's pretrial affidavit into the record. No objection was made.[7] Respondent was afforded the opportunity to cross-examine Snow and did 80. In view of Snow's obvious lack of candor at the hearing, I agree with General Counsel's position. Accordingly, some of my factual findings herein are based upon the contents of Snow's pretrial affidavits which were read into the record by counsel for the General Counsel. In all other respects, I conclude Snow's oral testimony at the hearing is of absolutely no probative value to the cause of any party to these proceedings.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[8]

Keatts, as Continental's president and general manager, has been in charge of Continental's operations since 1974. He has plenary responsibility of personnel and labor relations

[5] Contrary to Continental's contention, I do not find *Otis Elevator* governing herein. As will be demonstrated below, the evidence is insufficient to establish the use of temporary help after the Board-conducted election comprised a significant change in the scope, direction of nature of Continental's business. Continental's counsel conceded as much when, at the hearing, he asserted the company has *always* used temporary employee(s) and *continues to do what it has always done*, and that is used temporary employees . . . they've always used temporaries. They've done nothing different. (Emphasis supplied.)

[6] General Counsel presented Bruce DeCastro, a research associate of the Union, to testify concerning alleged failures to provide information subsequent to complaint issuance and during the course of settlement efforts during periods in which the hearing was in recess. I sustained Respondents' objection to such evidence, rejected General Counsel's offer of proof, and struck DeCastro's testimony. General Counsel has not contested my ruling in her posthearing brief. Thus, no need exists to further comment on DeCastro's credibility.

[7] Interestingly, Continental's counsel offered to affidavit into evidence, but later withdrew his offer. The affidavit is not in evidence.

[8] Not every bit of evidence or argument of counsel is reported. But each has been considered. Omitted matter is deemed irrelevant, superfluous, or of little probative value upon the critical issues.

matters. Plant Manager Sanom reports directly to Keatts. Sanom shares responsibility for interviewing, hiring, and terminating employees. Also, Sanom directs the activities of seven supervisors who, in turn, assign and direct employees in their work areas.[9]

Historically, the bulk of Continental's employees have been classified as general laborers. At the beginning of April 1983, the employee complement consisted of 26 full-time general laborers and 3 part-time laborers. No so-called temporary employees were working at Continental at that time.

All general laborers are unskilled and are not required to satisfy any educational or physical requirements as a prerequisite to hiring or working for Continental. The general laborers on Continental's payroll customarily are hired at minimum wage rates; earn between $3.35 and $3.85 per hour; and are entitled to paid vacations and paid holidays after a specified period of service.

The general laborers' job tasks include loading and unloading trucks, polishing, counting parts, shaking copper out of parts which have been burned out, and loading and unloading an oven, under the direct supervision of at least one of Continental's seven supervisors. The laborers are assigned to perform these tasks on an as-needed basis throughout Continental's facility.

From the time Continental began operations in 1974, it also utilized so-called temporary employees who reported when they were called in by Continental. These individuals, mostly students or housewives, were used to perform general laborers' functions when customer requirements necessitated augmentation of the regular work force. Continental maintained a written list of persons who were willing to be called in as work requirements dictated.

Keatts testified that such ''temporary'' employees worked only for the duration of the current work at hand and were sent home when the work was completed. This testimony was not contradicted by any other witness. However, that testimony is not wholly substantiated by documentary evidence. Summaries of employment records of ''temporary'' employees (R. Exh. 4) reflect that at least 20 such employees worked consecutively virtually without interruption for periods of several months to several years.[10] These indicia run contrary to Continental's (and Keatts') claim that ''temporaries'' necessarily work on as needed, on-call, basis.

On or about February 18, 1983, the Union commenced an organizing campaign among Continental's employees. As noted earlier, there were no ''temporary'' employees working at Continental at that time. On February 28, the Union filed a representation petition with the Board. On April 6, an election was held among Continental's 29 general laborers. The Union received a majority of votes cast. Continental filed objections to the election. Ultimately, on August 26, the Board issued its Decision and Certification of Representative, certifying that the Union was the exclusive bargaining representative of the employees in the following unit:

> All full-time and regular part-time general laborers employed by the Employer at its facility located at 15890 Common Road, Roseville, Michigan; but excluding office clerical employees, guards, and supervisors as defined in the Act.[11]

Employee D. Young credibly testified that during the Union's campaign, Sanom told him that he heard about the organizational efforts and said if the Union came in, Continental could not afford to keep its doors open and the shop would be closed.[12]

Shortly after the election, 18 of the 29 Continental unit employees resigned, apparently voluntarily.[13] None of the resignees was a ''temporary'' employee. Redyes immediately set out to obtain replacement help.[14] Thus, Redyes made his initial contact with Kelly in mid-April. He investigated the possibility of Continental using Kelly's services. At that time, Redyes informed Kelly's representative of Continental's union status. Redyes' testimony that he did so, coupled with the timing of his contact with Kelly, makes it reasonable to infer, as I do, that he at least advised the Kelly representative that the Union had won the election. This inference is supported by the fact that Kelly's representative responded that she would check with Kelly's legal staff to see what Kelly should do.

During the ensuing days, Kelly delivered to Keatts various documents setting forth the terms under which Kelly would provide employees to perform work at Continental's facility. Thereafter, on or about April 27, Continental began using Kelly employees to perform general laborers' work at its facility.

Under the Continental-Kelly agreement, Continental determined the number of employees to be supplied by Kelly. Kelly prescreened, interviewed, evaluated and hired the Kelly employees; and guaranteed that the services of Kelly employees would be performed ''in an acceptable, workmanlike manner . . . and, upon reasonable notice from Continental, Kelly will not charge for unsatisfactory service and will furnish a replacement as soon as possible.''

The Kelly employees were paid directly by Kelly for work performed at Continental's facility. Kelly withheld and reported the various required deductions to appropriate government agencies. Kelly billed Continental weekly for Kelly's employees' services through an invoice which contained the names of Kelly employees who worked during that week, as

[9] Based upon the record as a whole, and the parties' stipulations, I find Sanom and the seven supervisors to be supervisors within the meaning of the Act.

[10] Refer to J. Callis, L. Coval, L. DeMeyere, A. Horek, J. Jaromo, K. Jax, D Joly, C. LaFave, R. Lawrence, D. Lenox, M. McQuade, R. Palewski; N. Page, G. Phillips, D. Pulliam, S. Rankin, M. Spybrook, R. Ulecki, L. Vanzomeren, and D. Woody. Of these, Horek, Lawrence, and McQuade quit their employment and were not apparently terminated when work ran out.

[11] Based upon the certification, the readies and the record as a whole, I find the described unit appropriate for collective-bargaining purposes within the meaning of the Act.

[12] This testimony is uncontradicted. Though Young testified after Sanom, Sanom was not called upon to refute it. This statement is not alleged as an independent violation of the Act. However, it is relevant as background to the General Counsel' contention that, during bargaining, Respondent claimed an inability to meet the Union's economic demands.

[13] The precise reasons for these resignations remains unclear. None of these resignations is the subject of any complaint allegation herein.

[14] Keatts admitted Kelly's employees replaced those of Continental's who resigned. Sanom testified that Continental hired no one after Kelly employees began to work.

well as the total amount charged to Continental for their services. Kelly performed all recordkeeping functions with respect to the Kelly employees and agreed to furnish Continental with evidence of the payment of wages and compliance with all payroll deduction requirements, upon request. Continental, however, maintained timecards for the Kelly employees. Kelly provided insurance coverage for its employees, including workers' compensation, employers' liability, comprehensive general liability (including contractual liability and personal injury), comprehensive automobile liability, and a blanket commercial policy covering employee dishonesty. Continental provided no insurance with respect to the Kelly employees.

Also, Kelly expressly assumed a number of legal obligations with respect to the Kelly employees. These obligations are set forth in an ''Indemnity Agreement, as follows.

> [Kelly] assumes and agrees to indemnify and save harmless the Customer from any claims and expense (including reasonable attorney fees and other costs and expense of litigation) for bodily injury or property damage asserted by the employees of the Customer, by employees of Kelly, or by members of the general public, which are based in whole or in part upon any act or omission on the part of Kelly, its agents or employees, while acting within the scope of their duties, except any acts or omissions resulting from responsible charge for any engineering, architectural or surveying work performed, and subject to the specific written agreement from the home office of Kelly at GP. O. Box 1179, Detroit, Michigan 48232. Kelly does not assume liability for bodily injury, property damage, fire, theft, or collision claims arising but out of the use of Customers' machinery, equipment, material or automotive equipment, whether owned or rented, while in the care, custody or control of Kelly, its agents or employees.
>
> Kelly agrees to indemnify and save harmless the Customer against any liability for premiums, contributions or taxes payable under any workmen's compensation, unemployment compensation, disability benefit, old age benefit, or tax withholding laws for which the Customer shall be finally adjudged liable as an employer with respect to any employees of Kelly assiqned by Kelly in the performance of such work for the Customer, but Kelly shall not be obligsted to insure such risks.

Also, Kelly with respect to its employees, unconditionally assumed all legal responsibility as the employer of these persons.

Under the above conditions, Continental continuously used between 2 and 17 employees obtained from Kelly until on or about April 13, 1984. Frequently, the same individuals obtained from Kelly performed work at Continental'g facility for several successive weeks. Reatts attempted to minimize the use and tenure of Kelly employees when he testified that the average Kelly employee would remain at work at Continental's facility for approximately 2-1/2 weeks and since the use of Kelly employees began, approximately 100–150 Kelly employees worked for varying periods of time at Continental. This testimonial assertion is not supported by the only relevant documentary evidence available. Thus, lists of ''temporary'' employees provided by Continental for the dates January 25, 1984, and April 13, 1984 (G.C. Exhs. 11 & 13, respectively), contained *identical* names for each of these payroll dates. Accordingly, and contrary to Reatts' oral assertions, I find that Kelly employees, identified by Respondent as ''temporary help'' worked in bargaining unit jobs for substantial periods of time, and did so continuously.[15]

When working at Continental's facility, Kelly's employees worked in the areas of the shop as those on Continental's payroll and performed the same general laborers' work, including the tasks of loading and unloading trucks, loading ovens, polishing, shaking out copper, and counting parts. The Kelly employees were wholly supervised by Continental's supervisory personnel who exercised identical supervisory authority over Kelly and Continental employees. The Kelly employees worked the same hours as Continental employees and at least some of them were employed on a full-time basis. Kelly employees had the same lunch hour as Continental employees.

B. *Remaining Factual Scenario*

Between the August 26 certification and October, the Union made no request to bargain. In early October, Warren contacted Reatts by telephone. Warren told Reatts he had been assigned to negotiate a contract with Continental. The two scheduled an appointment to meet later that day. During the ensuing meeting, Reatts stated he believed the employees had organized out of spite after an employee was injured on the job, that he had lost a great deal of business when his customers learned the employees had organized, and that there was no money in the business. Reatts also said the Teamsters had attempted on three earlier occasions to organize the employees but had disclaimed interest after they found that there was no money in the business. Warren retorted that it would be easy to verify this by having the Union's research department examine Continental's books. Warren assured Keatts this would be done in strict confidence.

After their meeting, the Union, by letter dated October 19, requested the following information from Continental:

> 1. An employee list for Continental Winding Company showing names, classifications, hourly rates and dates of hire.
> 2. A list of current Continental Winding Company employees showing the census data used for insurance purposes and the cost of medical coverage.

On October 20, Warren conducted a meeting at the union hall for unit employees. At that time, Warren first learned that Kelly employees were working in unit jobs at Continental's facility. There is no evidence to show either that the Union had been notified of Continental's decision to use Kelly employees to perform bargaining unit work or that such work was being performed, at any time, by so-called temporary employees.

[15] It is reasonably inferable that such employment was continuous because the records cited contained identical names for the two time periods involved, and no effort was made at the hearing to demonstrate that any of those employees identified in those lists had any amount of broken service between the cited dates.

Shortly after the unit meeting, Warren telephoned Keatts. Warren protested there were outside agency employees working at Continental's facility. Warren said he did not care where the employees came from, but the work they were performing was bargaining unit work; that he considered all employees performing general laborers' work within the bargaining unit; and the Union wanted to bargain on behalf of all such employees. Reatts answered that Continental was saving money by using Kelly employees and that was why they were being used to do the bargaining unit work. Warren asked that Continental furnish the information he had previously requested, and said he was particularly interested in this information as it pertained to the Kelly employees. Reatts then told Warren that Morris would be Continental's representative for purposes of negotiations. Reatts said that all future contacts with Continental should be made through Morris.

In fact, Morris contacted Warren by telephone. Morris said he represented Continental. At no time did Morris or Continental represent to the Union that Morris represented Kelly. Indeed, whenever the matter arose, Morris expressly denied such representative capacity. Morris and Warren agreed to meet for collective-bargaining negotiations on November 2, and did so. Thereafter, bargaining sessions were conducted (before the instant hearing) on November 14 and 28, December 13, and on January 10 and 25, 1984.[16]

The relevant portions of the negotiating sessions follows:

November 2

Warren present the Union's initial contract proposals. They included a recognition clause by which the Union would be recognized as collective-bargaining representative for the employees in the certified unit. Warren demanded that the bargaining encompass the Kelly employees who were performing bargaining unit work. Morris refused this request. He said the Kelly employees were only ''temporary,'' and were not contained in the certified unit description, and that Kelly employees were not on Continental's payroll.

Morris gave Warren a document entitled ''Continental Winding Company employee listing.'' That list showed the names of Continental's full and parttime employees on November 1. A total of only eight names were on that list. No name of any Kelly employee or of any other so-called temporary help was included.

Warren then asked that Continental provide specific information with respect to Kelly employees, ''co-extensive with what had been provided with respect to employees on Continental's payroll, including their date of hire, rate of pay, classification, and a description of the work they were performing.''

Morris then said that Continental was saving money using Kelly employees. Morris and Warren then discussed Continental's financial condition. Morris said Continental was having difficulty competing in that it had lost so percent of its business from a key customer, Automotive Armature,[17] to a competitor located in Georgia as a result of being unionized. Morris said that Continental had not increased its prices in 11 years, despite the fact that the minimum wage had risen.

Morris said that Continental was a member of the Auto Parts Rebuilders Association and that all the companies that have been a member of the Association, and whose employees had organized, had gone broke. Morris told Warren that Reatts had not received a paycheck from Continental in over 3 years, that the Company had been losing money for the past 3 years, and that the Company was ''in the red'' for the current year.

Warren then said that, because Continental was ''crying poverty,'' the Union was formally requesting that its research department be allowed to inspect Continental's books. Morris said he would not respond to the request at that time. Instead, Morris asserted that Reatts obtained a personal loan to keep the business running. Morris also said that various expenses, including workers' compensation, had risen substantially in the past 12 months and that Continental expected a loss of $60,000 by the end of that year, without Reatts drawing any money from the business.

Several times, during this meeting, Warren asked whether Continental was ''crying poor mouth'' and said, if so, the Union wanted to examine Continental's financial records. Morris denied that was Continental's position. Morris claimed his references to Continental's earlier and current financial status was simply intended to provide the Union with an historical background of Continental's operations. Morris repeatedly said that Continental was not claiming poverty but, instead, was trying to demonstrate that it needed to remain competitive.

On November 7, Warren dispatched a letter to Keatts. He requested the following information:

1. Names of All Kelly Agency Workers
2. Kelly Workers' classifications
3. Date each Kelly worker started to work at Continental Winding.
4. The amount of wage each Kelly worker receives for work at Continental Winding.

November 14

Morris presented Continental's contract proposals. There was no response to the recognition clause request of the Union. Warren asked for the reason for this omission. Morris said it was his policy not to agree to a recognition clause until all other items had been negotiated to a conclusion.

Morris again said it was his position that Kelly employees were not included in the bargaining unit. Warren accused Continental of unlawfully subcontracting bargaining unit work.

Warren again asked for production of Continental's financial books. Morris once again denied that Continental was claiming poverty.

December 13

Morris said he had a response to the Union's above-described November 7 letter for information concerning Kelly employees. With respect to Item No. 1, Morris said that the names of Kelly employees were constantly changing so that he would not provide the names of Kelly employees working at Continental.With respect to the identity of Kelly-employ-

[16] An additional bargaining session was conducted on April 13, 1984, during a recess in these proceedings.

[17] Automotive Armature's chairman is Jack McGuire. Reatts and McGuire are the only two officers of Continental.

ees' job classifications, Morris said they are ''temporary help.'' Response to the request for the date each Kelly worker started to work at Continental, Morris said that Kelly employees started on May 1, 1983, and that they were still performing work at Continental's facility. Regarding the Union's request for wage rates of Kelly employees, Morris said he did not know what the wage rates were, but thought they were receiving the minimum wage.

Warren responded that Continental's response was inadequate; that the Union needed to know the names of all Kelly employees presently working; that the parties had not negotiated over the status of temporary employees, that there had been no such classification at the time of certification, and that he considered all work being performed at Continental's facility was bargaining unit work, and that the Union had the right to know the precise classification of Kelly employees; that the Union had requested the date each Kelly employee began working and not merely the first date on which Kelly began providing employees. Warren repeated that he intended to bargain on behalf of all employees who were performing bargaining unit work, including those obtained through Kelly.

Morris responded he would not provide further information on Kelly employees, insisted that they were not part of the bargaining unit, and said he would not discuss them. Warren then asked for a representative of Kelly to be present at negotiations. Morris answered, ''We'll try, but no promise.''

There followed a discussion over Continental's financial position. Morris said that Reatts had to loan money to the Company to enable it to meet its payroll obligations. Morris provided price figures to Warren and said that those statistics would support his claim that the Company had not increased its prices in 11 years. Morris asserted that, in 1979, Continental lost 75 percent of its customers because its competitors in Georgia had undercut Continental's price by 25 cents, and noted that such competition had made it necessary for Continental to reduce its prices by 25 cents in 1980. Morris said there was on money in Continental, and that the Union could not ''squeeze blood from a turnip,'' and that it was Continental's intention to save money by using the Kelly employees.

Warren then asked for information on the amount of money Continental was paying for the Kelly employees. Morris answered he was not authorized to provide that information at that time. Morris said that Continental was saving 4 cents an hour and thus ''saving dollars'' by using the Kelly employees.

Near the meeting's end, Warren again asked that the Union be permitted access to Continental's books. Warren noted Morris' assertions that Continental has no money, that Reatts had loaned money to it, and that Continental had lost business and could not compete. Morris answered Warren's request by saying ''no chance.''

On December 15, Warren sent the following letter to Keatts:

> The Company has been repeatedly maintaining the Company's poverty at the bargaining table, alleging that you had to lend the Company money from your personal funds to make the payroll, further alleging that you are unable to compete if our economic proposals are met.
>
> As a result of these and many other statements concerning the Company's alleged poor financial condition, the Union is now, once again, requesting that you allow our UAW auditors to go over the Company's books. This is done in the strictest of confidence and only to enable the union to determine if our proposals are reasonable and to expedite the negotiations.

January 10

The parties met again. Warren presented counterproposals. Morris said he would not agree to the Union's proposed recognition clause. Morris maintained it was Continental's position that the Kelly employees were temporary employees and outside the bargaining unit. Warren answered that all the employees performing work at Continental's facility were either full time or part time and that the certification encompassed those individuals. Warren further said that he did not care from what source Continental acquired its work force, but that the Union was insisting upon its right to negotiate the conditions under which those employees work.

Regarding Continental's financial condition, Morris again said Continental was losing money and was having difficulty competing. Morris said that Continental could not compete for business if it had to meet the Union's proposals. Warren again requested the Union be permitted access to Continental's books. Warren said that Union needed to verify Continental's assertions and to have a rational basis for structuring its bargaining demands. Morris answered that there was ''no way'' Continental's books would be made available to the Union.

January 25

On this date, Warren again requested access to Continental's books. Morris responded ''o, all you have to do is look at . . . (Continental's competitors) . . . and you can see that we can't compete with them.'' It was at this meeting that Morris provided Warren with the first of the two previously-described lists entitled ''All employees presently working at Continental Winding Co.'' (G.C. Exh. 11.) This list contained only the names of 23 employees. It did not include the employees' classifications, rates of pay, or family status.

Also during this bargaining session, Morris presented Continental's written counterproposals, among which was a proposal that the parties sign a side-letter agreeing to Continental's continued use of ''temporary help.'' Morris explained this proposal was needed to afford Continental operational flexibility.

Warren again accused Continental of claiming an inability to pay. Morris countered that they had made significant progress in economic areas such as vacations, holidays and bereavement pay.[18] Morris then repeated that Continental simply was trying to remain competitive with other companies which were ''minimum wage paying companies.''

On April 13, 1984, Morris delivered the second list entitled ''All employees presently working at Continental Wind-

[18] Subjects other than those reported by me above were, in fact, discussed at each of the bargaining sessions, but have been omitted from my recitation of events because they are irrelevant to the issues framed by the complaint.

ing Co.'' (G.C. Exh. 13.) As earlier indicated, this list contained the names of precisely the same individuals which appeared on the list bearing the same designation for the date of January 25, 1984. Specifically, the April 13 list contained those same 23 names but this time designated them as full-time, part-time or temporary. The April 13 list also contained the rate of pay and classification for each employee whose name appeared on it. Three employees were designated ''part-time''; one was designated ''full-time''; and 19 were designated ''temporary help.'' Also, seniority dates and marital status were provided for the employees who were in the full and part-time categories.

C. *Analysis*

1. The joint employer issue

General Counsel contends that Continental and Kelly, together, comprise a joint employer in the particular circumstances of this case. Continental and Kelly contend they may not be considered as a joint employer as that doctrine has been applied under the Act. Under established Board policy, separate entities will be ignored, and two or more employers treated as one, under auspices of the joint employer doctrine enunciated in *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964), or the single employer doctrine as delineated in *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255 (1965). These are two distinct concepts.

The critical elements of these concepts were outlined in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982), enfg. 259 NLRB 148 (1981), as follows:

> [A] single employer relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a ''single employer.''
>
> The factors of relevance to this determination require assessment of the degree of integration of operations, control of labor relations, common management and common ownership.

With respect to joint employer status, the Court went on to state:

> In contrast, the ''joint employer'' concept does not depend upon the existence of a single integrated enterprise . . . (but) rather . . . are . . . ''what they appear to be''—independent legal entities that have merely ''historically chosen to handle jointly . . . important aspects of their employer-employee relationship.''

As recently as September 10, 1984, the Board expressed continued adherence to the *Browning-Ferris* principles. *Aspen Leasing Systems*, 271 NLRB 1536 (1984). See also *TLI, Inc.*, 271 NLRB 798 (1984); *Pacemaker Driver Service*, 269 NLRB 971 and cases cited in fn. 2 (1984).

To establish a joint employer relationship, the separate entities involved must be shown to ''share or co-determine'' (*Browning-Ferris*, supra at 691 F.2d at 1123), the essential employment conditions of the employee group upon which the joint employer relationship is to be imposed. Thus, the evidence must demonstrate that the putative joint employers meaningfully affect matters of the employment relationship such as hiring, firing, discipline, supervision, and direction. *Laerco Transportation Warehouse*, 269 NLRB 324 (1984). I conclude the evidence before me demonstrates that Continental and Kelly sufficiently shared responsibility over the critical elements of the employment relationship of the Kelly employees who performed general laborers' work at Continental's facility as to render them joint employers of those employees.[19]

The facts reveal that although Kelly (1) alone, had authority to hire the employees it furnished to Continental, (2) set their wages and other compensation, (3) paid those employees, (4) paid for insurance on behalf of those employees, including workers' compensation and employer's liability insurance, (5) maintained the payroll records, (6) withheld required payroll deductions and made necessary contributions and reports on them, and (7) indemnified Continental for bodily injury or property damage caused by acts or omissions of Kelly's employees; the record also reveals that (1) discipline of those Kelly employees was shared by Continental and Kelly, Kelly having agreed to replace employees about whom Continental complained; (2) that Continental determined the number of Kelly employees to work at its facility; (3) solely retained, and exercised, authority to assign, direct and schedule Kelly's employees; (4) established (through Keatts' control) the labor relations policies applicable to Kelly employees while at work at Continental's facility; (5) used its own supervisors to exercise day-to-day control over Kelly's employees; and (6) maintained records of time worked (timecards) by Kelly's employees.

Factually, the instant case parallels those facts found material in *Manpower, Inc.*, 164 NLRB 287 (1967). There, the Board found the existence of a joint employer relationship between Armour and Company and Manpower, Inc. which, as Kelly herein, provided certain personnel to Armour under an oral agreement. *Manpower, Inc.* (as Kelly) was solely responsible for hiring, setting wage rates, making required payroll deductions and providing workers' compensation insurance; while Armour (as Continental herein) had, and exercised, the authority to assign, direct and supervise the daily work of Manpower's employees.

Under similar circumstances, the Board found a joint employer relationship to exist in *CPG Products Corp.*, 249 NLRB 1164 (1980); in *Pacemaker*, supra, the entities involved were found to be joint employers where they shared similar division of authority and responsibility regarding the employees in question, and where the direct employer of those employees agreed to take corrective action on complaints of the entity which had been serviced (as Kelly did herein); and in *Sun-Maid Growers of California*, 239 NLRB 346 (1978), and *Syufy Enterprises*, 220 NBRB 738, 740 (1975), the mere exclusive exercise of all day-to-day supervisory functions by the entity to which another's employees were furnished was sufficient to establish the joint employer relationship.

Kelly argues that *Manpower, Inc.*, supra, is inapposite to the instant proceeding because it was a representation case, and is distinguishable because a substantial number of Manpower, Inc., employees worked steadily and consistently for *Armour*, and were already working for *Armour* when the rep-

[19] In view of my findings and conclusions regarding the joint employer issue, I find it unnecessary to decide General Counsel's theory that Continental unlawfully subcontracted bargaining unit work.

resentation petition was filed. I reject each of these contentions. I conclude the distinction between unfair labor practice and representation proceedings before the Board is irrelevant to the applicability to, or component factors of, the joint employer doctrine. A review of the various Board cases which have applied the joint employer criteria reflects the same elements and standards have been equally applied without regard to whether a particular case involved adjudication of alleged unfair labor practices or a determination of representation-type issues. (See, for example, *Pacemaker*, supra, where the Board, in an unfair labor practice context, cited the *Manpower, Inc.*, case as a standard for affirming Judge Cates' joint employer findings.) In addition, since I have found that documentary evidence (G.C. Exhs. 11 & 13) reflects substantial continuity of employment of the so-called temporary help at Continental's facility, I conclude that finding constitutes an element of factual congruence between the instant case and *Manpower, Inc.*, rather than the dissimilarity Kelly asserts.

Also, I consider it is not germane to the joint employer issue that Kelly's employees did not begin to work at Continental's facility until after the filing of the Union's representation petition and after the Board-conducted election. The combination of all above-cited decisional authority makes it clear that the contextual predicate for resolution of joint employer issues is the existence (or absence) of a relationship between two or more entities by which they ''share or co-determine'' the essential employment conditions of the affected employees. The respective assumption, and division, of responsibility and authority between, or among, those entities has not been defined in chronological terms. Rather, it is the possession and exercise of the various criteria which is important, not when they arise.

In conclusion, it is noted that both Continental and Kelly have cited *United States Steel Corp.*, 270 NLRB 1318 (1984), as if it were a seminal decision in their favor on the joint employer issue. I conclude reliance upon that decision is misplaced. It was not the Board (as Respondents contend), which sets forth four enumerated criteria for joint employer findings. In fact, those criteria are contained in the administrative law judge's decision in *U.S. Steel*. Instead, the Board, in that case, cited *Laerco Transportation*, supra, which analyzes the joint employer issue as I have done above, according to standards different from those discussed by the judge in *U.S. Steel*.[20] If the language in footnote 3 of the Board's decision in *U.S. Steel* appears ambiguous, and subject to Respondents' interpretation, that ambiguity has been resolved by the more recent Board decision in *Aspen Leasing*, supra. There, as noted above, the Board observed, unequivocally in footnote 1, that the joint employer and single employer concepts are separate and not interchangeable, and clearly renewed its prior adherence to the *Brownings-Ferris* principles.

Upon all the foregoing, I find that Continental and Kelly, at all material times, in the particular circumstances of this case constitute a joint employer.

[20] Apparently, the judge inadvertently referred to the standards applicable to *single* employer findings rather than those relevant to joint employer issues.

2. The unit composition

Whether Kelly employees, in the circumstances of this case, are includable within the certified bargaining unit was extensively litigated and briefed by all parties. That subject constitutes the underpinnings of the complaint allegation which charges Respondent unlawfully refused to bargain over ''temporary'' employees.

General Counsel contends that all individuals who performed, or perform, general laborers' work at Continental's facility, including Kelly's employees and all help designated as ''temporary'' are encompassed within the certified unit. Both Continental and Kelly argue the contrary notion.

Several subsidiary arguments have been propounded in support of the parties' respective positions. The subsidiary arguments include (a) whether or not I am empowered to resolve the matter of unit inclusions, (b) whether the issue is only appropriately raised by the filing of a representation-type petition for unit clarification or one seeking amendment to the certification, rather than within an unfair labor practice proceeding, (c) whether a question concerning representation exists over the representation of Kelly's employees and, (d) whether Kelly's employees constitute an accretion to the certified unit. I conclude each of the subsidiary issues, although provocative, need not be resolved. They divert attention from the peculiar context of the instant proceedings.

In my view, the critical issue regarding Continental's use of Kelly employees and other ''temporary'' help is whether or not such employees possess the degree of community of interest with Continental's employees as would make them includable within the unit in the framework of the Board's certification of ''regular part-time employee.'' Clearly, this issue may be resolved in an unfair labor practice proceeding which contains interrelated refusal-to-bargain allegations. *L & B Cooling, Inc.*, 267 NLRB 1 (1983); *M. J. Pirolli & Sons*, 194 NLRB 241 (1972).

Neither Continental nor Kelly challenges the appropriateness of the certified unit. The thrust of their arguments contests the inclusion of temporary personnel. Accordingly, my analysis proceeds from a recognition that the Board's established policy is to exclude temporary or casual employees from bargaining units unless the parties agree to their inclusion. *B. J. Carney Co.*, 157 NLRB 1285 (1966); *Stop 127, Inc.*, 172 NLRB 289, 290 (1968).

The instant issue is not so easily resolved, however, because the mere fact that Continental designated Kelly's employees (and apparently others) as ''temporary help'' is not determinative of their status. It is, instead, resolved by the extent such employees are part of a cohesive group of individuals who possess a mutual interest in their working conditions. *Fresno Auto Auction, Inc.*, 167 NLRB 878 (1967); *Henry Lee Co.*, 194 NLRB 1107 (1972).

In evaluating the part-time status of employees, the Board considers the regularity and continuity of employment, the similarity of duties and functions to those of full-time employees, the similarity of wages, benefits and other working conditions, and their supervision. *Lancaster Welded Products*, 130 NLRB 1478 (1961); *Mensh Corp.*, l59 NLRB 156, 158 (1966).

The available credited evidence, though concededly sparse, when assessed in the light of the above principles and the factors indicated below, I conclude, militate in favor of finding that the so-called temporary employees working at Con-

tinental in bargaining unit jobs are, in effect, regular part-time, rather than temporary, employees.

(a) Work history of Continental's ''temporary'' employees

Where it is shown that employees have a substantial working history, with a probability of employment and regular hiring, they may be considered regular part-time employees. *Columbus Plaza Motor Hotel*, 148 NLRB 1053, 1056–1057 (1964); *Bailey Department Stores Co.*, 120 NLRB 1239, 1244 (1958).

The historical data (R. Exh. 4) relative to Continental's employment of ''temporary'' employees shows, as I have earlier observed, that many such employees had been consecutively employed over periods of time ranging from months to several years. Continental's records show that those employees worked an average of approximately 25 hours per week. Further, those records show that, with few exceptions, the ''temporary'' employees who are not counted as having substantial continuous employment indeed worked, as Reatts admitted, until they failed to ''show up.''

Viewing the pre-1983 work history of Continental's ''temporary'' employees in its total perspective (as depicted in R. Exh. 4), I am persuaded that the bulk of such employees had been hired without an established termination date, and worked for substantial periods of time and for such average hours per week as to be properly considered regular part-time employees.

As earlier noted, the only reliable and credible evidence of work history among the ''temporary'' employees after Continental began using Kelly's employees appears as the employee lists of January 25 and April 13, 1984. My earlier findings, based on these two lists, result in the conclusion that there was no material change, after the union election, in the regularity of employment of ''temporary'' employees by Continental. In fact, Continental concedes as much. Thus, in its posttrial brief, addressing its use of ''temporary'' employees, Continental asserts ''The only thing that Continental did differently after the election was to use an outside agency to secure the temporary help it needed. Clearly, Continental's conduct in hiring Kelly to supply these temporaries did not vary significantly in kind or degree from what has been customary and traditional under the past established practice.''

Moreover, the documentary evidence, and credited testimony, reflects that ''temporary'' employees used by Continental easily meet several Board tests for regularity of employment warranting consideration as regular part-time employees. See *Schoa, Inc.*, 140 NLRB 1379 (1963), employees in *Retail Department Store*, who worked a minimum of 15 days in calendar quarter considered regular part time; *Jat Transportation Corp.*, 128 NLRB 780 (1960) and *Cab Operating Corp.*, 153 NLRB 878 (1965), part-time taxidrivers working one or 2 days a week included in unit; *Chester County Beer Distributors Assn.*, 133 NLRB 771 (1961), included employees who worked at least 8 hours a week; *Farmers Insurance Group*, 143 NLRB 240 (1963), employees working 20 hours a week included and *Allied Stores of Ohio*, 175 NLRB 966 (1969), employees who regularly averaged 4 hours a week for last quarter prior to eligibility date found to possess sufficient community of interest to warrant inclusion.

Finally, the conclusion that the record as a whole demonstrates the ''temporary'' employees, particularly Kelly's, should be considered regular part-time employees is buttressed by two other facts: (1) those employees admittedly were hired as replacements for those of Continental's permanent cadre who resigned shortly after the representation election; and (2) no new employees were hired by Continental since the time Kelly's employees began working at Continental's facility. I consider these factors impressive indicators of a probability of regular employment.[21]

(b) Similarity of working conditions and supervision

As earlier reported, the available evidence shows that Kelly's employees were virtually indistinguishable from Continental's employees, when the former were working as general laborers at Continental's facility. Thus, all general laborers worked (1) under identical labor relations policies controlled by Reatts; (2) under common supervision by Continental's supervisors only; (3) alongside one another in common working areas and departments; (4) at identical job tasks which they performed together; and (5) at identical hours and shared the same timeclock and lunch hour.

Although there is some evidence the ''temporary'' employees received fringe benefits, such as overtime payments, wage increases, bonuses, and paid holidays and vacations, that evidence is minimal, as Respondents contend. Nonetheless, the mere failure to receive fringe benefits offered other employees is not sufficient to disqualify the ''temporary'' employees from unit inclusion, where as I find, the record in its totality, shows the existence of a substantial community of interest among all individuals who work as general laborers at Continental's facility. *Pandick Press Midwest*, Inc., 251 NLRB 473, 474 (1980) *F.P Packaging*, 236 NLRB 239, 241 (1978).

Accordingly, I find that, in the particular circumstances of this case, the Kelly employees and other ''temporary'' help used by Continental to perform bargaining unit work are not temporary employees as the Board defines that term. Instead, I find the record contains sufficient evidence to conclude, as I do, that they properly are included in the certified bargaining unit as regular part-time employees.

3. The refusals to bargain

(a) Failure to bargain over temporary employees

It was on October 26, 1983, that the Union first became aware that Kelly's employees were working as general laborers at Continental's facility. Warren, at once (by telephone call to Reatts) demanded bargaining on behalf of those employees. At that time, Reatts merely explained the use of Kelly employees was cost-reducing to Continental.

Thereafter, beginning in the first bargaining session on November 2, and throughout the entire course of negotiations between Warren and Morris, the Uni.on persisted in its de-

[21] I am mindful that Kelly stopped providing employees to Continental effective the payroll week ending April 1, 1984. That cessation does not render the issue moot because (1) there is some evidence that Continental continues to operate with ''temporary'' employees from other sources, and (2) it is possible that Kelly may resume providing employees to Continental under circumstances to which my findings would apply.

mand that bargaining encompass all employees who were performing bargaining unit work. Morris steadfastly and unalterably explicitly rejected the Union's demand by claiming that Kelly's employees were just not part of the certified bargaining unit; that they were not Continental's employees; and that they were merely ''temporary'' employees. On January 25, 1984, Continental proposed a provision (art. 18, sec. 2, the side letter, described above), by which the Union effectively waived any right to bargain over these employees by agreement that Continental could continue to use the temporary help.

The parties' final position on this issue were provided on January 25 by the following interplay not previously recited. Morris proposed the parties agree to exclude ''temporary'' employees by physically amending the recognition language so that such employees would be considered outside the scope of the certified unit description. He then said he would refuse to sign a collective-bargaining agreement which covered terms and conditions of employment of employees obtained from ''outside agencies.''

The facts recited immediately above are persuasive indicators that Continental did not meets its bargaining obligations regarding temporary employees. I have found that such employees are includable in the certified unit as regular part-time employees. I find each of Continental's positions regarding temporary employees is either an explicit rejection of such unit inclusion or is tantamount to such rejection. Thus, though it might be argued Continental did not refuse to bargain over temporaries when is proposed an exclusionary side letter or an amendment to the certification language, such proposals, coming after the earlier positions by which Continental disclaimed all responsibility for, and attachment to, those employees, amount to a mere extension of Continental's explicit refusals to incorporate such employees into the scope of the collective-bargaining negotiations.

In sum, the totality of the relevant evidence leads me to find that Continental refused to bargain over the terms and conditions of employment of the temporary employees and that such refusal, in the instant circumstances, constituted a violation of Section 8(a)(5) and (1) of the Act.

Kelly, in the present circumstances, I conclude, is equally chargeable for this violation. I have found that Kelly and Continental are a joint employer within the meaning of the Act with respect to the circumstances of the case at bar. The record shows that relationship existed when Continental propounded its positions regarding temporary employees. The joint employer relationship imposes equal culpability upon all component employers as a single de jure entity. *Sun-Maid Growers of California*, 239 NLRB 346, 354 (1978); *American Air Filter Co.*, 258 NLRB 49, 54 (1981). Thus, Kelly may be presumed to have advanced the same bargaining positions as Continental.

Earlier recited facts show that Kelly had been told by Reatts that the Union won the representation election. It is equally clear that Kelly was not a party to the underlying representation case which gave rise to the bargaining obligation which the General Counsel seeks to enforce herein. Kelly argues this last factor as the basis for a claim of due process (alluded to above) and makes it inappropriate to impose any bargaining duty upon it. I disagree.

First, I find Kelly's reliance upon *Alaska Roughnecks & Drillers v. NLRB*, 555 F.2d 732 (9th Cir. 1977), cert. denied 434 U.S. 1069 (1978), is misplaced. The court of appeals denied enforcement of a Board order that Santa Fe, an Employer in a parallel position to Kelly, bargain as a joint employer with Mobil, to which Santa Fe supplied employees. Unlike the situation herein where the representation proceedings involved the employer who received the temporary help, the representation proceedings in *Alaska Roughnecks* involved Santa Fe, the supplier of the employees. Mobil (as Kelly) was not a party to the representation proceedings. Enforcement of the Board's order against Mobil to bargain as a joint employer was denied because the court of appeals decided Mobil had been denied due process by virtue of the omission from notice of, and participation in, the representation proceedings.

I find *Alaska Roughnecks* distinguishable. In that case, Mobil's relationship with Sante Fe *preceded* the filing of the representation petition. It was in 1972 that Sante Fe and Mobil entered their contractual relationship for Sante Fe to furnish employees to Mobil. The Sante Fe employees' organizational activities did not begin until the fall of 1973 and the Board's representation proceedings did not end until January 1974 with issuance of a certification. The business relationship between Mobil and Santa Fe continued throughout the entire pendency of the representation proceedings. In those circumstances, the court of appeals concluded that Mobil was entitled to rely upon the certification result which named Sante Fe, alone, as the employer.

In the case at bar, Kelly and Continental did not establish their relationship until after the Board election. Although that relationship was already in existence when the certification naming Continental as the employer was issued, neither Continental nor Kelly, took any steps to inform the Union or the Board of that fact. Though no authority has been cited or uncovered to cast such a burden upon either employer, it is a factor which I consider in the framework of Kelly's claim it is denied the benefits of due process if a bargaining obligation should be imposed on it herein. In this connection, I am mindful of the evidence which shows Kelly entered its relationship with Continental with knowledge of the Union's election victory. This factor, considered in conjunction with the fact it simply was not possible to have named Kelly as an employer in the underlying representation proceeding, persuade me that the real issue regarding Kelly's bargaining duty is not one of a denial of due process.

I view the issue to be not whether it is unfair to Kelly to litigate its status as a joint employer when it was not initially certified by the Board as an employer. Instead, the real issue is whether Kelly's rights are unjustly affected during this unfair labor practice proceeding. Herein, Kelly was given notice of General Counsel's intentions to litigate Kelly's status as a joint employer. Thereafter, Kelly fully participated in these proceedings. Kelly was permitted to, and did, present oral and written arguments and interrogated witnesses. All this was in pursuit of Board precedent which hold that matters of an employer's status as a joint employer in unfair labor practices cases are separate and distinct from such issues in representation cases. *U.S. Pipe & Foundry Co.*, 247 NLRB 139 (1980); *Royal Typewriter Co.*, 209 NLRB 1006 (1974), affd. 533 F.2d 1030 (8th Cir. 1976).

Upon the foregoing, I reject Kelly's claim that *Alaska Roughnecks* prevents me from finding Kelly had an obligation, as a joint employer, to bargain the Union in the cir-

cumstances herein, and I find the record as a whole justifies imposition of such a bargaining duty. Accordingly, I find that Kelly is bound by the negotiating positions taken by Continental and, as a joint employer with Continental, has thereby similarly violated Section 8(a)(5) and (1) of the Act by refusing to bargain over temporary employees.[22]

As earlier noted, General Counsel contends that the refusals to negotiate the terms and conditions of Kelly employees and other temporary help was intended to erode the bargaining unit and, hence, was discriminatory in violation of Section 8(a)(3) of the Act. Respondents assert there is absolutely no evidence of discriminatory motivation. I find the General Counsel's claim supported by substantial record evidence and reasonable inferences which may be made from it.

First, the credited testimony of employee D. Young reflects that, during the Union's organizing drive, plant manager Sanom said Continental's facility would close if the Union got in. A threat of plant closing, in my judgment, imparts an intent to discriminate, when made contingent upon how employees exercise their Section 7 rights to select a collective-bargaining representative.

Next, whether or not Sanom's threat, concededly not alleged as a violation of Section 8(a)(1), is viewed as an indicator of discriminatory intent, the record contains other elements which I find to be even more cogent and persuasive of such motivation.

These elements evolve from Keatts' testimony. My observation of Reatts' incredulous and confusing of termination of warehouse operations appears in the crediblity section of this decision. That testimony was designed to make it appear that it was the cessation of the warehouse operation which confronted Continental with a perceived need for a flexible work force. Keatts' accounts of the cessation of warehousing operations are varied. I conclude his attempt to connect elimination or reduction of warehouse operations to the procurement of personnel from Kelly do not withstand scrutiny. It appears to be a contrivance for purposes of this litigation. Thus, the record contains three versions by Keatts of the warehouse operation's cessation. First, he acknowledged his affidavit reflects that the operations stopped in September 1982. Next, in an apparent self-contradiction, Reatts admitted his affidavit also contains the statement that Continental was ''completely out of the building (referring to the warehouse) by October 1982.'' Finally, in oral testimony at the hearing, Reatts asserted that the same warehouse had been in use just before the April 1983 election.

If Reatts were credited in his initial assertion that the warehouse operation ended in 1982, then the claimed ''flexibility'' was ostensibly present at least some months before the Union's campaign. If Reatts were credited in his later assertion that not all warehouse operations had ceased, even at the hearing date, then the claim the need for ''flexibility'' occurred at the time of the Board election is dubious. Viewed in this posture, I conclude that the totality of Reatts' account of warehouse operations reflects Continental falsely asserted that the acquisition of Kelly employees was attributable to the termination or reduction of warehouse operations.

A finding of unlawful discriminatory motivation ''is augmented (when) the explanation of the . . . (events) . . . offered by the Respondent (does) not stand up under scrutiny. *NLRB v. Bird Machine Co.*, 161 F.2d 589, 592 (1st Cir. 1947). If a trier of fact . . . finds that the stated motive . . . is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference.'' *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

In the instant case, there is evidence which tends to reinforce the making of the inference of unlawful motivation. That evidence consists of two events which undeniably occurred in chronological tandem. Those events are (1) the Union's election victory, and (2) Continental's contact with Kelly to arrange for temporary personnel. In all the instant circumstances, I find the timing of Continental's contact with Kelly more than a mere fortuitous coincidence with the election results. In so concluding, I am mindful that 18 unit employees quit their jobs at Continental shortly after the election. I find that fact serves to support the inference which I make. It is not speculation that, given the falsity of the claimed reliance on cessation of warehouse operations, Continental would have sought to replace the resigned employees with other permanent personnel. I simply cannot credit Continental's assertions that it needed to reduce costs by hiring only temporary help because of the loss of business from Automotive Armature. I consider that claim disengenuous under the circumstances. Continental and Automotive Armature operated with interlocking officers. Continental, itself, admitted that the loss of the Automotive Armature account was directly attributable to the Union's election victory. Standing alone, the sudden loss of business arguably presents only suspicious circumstances. However, when considered in the backdrop of all other credible and undeniable circumstances; especially in the context of interlocking officers between vendor and customer, I conclude the loss of Automotive Armature's business was a link in a chain of events designed as a subterfuge to mask Continental's true motivation in seeking personnel from Kelly.

Upon the foregoing, I find the record supports the conclusion that it was the employee' selection of a collective-bargaining representative, and not a warehouse closing or customer loss which caused Continental to procure temporary help from Kelly. In the surrounding circumstances, such a reason is clearly discriminatory. It follows that the failure to bargain over the working conditions of Kelly and other temporary employees was in further retaliation for the employees' selection of their collective-bargaining representative. Accordingly, I further find that such refusal to bargain was intended to erode the bargaining unit and in violation of Section 8(a)(3) and (1) of the Act.[23]

[22] If my analysis of *Alaska Roughnecks* is deemed imprudent, this would not affect by conclusions because, though I accord deference to the Ninth Circuit's opinion, I am bound to follow the Board's construction of the Act.

[23] In so concluding, I reject General Counsel's alternative theory that Respondents' conduct was inherently discriminatory within the rule of *Great Dane Trailers*, 388 U.S. 26 (1967). If General Counsel's inherently discriminatory'' theory prevailed on the instant facts, virtually every violation under Sec. 8(a) of the Act would be inherently discriminatory. To apply *Great Dane* there must be more pervasive evidence than exists herein.

(b) Refusal of information

General Counsel contends Respondents unlawfully refused to bargain by the failure to comply with legitimate requests for information in two respects: (1) by withholding wage and seniority data, and (2) by refusing to provide the Union with access to Continental's financial records. Respondents generally claim there was no obligation to furnish the requested information and, further, that Kelly complied with information requests within a reasonable time after demand was made upon it.

The information requegted falls into two categories. Thus, the wages, and seniority data are within matters considered by the Board and courts as presumptively relevant. The production of financial records raises different elements of proof. Each category is analyzed below.

(1) Wage and seniority data

The evidence shows the Union initiated a request for wage rates paid to Kelly employees in late October 1983. During the first bargaining session, the Union asked Continental for rates of pay, dates of hire, job classifications, and description of the work the employees performed. The Union's November 7 letter essentially repeated the former requests.

During the December 13 meeting, Continental responded by claiming Kelly employees were temporary, but did not provide the names of those employees or their wage rates, seniority dates or job classifications because of Morris' claim the Kelly employees were not part of the bargaining unit and Continental had no duty to provide the requested information. The Union persisted in its requests. Finally, during the January 25, 1984 meeting, Continental presented the Union with the first list entitled ''All employees presently working at Continental Winding Co.'' That list contained only employees' names. No other information was provlded prior to issuance of the complaint. The second list of employees provided on April 13 was more complete. It bore the names of the employees working at Continental's facility, their status (full time, part time, or temporary), pay rate and job classification.

Information, such as wage data, classification and seniority, is ''so intrinsic to the core of the . . . (employment) . . . relationships that it is considered presumptively relevant.'' *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 871 fn. 5 (9th Cir. 1977), and cases there cited. It is not necessary that the Union demonstrate the relevancy of such information. *Abbey Medical/Abbey Rents, Inc.*, 264 NLRB 969 (1982).

Inasmuch as I have found Kelly employees includable in the certified bargaining unit, I conclude the various requests for wage and related data were for information presumptively relevant to the Union's performance of its collective-bargaining obligations. An employer's duty to bargain in good faith includes the obligation to provide information that is needed by the bargaining representative for the proper performance of its bargaining duties. *NLRB v. Truitt Mfg., Co.*, 351 U.S. 149 (1956). In this case, several requests over a period of 7 months were required to obtain delivery of the information. Collective bargaining was stymied as a result. It is noted that on April 13, after the instant hearing opened, Continental gave the Union a list which contained substantially all the requested wage and seniority information. Similarly, Kelly separately delivered information which Warren asserted, the hearing, apparently satisfied the Union's request.[24] These events, however do not include the issue.

The ultimate issue regarding the Union's requests for wage, seniority, and related, information is whether that information was provided in a timely manner. Generally, an employer must make relevant and necessary information available in a manner not so burdensome or time-consuming as to impede the process of bargaining.'' *Cincinnati Steel Castings Co.*, 86 NLRB 592, 593 (1949); *Abercrombie & Fitch Co.*, 206 NLRB 464, 466 (1973). Thus, an employer must provide such requested information within a reasonable time. *International Credit Service*, 240 NLRB 715, 719 (1979); *Keystone Casing Supply*, 196 NLRB 920 (1972).

Herein, the inquiry is whether the duration of delay in information delivery was unreasonable. This is a factual question to be resolved on the circumstances of each case. *Harowe Servo Controls, Inc.*, 250 NLRB 958, 959 (1980). In *R & R Transportation Corp.*, 254 NLRB 722 (1981), several months elapsed; in *Keystone Casing*, supra, 3 months elapsed; and in *Crispo Cake Cone Co.*, 190 NLRB 352 (1971), 4 months elapsed, between requests and delivery. In each of these cases, the Board found production of the information was untimely.

Herein, both Continental and Kelly provided their information to the Union after the hearing opened. In each case, a period of at least 7 months passed between initial request[25] and delivery. I find this delay, standing alone, unquestionably impeded and frustrated the bargaining process. At the very least, the Union was deprived of even knowing who was considered in the bargaining unit; and the absence of wage data certainly was a deterrent to the Union making intelligent and informed economic proposals.

Upon the foregoing, I am persuaded that, on the facts of this case, the failure and refusal to furnish the requested wage, seniority, and related, data in a timely manner constituted breach of Respondents' duty to furnish information, and thereby violated Section 8(a)(5) and (1) of the Act.

(2) The financial records

In *Truitt*, supra, the Supreme Court established the duty of an employer to furnish financial records upon demand of the collective-bargaining representative of its employees in situations where the employer makes such data relevant by claiming it is financially unable to meet the Union's economic demands. . . . when the employer itself puts profitability in contention—as by asserting an inability to pay an increase in wages—the information to substantiate the employer's position has to be disclosed. *Teleprompter Corp. v. NLRB*, 570 F.2d 4, 9 (1st Cir. 1977).

The Board in *Taylor Foundry Co.*, 141 NLRB 765 (1963), enfd. per curiam 338 F.2d 1003 (5th Cir. 1974), expressly adopted the *Truitt* principle when it held that application of *Truitt* to an employer's claim of financial inability to pay union economic demands imposed a duty upon such employer to comply with the Union's request for production of

[24] Warren said he sought no further information from Kelly.

[25] Because of its status as a joint employer, I conclude that the Union's initial request for information made of Continental constitutes an initial request upon Kelly.

the Employer's relevant financial records. See also *Hiney Printing Co.*, 262 NLRB 157, 162–163 (1982).

The rationale for the *Truitt* obligation is clear. There needs to be an inherent responsibility laid upon the participants to bargaining to prove the accuracy of their critical assertions. Such procedure will provide the greatest assurance that bargaining claims are honest. That honesty is an essential ingredient of good-faith bargaining.

Inasmuch as financial information is not presumptively relevant, a threshold question is presented herein. Did the employer's position, as presented by Morris, amount to a plea that it was unable to pay the Union's economic demands? The answer to this question must be derived by analysis of the totality of circumstances during negotiations. If the positions taken by Respondent are equivalent to a claim of financial inability to pay, then Respondent should have acceded to the Union's request to examine the financial records. If, on the other hand, the facts reflect that Morris merely was asserting Respondent's unwillingness to pay (as Respondent contends), then Respondent was under no obligation to produce financial records for the Union's examination. *S-B Mfg. Co.*, 270 NLRB 485 fn. 2 (1984).

Herein, I find a pervasive theme which leads to the conclusion that Respondent was consistently, and persistently, pleading inability to pay the Union's economic demands.

It is true, as Respondent contends, that Morris expressly denied throughout the negotiations that Respondent was not claiming inability to pay. All statements Morris made in this connection consistently referred to Respondent's desire to remain competitive. Thus, if taken literally, Morris had not claimed an inability to pay.

Nonetheless, Morris' self-serving declarations are contrary to other aspects of vocalization of Respondent's position. I rely upon the following factors which, in their totality, establish the true meaning of Morris' words. In chronological order, the persuasive factors are:

(a) During the campaign, Sanom said Continental could not afford to keep the doors open, when he made the threat to close the shop.

(b) During the October meeting between Reatts and Warren, Reatts commented there was no money in the business.

(c) Reatts told Warren that Continental was saving money by using Kelly employees, immediately after Warren learned that Kelly employees were working in unit job.

(d) Morris at the November 2 bargaining session:

(1) told Warren that Continental was saving money by using Kelly employees;

(2) told Warren that Continental was having difficulty competing and lost 50 percent of its business;

(3) said Reatts had not drawn money from Continental for over 3 years;

(4) said Continental had been losing money for the past 3 years;

(5) said Continental was ''in the red'' for the current year;

(6) told Warren that Reatts obtained a personal loan so Continental could meet its payroll and other financial obligations;

(7) complained that Continental's expenses, including workers' compensation, rose substantially in the past year;

(8) told Warren that Continental expected a $60,000 loss by year's end; and

(9) told Warren that other members of the employer association of which Continental was a member had gone broke after being unionized.

(e) On December 13, Morris told Warren that there was no money in Continental and that the Union could not ''squeeze blood from a turnip.''

(f) On January 10, 1984, Morris again told Warren that Continental was losing money and was having difficulty competing.

Viewed conjunctively, I conclude, these factors depict an employer who was so financially distressed that it had to operate using its president's personal funds, could not afford to pay its chief operating official, was currently losing money, and was preoccupied with the fear that unionization would financially bankrupt it, as occurred with other members of its employer association similarly situated.

In the above context, I cannot accept Morris' efforts to claim that Respondent only was unwilling to meet any economic demands of the Union. A similar contention was rejected by the Board in *Stockton District Ridney Bean Growers*, 165 NLRB 223 (1967). There the Employer contended it was in ''no mood'' to grant economic concessions. Similarly, and in a ''can't afford'' formulation, the Board decided the surrounding factual context showed its true meaning was an expression of inability to pay. See *Latimer Bros.*, 242 NLRB 50 (1979).

In sum, I conclude the preponderance of evidence shows that Respondent had, in effect, pleaded an inability to pay the Union's economic demands and that the Union's requests for examination of financial records was based upon its need to verify the accuracy of these bargaining assertions. Accordingly, I find Respondent refused to bargain in violation of Section 8(a)(5) and (1) of the Act by refusing to grant the Union's request for production and examination of Continental's financial records.

On the basis of the above findings of fact and on the entire record in the case, I make the following

CONCLUSIONS OF LAW

1. Continental is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Kelly is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Union (the International and Local) is a labor organization within the meaning of Section 2(5) of the Act.

4. In the circumstances of this case, Continental and Kelly are a joint employer within the meaning of the Act.

5. All full-time and regular part-time general laborers employed by Continental at its facility located at 15890 Common Road, Roseville, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act.

6. At all material times, the Kelly employees, and other temporary help used by Continental to perform bargaining unit work at Continental's Roseville, Michigan facility are includable, as regular part-time employees, within the unit found appropriate above.

7. By failing to bargain over terms and conditions of employment of Kelly employees and other temporary help doing bargaining unit work at Continental's Roseville, Michi-

gan facility, Respondent refused to bargain in violation of Section 8(a)(5) and (1) of the Act.

8. By refusing and failing to timely provide information relevant and necessary to the performance of the Union's collective-bargaining obligations, Respondent refused to bargain in violation of Section 8(a)(5) and (1) of the Act.

9. By refusing and failing to provide Continental's financial records for examination by the Union, Respondent refused to bargain in violation of Section 8(a)(5) and (1) of the Act.

10. The use of temporary help to perform bargaining unit work, and then the refusal to consider them within the certified unit was done with an intent to erode the bargaining unit, and was discriminatory in violation of Section 8(a)(3) and (1) of the Act.

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

THE REMEDY

Having found that the Respondents violated Section 8(a)(5), (3), and (1) of the Act they shall be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy the various refusal-to-bargain violations, the order shall require Continental and Kelly,[26] as joint employers, to:

1. Bargain collectively, upon the Union's request, with the Union over the wages, hours, and other terms and conditions of employment of all employees described in the Board's certification, in addition to all temporary help who perform bargaining unit work on a regular part-time basis at Continental's Roseville, Michigan facility and, if agreements are reached, reduce them to writing and sign them;[27]

2. Provide the Union at its request, in a timely manner, with all information, including Continental's material financial books and records, which is relevant and necessary to the Union's performance of its obligations as collective-bargaining representative of the employees in the unit found appropriate herein.

In order to prevent the discriminatory erosion of the bargaining unit, Respondent shall be ordered to cease using temporary help to perform bargaining unit work in order to avoid its collective-bargaining obligations.

Further, Respondent shall be ordered to post an appropriate notice.

Finally, Respondent shall be ordered to refrain from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

[Recommended Order omitted from publication.]

[26] Although Continental and Kelly terminated their relationship in late April 1984, my recommended remedy will run toward both employers to assure that the unfair labor practices will be fully corrected in the event Continental and Kelly resume similar arrangements in the future.

[27] The inclusion of ''all temporary help who perform bargaining unit work on a regular part-time basis'' is consistent with Conclusion of Law 6. This part of the order is not intended to alter the unit description of the Board's certification (see Conclusion of Law 5).

In other circumstances, it would be appropriate for me to more explicitly define the term ''regular part-time.'' However, I have earlier noted the paucity of evidence with respect to the frequency and hours of work of the so-called temporary personnel. Thus, on the state of this record, I am unable to set forth a precise definition or formula of what comprises ''regular part-time.''

In these circumstances, that term can be given meaning, in the future, by either of two methods (1) mutual agreement reached by the parties through collective bargaining; or (2) litigation of that issue in the compliance phase of this case.