278 NLRB No. 91 (N.L.R.B.), 278 NLRB 601, 123 L.R.R.M. (BNA) 1040, 1985-86 NLRB Dec. P 17750, 1986 WL 54168

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

McAllister Brothers Inc. And Outreach Marine Corporation, Alter Egos
And
Seafarers International Union Of North America, Atlantic, Gulf, Lakes And Inland Waters District; Seafarers International Union Of North America, AFL-CIO

Case 5-CA-16495
February 18, 1986

DECISION AND ORDER

**1 BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 22 April 1985 Administrative Law Judge Marvin Roth issued the attached decision. All parties filed exceptions and supporting briefs. Respondent Outreach Marine Corporation, the General Counsel, and the Charging Party also filed answering briefs.

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 [1] and has decided to affirm the judge's rulings, findings, [2] and conclusions [3] as modified and to adopt the recommended Order.

The judge properly found McAllister and Outreach to be alter egos and a single employer. [4] Thus he concluded, and we agree, that the Respondents violated Section 8(a)(5) and (1) of the Act by failing to abide by the terms and conditions of employment established by the collective-bargaining contracts between McAllister and the Union. In setting forth his Conclusions of Law, however, the judge found as the appropriate bargaining units the units unlawfully altered by Respondent Outreach rather than the units described in the contracts. We disagree with that finding, and find instead that the appropriate units should be those set forth in McAllister's contracts with the Union. Therefore, we shall amend the judge's Conclusions of Law.

Amended Conclusions of Law

Substitute the following for Conclusion of Law 3.

"3. The following units constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:
Unit I

All tugboat Captains, Mates and Engineers employed by Respondents in connection with towing in and from the Baltimore Harbor, including inland waters.

Unit II

All unlicensed tugboat personnel employed by Respondents in connection with towing in and from the Baltimore Harbor, including inland waters."

***602** ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, McAllister Brothers, Inc. and Outreach Marine Corporation, alter egos, Baltimore, Maryland, their officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

****2** 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 discourage membership in Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District; Seafarers International Union of North America, AFL-CIO (SIU), or any other labor organization, by discharging employees in order to avoid our collective-bargaining obligations, failing or refusing to reinstate or recall employees to work in accordance with their contractual seniority rights, failing to maintain terms and conditions of employment as provided in our collective-bargaining contracts, or in any other manner discriminating against you with regard to your hire or tenure of employment or any term or condition of employment.

WE WILL NOT fail or refuse to recognize and bargain collectively and in good faith with SIU as the exclusive representative of our employees in the following appropriate units:
Unit I

All tugboat Captains, Mates and Engineers employed by us in connection with towing in and from the Baltimore Harbor, including inland waters.

Unit II

All unlicensed tugboat personnel employed by us in connection with towing in and from the Baltimore Harbor, including inland waters.

WE WILL NOT fail or refuse to honor collective-bargaining agreements applicable to the unit employees.

WE WILL NOT unilaterally change the wages, hours, and other terms and conditions of employment of the unit employees without prior notice to SIU and without affording SIU an opportunity to meet and bargain concerning such matters as such representative, or bypass SIU and deal directly with unit employees concerning changes in wages or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL offer Ralph Kirchner, Charles Rogers, Louis Canavino, Jerome Lukowski, Leon Mach Sr., Peter Messina, Alvin Hirsch, Manuel Alvarez, Joseph Zorbach Jr., Joseph Rakowski, Paul Pusloskie, Robert Machlinski, Ronald Neibert, and Robert Henninger immediate and full reinstatement to their former jobs or if, for lawful reasons, such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights, privileges, and benefits previously enjoyed.

WE WILL offer Steven Hardin, Charles Dougherty, Robert Schwatka, James Perry, George Lemaire, William Miller, William Bobac, Karl Dlabich, Raymond Kuta, Steve August, Larry Neibert, and Norman Gifford employment in accordance with their seniority rights, without prejudice to their seniority or other rights, privileges, and benefits previously enjoyed, displacing, if necessary, employees hired by us with less or no seniority rights.

WE WILL make whole the above-named employees for losses they suffered by reason of our unlawful failure and refusal to employ them in accordance with their seniority and other rights under the SIU contracts, including loss of docking pilot fees, all with interest.

****3** WE WILL make whole former McAllister employees employed at Outreach Marine Corporation for the difference between the contract terms and what they were actually paid, to the extent that they had sufficient seniority to be employed if the seniority provisions of the McAllister contracts had been followed, with interest.

WE WILL maintain and give full effect to the collective-bargaining contracts covering the unit employees which were effective by their terms through September 30, 1984, and from year to year thereafter until terminated upon proper notice, unless and until we and SIU negotiate a new agreement or agreements or we bargain in good faith to an impasse in accordance with the Act; including but not limited to the following:
Paying wages and overtime pay and maintaining crew sizes as required by the contracts.

Making the contractually established payments to the various trust funds established by ***603** the contracts on behalf of all employees who were entitled to employment.

Reimbursing those employees for any expenses ensuing from our failure to make such contributions, specifically: any medical or dental bills they have paid to health care providers that the contractual policies would have covered; any premiums they may have paid to third party insurance companies to continue medical and dental coverage in the absence of our required contributions; and contributions they may have made for the maintenance of the contractual trust funds after we unlawfully discontinued or failed to make contributions to those funds, all with interest, and

Reimbursing SIU for any loss of dues caused by our failure to deduct dues pursuant to checkoff authorizations and remitting same to SIU as required by contract, with interest.
MCALLISTER BROTHERS INC. AND OUTREACH MARINE CORPORATION, ALTER EGOS

Mark Carissimi, Esq., for the General Counsel.
Henry P. Baer, Esq., of New York, New York, for Respondent McAllister Brothers, Inc.
Jerald J. Oppel, Esq., and *Roeann Nichols, Esq.*, of Baltimore, Maryland, for Respondent Outreach Marine Corporation.
James M. Altman, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge.

This case was heard at Baltimore, Maryland, on November 8, 9, 14, 15, and 16, 1984. [1] The charge was filed by Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District; Seafarers International Union of North America, AFL-CIO (the Union) on June 25. The complaint, which issued on August 15 and was amended on August 31, September 12, and October 2 and at the hearing, alleges that McAllister Brothers, Inc. and Outreach Marine Corporation (respectively McAllister and Outreach and collectively Respondents) are alter egos and a single employer within the meaning of the National Labor Relations Act or, in the alternative, that Outreach is a successor to McAllister, and Respondents have violated and are violating Section 8(a)(1), (3), and (5) of the Act. The gravamen of the complaint is that Respondents unlawfully withdrew recognition of the Union as bargaining representative of their employees in two appropriate units, bypassed the Union and dealt directly with their employees, unilaterally reduced employees' wages, crew sizes, vacation benefits, eliminated overtime pay, and failed to recall employees in accordance with seniority, all in violation of McAllister's contracts with the Union and refused to abide by those contracts, that Outreach refused to recognize and bargain with the Union as the representative of its employees in the appropriate unit, and that McAllister discriminatorily refused to rehire 27 of those employeees. Respondents' by their respective answers deny the commission of the alleged unfair labor practices.

**4 All parties were afforded full opportunity to participate, to present relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. On the entire record in this case, [2] and from my observation of the demeanor of the witnesses and having considered the briefs submitted by the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENTS

McAllister, a Maryland corporation with an office located in Baltimore, Maryland, was engaged at least until April 13, 1984, in the provision of tugboat services in the Baltimore Harbor and surrounding area. In the course of its business McAllister annually performs services valued in excess of $50,000 directly to customers located outside of Maryland. Since April 14, 1984, Outreach, a Maryland corporation with its principal office located in Baltimore, has been engaged in the provision of tugboat services in the Baltimore Habor and surrounding area. During the first year of its operations, Outreach performed services valued in excess of $50,000 to customers engaged in commerce. Without reaching the question of their relationship to each other, I find as admitted by the respective Respondents that McAllister and Outreach are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it would effectuate the purposes of the Act for the Board to assert its jurisdiction in this case.

II. THE LABOR ORGANIZATION AND BARGAINING UNITS INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act. It is undisputed that from January 1980, until April 14, 1984, the Union was the recognized exclusive collective-bargaining representative of McAllister's tugboat personnel in the following units:
Unit I

All tugboat Captains, Mates and Engineers employed by McAllister in connection with towing in and from the Baltimore Harbor, including inland waters.

***604** *Unit II*

All unlicensed tugboat personnel employed by McAllister in connection with towing in and from the Baltimore Harbor, including inland waters.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. The operations of McAllister prior to April 14, 1984

McAllister is a wholly owned subsidiary of McAllister Towing and Transportation Company, Inc. (McAllister Transportation) a long-established firm which has been engaged, directly or through its corporate subsidiaries, in various business operations in or related to the maritime industry, including the operation of tugboats. Anthony McAllister, Brian McAllister, and William Kallop are the sole shareholders of McAllister Transportation. McAllister Transportation's principal competitor is Moran Towing and Transportation (Moran), also an old established firm, which operates tugboats in Baltimore Harbor through its corporate subsidiary, Curtis Bay Towing. Moran operates tugboats in four major ports of Eastern United States: New York, Philadelphia, Baltimore, and Norfolk. Prior to 1960 McAllister Transportation operated in only three of these ports: New York, Philadelphia, and Norfolk. This fact placed McAllister Transportation at a competitive disadvantage, because its customers (shipowners and their agents) preferred to have a single towing contract which would cover all four ports. Therefore, in 1960 McAllister Transportation negotiated an arrangement with Baker-Whitely Towing Company (Baker-Whitely), which operated tugboats in Baltimore Harbor, whereby McAllister Transportation referred its Baltimore business to Baker-Whitely and Baker-Whitely referred other business to McAllister firms. Since 1957 Baker-Whitely's tugboat personnel were represented by the Union and covered by a series of contracts covering the licensed and unlicensed personnel. McAllister's tugboat personnel in New York, Philadelphia, and Norfolk were and still are also represented by the Union.

2. McAllister's economic problems, and its efforts to solve those problems within the framework of its existing collective-bargaining contracts

****5** In 1979 Baker-Whitely decided to sell its Baltimore operation. In January 1980, McAllister reluctantly purchased the business in order to protect its competitive position vis-a-vis Moran, and thereupon directly engaged in the business of operating tugboats in Baltimore Harbor. McAllister substantially retained Baker-Whitely's personnel complement (with subsequent changes at the executive level), recognized the Union as bargaining representative, voluntarily assumed Baker-Whitely's collective-bargaining contracts, and in 1981 negotiated and executed new contracts with the Union covering the licensed and unlicensed units respectively, effective by their terms from October 1, 1981, through September 30, 1984. McAllister conducted the negotiations jointly with Curtis Bay Towing (similar joint negotiations were conducted with Moran or its subsidiaries in other ports). The resulting contracts in Baltimore were similar and substantially equal with regard to economic matters, although they differed in some respects. When McAllister commenced its Baltimore operation, Curtis Bay Towing controlled about 80 percent of the tugboat business in Baltimore Harbor, and McAllister assumed the remaining 20 percent which had been performed by Baker-Whitely (substantially for McAllister's customers). McAllister hoped to increase its share of the Harbor business to 45 percent, but this hope proved to be overly optimistic. McAllister increased its share to 30 percent, but was unable to progress beyond that point. McAllister never seriously expected Baltimore to be a profitable operation. Rather, as indicated McAllister sought to maintain a presence in Baltimore, breaking even or sustaining a tolerable loss, in order to

offer 4-port service to its customers and thereby generally advance the business interests of McAllister Transportation and its subsidiaries. However, in 1981 McAllister lost $250,000 from its Baltimore operation and its losses increased in 1982 and 1983. By the fall of 1983 McAllister projected an annual loss of $750,000. In the meantime McAllister embarked on a threefold effort to reduce its annual deficit to a tolerable level of $250,000 or less. McAllister sought to attain this goal by (1) cutting expenses, (2) increasing revenue, and (3) increasing rates. McAllister Transportation and its subsidiaries, including McAllister, economized by freezing wages and salaries not governed by union contract, reducing its office staff and otherwise reducing office expenses, and refraining from hiring new nonessential personnel. However, McAllister was limited in the extent to which it could economize by laying off or limiting utilization of unit personnel, because crew sizes and working hours (including a guaranteed workweek) were governed by the union contracts. Consequently McAllister could not economize in this manner without reducing its operations, which would be self-defeating. McAllister's Baltimore operation substantially consisted of the docking and undocking of ships. McAllister considered expanding its operations into other work, such as towing of barges, but concluded that its costs and expense structure precluded any possibility that it could successfully compete for such work. Labor costs accounted for about 5 percent of those costs. As Anthony McAllister admitted in his testimony, the tugboat business is "labor intensive." Other possibilities such as dredging or salvage work provided few opportunities. McAllister made a strong sales effort, but was unable to increase the volume of its docking and undocking work to a desirable level. As for increasing rates, McAllister's one effort in this direction proved nearly disastrous. Curtis Bay Towing, as the big operator in Baltimore, normally set the pattern for towing rates. Prior to October 1 of each year, i.e., with the effective date of new labor contracs or annual wage increases under the contracts, Curtis Bay Towing would publish its tariff, i.e., schedule of rates and terms for the Port of Baltimore. McAllister then published its tariff, which normally approximated the rates offered by Curtis Bay. In 1983 McAllister attempted to set the pattern. On August 29 McAllister published a tariff which utilized a ***605** net tonnage rate rather than the "surcharge rate" previously used, and which would have substantially increased the charges to McAllister's customers. McAllister explained to its customers that this increase was primarily needed to cover the cost of wage and fringe benefits in the third year of its labor contracts. Curtis Bay failed to follow suit. Because of its larger volume of business, Curtis Bay was in a better position than McAllister to absorb the costs of its labor contracts. Curtis Bay published a tariff which increased rates by only 6 percent. Confronted with the spectre of losing its customers, McAllister rescinded its prior action and published a revised tariff which approximated that of Curtis Bay.

B. *McAllister's Efforts to Obtain Relief From the Union and the Unit Employees*

****6** In August 1983 Company President Anthony McAllister and Vice President Donald Stephens, who was general manager for Philadelphia and Baltimore, met with Union Official John Fay for the purpose of finding a "joint solution to the financial problem in Baltimore." Fay suggested that they meet with unit personnel. On October 3 McAllister conducted a meeting of all unit personnel, whether active or on layoff status. McAllister presented an explanation of his Company's financial problem and its unsuccessful efforts to deal with that problem. McAllister distributed a written proposal which provided for a 15-percent wage reduction and waiver of scheduled wage increases, subject to reimbursement and a bonus if and to the extent the Company made a profit by July 31, 1984, and certain changes in work rules. After some argument McAllister told the employees to forget about the work rule changes and just consider the wage concessions. McAllister proposed that the Union could examine the Company's books. He asserted: "I know where to attack the problem. I know where to go for assistance, and that's why I'm here today."[3] McAllister added that the Company needed "relief" in the area of wages, and could not afford to pay as much as Curtis Bay Towing. In McAllister's words:

> Curtis Bay has been hit harder than we have, but that's probably just due to traffic. But if they are getting down to a level where they are probably—I mean they are doing 2000 ships a year versus our 900. When you have that disparity, there is no way we can pay our rates and your rates to us are 50-percent of our costs

> —it is actually 52 point something. There is just no way that we can sustain that, in the long run, unless there is something happening in the port that we are totally unaware of. [4]

The Union's accountants subsequently examined McAllister's books, and certified that the figures were compiled in a proper manner. On October 17 McAllister again met with employees, at which time the employees were given an opportunity to ask questions, McAllister subsequently learned that the employees would not agree to the October 3 proposal, but instead intended to propose to make a loan to the Company. On November 21 General Manager Stephens, acting as a spokesman for McAllister, met with the employees. Stephens rejected the loan proposal, saying that it would be like "prolonging the agony." Instead the Company proposed an employee stock option plan whereby the employees would purchase the Baltimore operation. Specifically, the Company proposed to sell the tugboats which it contemplated would be used in the Baltimore operation (*America, Brittania, Holland*, and *Resolute*) for their aggregate market value of $1.9 million, that McAllister would act as sales representative for the employees, who would pay a fee for its services, and McAllister would use its best efforts to retain a $3-million annual volume of business. As will be discussed, McAllister's proposal was substantially similar to the transaction which McAllister eventually made with Outreach, although the employees were offered slightly more favorable terms. [5] Stephens told the employees that the Company needed an answer by January 15, and that if the employees did not buy, the Company would look for another buyer.

****7** The next and final meeting between the Company and its tugboat personnel took place on January 16. In the interim the Company learned that the employees could not agree on buying the business. Stephens, acting as Company spokesman, told the employees that McAllister wanted to remain in business in Baltimore, but was still operating at a deficit, and therefore would go into the market and make the same offer as McAllister had made to the employees. Stephens added that if the Company found a purchaser, he would talk to the employees. In fact, as Stephens knew, McAllister had already found a purchaser.

C. *McAllister's Negotiations with Alcide Mann, and the Sale of Tugboats to Outreach*

Alcide Mann was a former McAllister employee who progressed through the ranks to become general manager at Philadelphia until 1977, when he left to work for another firm in the maritime industry. Mann had extensive managerial experience in various facets of the maritime ***606** industry, including sales promotion; was familiar with tugboat operations and the operations of McAllister; and was well qualified by reason of his training, experience, and knowledge to manage a business such as McAllister's Baltimore operation. He had never been an owner of a business, however, and, as will be discussed, he lacked either the resources or the inclination to invest his own money in a business. In 1983 Mann was employed by a maritime firm in Florida. In October Mann, on behalf of his employer, contacted Anthony McAllister concerning a business matter. McAllister asked Mann if he knew of a buyer for the Baltimore tugboats. Mann initially "shrugged off" the inquiry. However about November 1 McAllister again contacted Mann, this time suggesting Mann as the purchaser. McAllister complained that his labor costs were high, and he could not get concessions from the employees. Mann was initially reluctant, but requested financial information, including actual and projected income and expense figures. On November 14 McAllister forwarded the requested information to Mann. McAllister did not send copies of the union contracts to Mann. Mann already had copies of those contracts, and by reason of his current job responsibilities was required to be familiar with union contracts in the maritime industry. On the Sunday following Thanksgiving, Anthony McAllister and Mann had their "first serious discussions" (Mann's words) concerning the proposed sale. [6]

Alcide Mann testified that after receiving the financial information he analyzed that information and made projections as to how he could run the Baltimore operation at a profit. In mid-December, McAllister forwarded additional information consisting of

engine reports and dispatchers' schedule sheets. In late December Mann met in New York City with three McAllister officials (Anthony McAllister, Vice President Stephens, and Vice President for Sales Jack McCormick) to discuss the proposed sale. The meeting lasted 4 to 6 hours. Mann testified that they discussed their specific interests and concerns at this meeting, but that no agreement was reached at this time. However, in light of the sequence of events described above, events subsequent to the December meeting, and admissions by McAllister and Mann in their testimony, it is evident that McAllister and Mann reached at least substantial agreement on the terms of a sale; that such terms were substantially as contemplated and proposed by McAllister; and that the parties thereafter proceeded in accordance with the premise that Mann would soon be taking over the Baltimore operations. [7] There was never any question that McAllister would sell the *America, Brittania, Holland*, and *Resolute* for their aggregate market value of $1.9 million, of which $1.4 million would be financed by a bank loan and the balance by McAllister, and that the purchaser would enter into a sales and service agreement with McAllister. Mann candidly admitted that he would not have purchased the tugs without a sales and service contract because the tugs were usable only for harbor work, principally the docking and undocking of ships, for which he neded customers, i.e., McAllister's customers. By letter dated January 2 to Anthony McAllister, Mann outlined in detail the provisions of a proposed "sales ... and consulting agreement." Mann added that "my notes on the labor agreement ... will follow in a day or two." He proposed "Outreach Marine Corporation" as the name of the business. Mann testified that by January 2 the "major outlines were in place" and that his letter was the "first written expression of a possible agreement." It is evident from these admissions that the January 2 letter did not represent an original proposal by Mann. Rather the letter was a fleshed out draft of Mann's understanding of the sales and service arrangement agreed on at his meeting with McAllister in December. On January 13 Mann incorporated Outreach. By letter dated January 17, Mann informed Nicholas Gumbrecht of the National Westminister Bank (Westminister) that he had formed Outreach to purchase and operate the tugs, and "will obtain a five year renewable agency contract with McAllister to perform work for their contracted customers." Mann stated that "we have reached an agreement with McAllister, and do not anticipate any serious difficulties," and that he anticipated starting operations by March 1. Mann added that he was looking forward to applying for loans to Westminister. McAllister had a continuing business relationship with Westminister, and Anthony McAllister referred Mann to Gumbrecht about the time of their December meeting. Mann replied to Westminister for the loan and Westminister issued a loan commitment letter on March 1. [8] On February 7 McAllister loaned Mann ***607** $20,000. McAllister loaned Mann an additional $2500 on March 27 and $20,000 on April 6, totaling $42,500, all before Outreach commenced operations and all without interest. On March 1 Mann hired his first employee (Ray Jankowiak) and placed him on Outreach's payroll. These actions would not have taken place in early 1984 if Mann and McAllister did not already know by the beginning of 1984 that Mann would be taking over the Baltimore operation. The loans totaling $42,500 from McAllister to Mann were designed to provide Outreach with $32,500 in startup funds, and to compensate Mann for his initial capitalization of Outreach in the amount of $10,000 on January 24. As a result of these loans, coupled with 100-percent financing of the sale by Westminister and Outreach and a credit agreement between McAllister and Outreach (which will be discussed), Mann never had to invest 1 cent of his money in the Baltimore operation.

****8** The sale and concurent financing were consummated on April 13, and Outreach commenced operating the tugboats in Baltimore Harbor the next day, without any break in service. According to Mann, the original target date was March 1, but the closing date was continually delayed because of protracted negotiations between the parties and their attorneys, centering on the service and sales agreement, which at times threatened to wreck the entire transaction. Mann testified that there were 13 or 14 drafts of that agreement, that he and McAllister reached general agreement after the first 4 or 5, but then the lawyers got involved. In fact, although there was a profusion of paperwork befitting a transaction of this size (principally for the benefit of Westminister), and nitpicking (Mann's description) over minor matters such as whether New York or Maryland law should govern, the end result substantially reflected McAllister's concept as originated in the fall of 1983 and proposed to the employees and Mann. Some changes were imposed by Westminister, e.g., that the bank wanted the initial term of the sales and service agreement to be 7 instead of 5 years, in order to be concurrent with the duration of its loan. At the present hearing, Outreach counsel went through a section-by-section review of the agreement with Mann in order to determine which matters were the subject of significant negotiation or disagreement between Mann and McAllister. In light of Mann's testimony, it is evident

that there were few areas of disagreement and no area in which McAllister made any significant concession. Mann's testimony concerning one such alleged area of disagreement was demonstrably false. According to Mann, paragraph 2:4 of the agreement, providing for the use of a tugboat of the *Grace McAllister*, class by Outreach for the benefit of McAllister's customers, was a "major item" because Mann did not want to buy the *Grace McAllister*, as it was too expensive to maintain, whereas McAllister feared that it would lose substantial business if that type of boat was not in the harbor. In fact, McAllister had already reached the same conclusion as Mann, and did not contemplate selling the *Grace McAllister* for use in Baltimore Harbor. (McAllister so informed the employees in November.) The market value of the *Grace McAllister* was $1.8 million, almost as much as the total value of the four tugboats which were sold. McAllister Vice President Stephens testified that McAllister did not offer to sell the *Grace McAllister* to Mann because business in Baltimore did not justify the expense of maintaining it, and therefore McAllister transferred that boat to Norfolk. As a result of McAllister's decision, McAllister, and consequently Outreach, lost its biggest customer (Atlantic Container Line) which was not satisfied with the power of the other boats.

As indicated, McAllister sold the *America, Brittania, Holland*, and *Resolute* for $1.9 million to Outreach: $1.4 million of the purchase price was financed by a loan from Westminister, repayment of which was secured by a promissory note and first preferred fleet mortgage. As required by Westminister, repayment was also guaranteed by McAllister, McAllister Transportation, and the three individual principals of McAllister Transportation, as well as Mann and his wife Audrey, the sole shareholders of Outreach. The note was payable in monthly installments of $25,468.75 over a 7-year period. The remaining $500,000 was financed by a loan from McAllister to Outreach, secured by a promissory note and second preferred fleet mortgage. The note provided for repayment in semiannual installments of $50,000 each plus 10-percent interest over a 5-year period, commencing on April 15, 1986, i.e., 2 years after the sale. In fact, McAllister received none of the money which ostensibly changed hands on April 13. As a condition of releasing the boats from the existing mortgage, Westminister required that the proceeds of its loan be assigned to it as security for repayment of the loan. In sum, notwithstanding its elaborate verbosity, the loan transaction amounted to a paper shuffling device whereby for all practical purposes Westminister substituted one mortgage guaranteed by McAllister for another mortgage guaranteed by McAllister. Westminister actually loaned nothing and McAllister received nothing, at least not from the transaction.

****9** At the time of the sale and loan transactions, McAllister and Outreach executed two documents which basically defined their operational relationship; specifically, a "Tug Service and Sales Representation Agreement, and a Credit Agreement." The service and sales agreement provided in sum as follows: Outreach agree (par. 1:1(A)(B), and (C)) to provide certain tugboat services (assistance to ships, towing of barges, and towing of LASH barges) in the Baltimore Harbor area for McAllister's customers on a "first priority" basis. Outreach further agreed (par. 1:1(D)) to provide such additional tug services "as required by McAllister that are most efficiently served from the port of Baltimore," without geographical limitation, also on a "first priority" basis. Specifically, the agreement required Outreach to provide ***608** such services with the *America, Brittania, Holland*, and *Resolute*, to operate at least two tugs, fully manned, on a 24-hour basis, and to assign its tugs to work booked by McAllister before any other work. However, McAllister cannot unreasonably demand service on short notice when Outreach has given McAllister notice of prior commitments. The agreement (par. 1:2) ostensibly permitted Outreach to independently solicit towing or barge work in six specifically defined categories which did not include docking or undocking of ships in the Baltimore Harbor area. Three of these categories involved work exclusively outside of the Baltimore Harbor area, two (including towing of oil barges) required prior authorization by McAllister if it involved work in the Hampton Roads area, and one (interport towing between Philadelphia and Norfolk) entitled McAllister to a 10-percent commission on any such work performed for customers with whom McAllister has an established relationship or is even soliciting business, regardless of whether McAllister has ever done work for that customer. However, other provisions of the agreement virtually nullified even this limited ostensible autonomy. Specifically, paragraph 3:1 provided that "McAllister should be the exclusive sales agent for Outreach for all Shipwork, Bargework, and LASH Bargework performed pursuant to paragraphs 1:1:(A), (B) and (C),": and that "McAllister is authorized to solicit, on behalf of Outreach, other harbor work as per paragraph 1:1(D)." Paragraph 5:1 further provided that: "Outreach shall not solicit any business covered by paragraphs 1:1:(A), (B) (C) and (D) above without McAllister's prior approval. All business covered by these paragraphs shall be protected to McAllister for a 10% commission on

the net amount of invoices to the customer." The agreement (par. 5:2) further prohibited Outreach from performing tug or towing services within a 50-mile radius of other ports in which McAllister Transportation or its subsidiaries performed operations (New York, Philadelphia, Norfolk, and San Juan), "without prior written agreement of McAllister and then only upon such terms as may be set by McAllister." In view of the broad language of paragraph 1:1(D), covering additional services which McAllister could require Outreach to perform, McAllister could reasonably interpret these provisions as prohibiting Outreach from performing any tugboat service, i.e., any business whatsoever, [9] without McAllister's prior approval and without allowing McAllister the same 10-percent commission which it received for work performed by Outreach for McAllister's customers. Moreover, the agreement prohibited Outreach from replacing or adding tugboats without McAllister's approval, but permitted McAllister to require Outreach to use a tugboat of the *Grace McAllister* class as needed to service McAllister's customers. Therefore, Outreach was effectively precluded from obtaining any significant anount of work in addition to that performed for McAllister's customers, as its limited fleet (smaller than that used by McAllister) had to be available to service McAllister's customers on first priority basis. As will be discussed, this was in fact the result after Outreach commenced operations.

****10** The agreement further required Outreach to provide its services "in a workmanlike manner and of a standard acceptable to McAllister," including timely service, reliable equipment, and trained crews, and performance standards as spelled out in an appendix to the agreement. These performance standards required Outreach among other things to maintain around-the-clock communication with McAllister's local manager, provide McAllister with the home phone numbers of all operating prsonnel and docking pilots, immediately notify McAllister of any incident of damage or tardiness, and to coordinate with McAllister the fulfillment of Outreach's responsibility to "properly oversee their licensed personnel in order to eliminate repeated incidents" of pilot error. Standard was defined as one error per month. [10] The standard on tardiness was defined as not exceeding one-half hour. In sum, McAllister reserved to itself the right and obligation to monitor and control not only the end result of Outreach's operations, but also the manner in which Outreach's licensed personnel carried out those operations. The service and sales agreement further gave McAllister the right to require Outreach to improve its performance to meet the criteria established by their agreement. In the event of a dispute over Outreach's performance, either party could submit the matter to an impartial arbitrator selected by McAllister. If in McAllister's opinion Outreach failed to perform pursuant to the arbitrator's decision, McAllister could terminate the agreement. [11] In such event, Outreach is required to resell the tugs to McAllister without profit or loss to Outreach, i.e., in accordance with a formula under which McAllister would not pay more than the original sale price or less that Outreach's outstanding mortgage obligations.

The agreement further provided that: "In providing services hereunder, McAllister undertakes to offer the services of Outreach's tugs pursuant to the terms of McAllister's tariff." McAllister thereby excluded Outreach from any role in setting rates for work performed for McAllister's customers, which work constituted virtually all of Outreach's business. Thus, Outreach could not increase those rates, nor could it take advantage of its lower labor costs by charging less that Curtis Bay Towing, unless McAllister decided to reduce those rates or refrain from matching Curtis Bay's increases. [12] Consequently, ***609** except to the very limited extent that it could obtain new business, Outreach had no way of increasing its profits or even making a profit, other than by reducing its operating costs and expenses. As previously discussed, McAllister endeavored to reduce its costs and expenses and did so, except with respect to those costs and expenses which were governed by its collective-bargaining contracts. Consequently, unless Alcide Mann had greater expertise in tugboat management than McAllister, which is unlikely, Outreach could only make a profit or enhance its profit by reducing or eliminating labor costs and expenses.

****11** The service and sales agreement, coupled with the credit agreement, effectively relieved Outreach of any risk of nonpayment, and further provided Outreach with what amounted to a $500,000 line of credit. Under the service and sales agreement, McAllister agreed to pay Outreach for all work solicited by McAllister and performed by Outreach, and to accept the credit risk for failure of any customer to pay for such work. Specifically, McAllister agreed that after deducting its 10-percent commission, discounts, and commissions to foreign sales agents, it would pay 90 percent of the amounts due Outreach within 45 days and the balance within 120 days of presentation of invoice. Although not specified in any written agreement,

McAllister also deducted 5 percent toward repayment of the sum of $42,500 previously loaned to Alcide Mann, except on some jobs where the profit margin was low, until August 23, 1984, when those notes were paid in full. However in the credit agreement, which was effective for 2 years and subject to renewal by McAllister, McAllister agreed to pay Outreach all amounts due Outreach immediately upon presentation of invoice and assignment of the respective account receivable, up to a total maximum of $500,000 owed by McAllister's customers at such time. In practice McAllister deposits all moneys due Outreach into Outreach's bank account. The sales and service agreement provided that "McAllister will use its best efforts to secure a minimum of $3,000,000 net revenue to Outreach per calendar year." Although this provision might seem on its face to be designed for Outreach's benefit, the figure at least coincided with McAllister's interests in the arrangement. McAllister Vice President Stephens testified in sum that McAllister projected an annual volume of business of $3 million, and also projected that it would need $300,000 per year to compensate for the cost of its sales and accounting services, i.e., 10 percent of $3 million. As discussed, McAllister never viewed Baltimore as a profit-making operation. Rather McAllister wanted a Baltimore operation in order to offer 4-port service to its customers and thereby enhance its business elsewhere, without suffering unacceptable losses. Therefore, by maintaining its presence in Baltimore through Outreach and attaining or maintaining a $3 million volume of business, McAllister would break even and thereby achieve its goal. Stephens testified that in fact, by the time of the present hearing, McAllister was close to breaking even through the Outreach operation.

The sales and service agreement further required Outreach to maintain at its own cost, insurance in form and amounts and under conditions set forth in the agreement, with underwriters approved by McAllister, and with McAllister named as an additional insured under the liability policies. The agreement was effective by its terms for 7 years, subject to McAllister's option to renew the agreement for up to 3 additional 5-year periods. (The parties originally contemplated an initial 5-year period, but Westminister requested that the period be coextensive with the duration of its loan agreement.) The agreement provided in sum that in the event Outreach wished to sell its business, and obtained a prospective purchaser, McAllister would have the right of first refusal or could purchase the business at the amount of the third party offer or in accordance with a formula set forth in the agreement.

D. *Operations Before and After the Sale, and Concluding Findings with Respect to the Appropriate Unit or Units as of April 13, 1984*

****12** As of April 13, 1984, President Anthony McAllister was McAllister's highest ranking official. However, he had far flung responsibilities for the operations of McAllister Transportation and its subsidiaries, he was not based in Baltimore, and he was not normally involved in day-to-day operations in Baltimore. Vice President Stephens who was based in Philadelphia, functioned as general manager for Philadelphia and Baltimore, and was in overall charge of operations at both ports. Assistant General Manager Rollins Bishop was based in Baltimore and was in charge of day-to-day operations in that port. Operations Manager Richard Gross was Bishop's immediate subordinate. Gross functioned as chief dispatcher, and was assisted by dispatchers John Franey and Edward Johansen. (A third dispatcher retired in the fall of 1983 and was never replaced.) The remainder of McAllister's shore personnel in Baltimore consisted of accountant-bookkeeper Philip Goldrick, port engineer William Davis, assistant port engineer Richard Efford, and clerical employees Mary Geeson and Shirley St. John. Gross' role in the managerial hierarchy was the subject of much testimony by both sides. Gross was one of two vice presidents for Baker-Whitely. After taking over the operation, McAllister brought in Bishop, demoted Gross, and terminated the other vice president. However, Gross continued to exercise supervisory authority with respect to the boat personnel, and he was the highest ranking person with whom they normally dealt. Vice President Stephens testified that Gross and the dispatchers had authority to fire, lay off, and discipline personnel. [13] Stephens further testified that he and Bishop would decide on layoffs, although Gross would advise them as to anticipated personnel needs. (Selection of employees for layoff, like promotions and transfers, was governed by provisions of the union contracts, and consequently involved minimal employer discretion except with respect to the selection of captains. McAllister hired new personnel through the Union's referral system, and consequently ***610** the selection of new boat personnel also involved minimal employer discretion.) Boat personnel in all categories testified, in sum that Gross and the dispatchers

made crew assignments and authorized time off, and that Gross represented the Company at monthly grievance meetings, and he sometimes resolved work-related problems which boat personnel submitted to him or the dispatchers. Sometimes the dispatcher on duty would refer requests for time off to Gross. Gross or the dispatcher on duty would resolve conflicts in work assignments, e.g., if one ship was late and the captain had to know whether his boat should assist that ship or the next scheduled assignment. Vice President Stephens, in his testimony, tended to be evasive concerning Gross' authority, but inferentially corroborated the testimony of the boat personnel. Stephens testified that the captain would make a recommendation when there was conflict in work assignments, but that the dispatcher was the person who knew what jobs had to be performed that day. Stephens admitted that Gross "stayed on top of scheduling crews" and that "it would get back to [Gross]" if an employee wanted time off for personal reasons. Gross, together with Stephens and Anthony represented McAllister in the 1981 contract negotiations, although only McAllister and Stephens had authority to make commitments on behalf of the Employer. I find that Gross and the dispatchers had authority, in the interest of the Employer, to responsibly assign and direct employees in their work and to grant time off, and that Gross further had authority on behalf of the Employer to discipline or discharge employees and adjust employee grievances and effectively recommend layoffs. Therefore, Gross and the dispatchers were supervisors of McAllister within the meaning of the Act. I further find that Gross was McAllister's 75 principal and highest ranking supervisor who dealt with the boat personnel on a day-to-day basis. With regard to the port engineer and assistant port engineer, Gerard Freburger, who worked as an engineer on McAllister's boats, testified that William Davis was his immediate supervisor, that if he had a problem with the engine, he would notify the captain (who would notify the office if the boat had to go out of service) but would contact Davis with regard to normal maintenance. However Freburger testified, as did other personnel, that Operations Manager Gross handled hiring, firing, transfers, layoffs, and adjustment of grievances, and that if he had a grievance he would take it to Gross. Davis and Efford, like other shore personnel, were not included in either bargaining unit. I find that the evidence is insufficient to establish that Davis or Efford had or exercised authority of a suprvisory nature, as distinguished from directing the technical aspects of maintenance work.

****13** The makeup of McAllister's boatcrews was governed by its union contracts, which provided that singly boatcrews (normally used by McAllister) would be manned by a crew consisting of at least one captain, one mate, and one engineer (licensed personnel), and two deckhands (unlicensed personnel). The captain was nominally in charge of the tugboat, although in practice he had limited authority and little need to exercise control over the crew. The captains, like other personnel, were normally assigned to one boat on a regular basis. About 6 p.m. each day, the boat personnel including the captains would call McAllister's office for their next work assignment, if any. The captain would do paperwork, plan the operation, and observe conditions while the boat, navigated by the mate, was proceeding to an assignment. When the boat reached the assigned ship, the captain would board the ship and replace its pilot in order to direct the docking or undocking operation. The captain would maintain radio contact with the mate, who was responsible for navigating the tugboat, in order to coordinate the operation. The captain would exchange information with the mate, and sometimes with a deckhand, and would give such directions as were necessary to carry out the operation, principally concerning the placement of lines. The pattern of handling normally depended on the class of ship involved, e.g., container, tanker, bulk carrier, or auto carrier. As the tugboats regularly serviced the same ships or classes of ships for McAllister's customers, the patterns were usually familiar to the tugboat crews. The pilotage clause of McAllister's contract (tariff) provided that the captain was the "borrowed servant" of the shipowner or operator while directing the ship during the docking or undocking operation. The deckhands were primarily responsible for cleaning and maintaining he tugboat and handling lines. The engineer was responsible for maintaining watch and maintaining or repairing machinery as necessary. The captain, by virtue of his Coast Guard license, was responsible for the welfare of the personnel and the equipment on the tugboat. For example, in the event of a collision or other mishap the Coast Guard might well determine that the captain was responsible if the mishap was caused by improper action or failure to act by another member of the crew. In practice the captains had only limited authority to exercise control over their crews on behalf of McAllister. The captains neither had nor exercised authority to hire, fire, lay off, recall, assign crews, grant time off, adjust grievances, or to effectively recommend such action, or to exercise any discipline beyond occasionally "chewing out" a crewmember for not doing his job properly. Vice President Stephens testified that to his knowledge no McAllister captain in Baltimore ever imposed discipline. The tugboats maintaind

radio contact with McAllister's office and kept the office informed of developments. As indicated, personnel problems, e.g., actual or potential conflicts in assignments, were referred to Operations Manager Gross or the dispatcher on duty.

**14 There were additional factors which rendered it unnecessary or unlikely for boat captains to exercise supervisory functions. At least in part because of the contractual seniority system, coupled with layoffs and a declining work force in recent years, most of the boat personnel, including deckhands, had worked for McAllister for many years and were experienced and well qualified to perform their jobs without on-the-spot supervision. Through their long and close association, the crews were, as testified by two witnesses, like one family. Indeed they constituted a family in more than one sense, as many were related to one another. Consequently, the captains were not inclined to act as management representatives in dealing with their fellow crewmembers. *611 Moreover, unlike the shore-based personnel, they lacked a sufficient overview of McAllister's operations, even on a day-to-day basis, to enable them to effectively exercise or recommend discretionary action with regard to personnel matters. Therefore the crews, including both the licensed and unlicensed personnel, preferred to resolve routine problems among themselves, and to refer to the shore based personnel problems which required the exercise of supervisory discretion. The crews' feelings of solidarity were reinforced by the fact that they were all represented by the Union. Some captains served as union stewards. For its part, McAllister recognized that the captains were not a part of management. Consequently, McAllister never told its captains that they were supervisors or management representatives, and they were normally not requested to attend supervisory or management meetings.

The captains, like other boat personnel, were paid in accordance with hourly pay scales established in the union contracts, and they received the same fringe benefits as the other boat personnel. However, the captains did have an income in addition to their hourly wages from McAllister. The captains who worked for McAllister and Curtis Bay Towing belonged to a group known as the Baltimore Docking Pilot Association which established a schedule of fees to be charged to the shipowners or operators for whom they performed docking services. Each month McAllister's bookkeeper would bill the customer, and would disburse the proceeds to McAllister's captains in accordance with their respective services. Each captain would give his mate a 20-percent share of the proceeds. These fees usually comprised from 20 to 33 percent of the captain's total income. McAllister deducted Federal and state income and Social Security taxes from the captains' wages, but not from fees, except insofar as a captain might request a higher deduction in order to avoid underpayment of taxes at the end of the year. Only licensed personnel employed by a tugboat firm doing business in Baltimore Harbor, i.e., McAllister or Curtis Bay Towing, could perform the docking services which entitled them to these fees. McAllister never informed its captains that they were independent contractors by reason of this arrangement or for any other reason. Rather, as indicated, McAllister and its customers contractually agreed that they were borrowed servants when performing a docking operation.

**15 In Feruary 1984, Alcide Mann met with Carl Cudworth and Ray Jankowiak, offered them positions as “docking pilot,” and explained the terms under which they would perform such work for Outreach. Cudworth was not a McAllister captain. Jankowiak, a McAllister captain, was low man on McAllister's seniority roster of captains and mates. [14] In late 1983 and early 1984 he was working as a relief man. Cudworth declined the offer, but Jankowiak accepted. He went onto Outreach's payroll as of March 1, at $2300 pr month although Outreach did not begin operations until April 14. Therefore it is evident that Jankowiak was paid with money borrowed from McAllister. Mann testified that he offered them employment in order to establish a nucleus of operating personnel. As will be discussed, Jankowiak subsequently made recommendations to Mann concerning the hiring of boat personnel.

Anthony McAllister testified that in March he discussed retention of shore-based personnel with Mann, and specifically recommended that Mann hire Richard Gross and dispatchers Franey and Johansen. Some time prior to April 13 Mann informed Gross that he would have a position with Outreach if he wanted it. (Therefore it is evident that Gross had advance notice of the sale.) On April 13 McAllister informed Gross, Franey, Johansen, Davis, and Efford that they were terminated as of that date, and suggested that they see Mann. At 5 p.m. that day Mann met with the five shore personnel for about 1 hour,

and offered them employment on the spot, although he personally knew only Gross and Davis. Mann testified that he did not consider anyone else for their positions. (Mann initially testified that he hired Franey on McAllister's recommendation, but subsequently asserted that he could not recall whether McAllister made any recommendations. As indicated, McAllister admitted that he recommended at least three of the five shore-based personnel.) On and after April 14 the combined shore-based personnel of McAllister and Outreach consisted of and functioned as follows: McAllister Vice President Stephens, still based in Philadelphia, remained in overall charge of McAllister's Philadelphia and Baltimore operations. Assistant General Manager Bishop, still based in Baltimore, continued to function as McAllister's manager in that port. Bishop received orders from McAllister's customers, passed them on to Outreach, and did some local selling in order to acquire more business for Outreach. However, Bishop's involvement in day-to-day operations was substantially diminished insofar as his functions were taken over by Mann. Philip Goldrick, assisted by Mary Geeson, continued to function as McAllister's accountant-bookkeeper, principally submitting, receiving, and recording invoices. However his functions were substantially reduced insofar as he no longer performed payroll or other personnel functions outside of McAllister's own office staff. One office clerical was terminated. [15] As president of Outreach, Alcide Mann, assisted by his wife, "executive vice president" Audrey Mann, performed Outreach's administrative and financial work. As Outreach did not have any clerical employees, it is evident that Audrey Mann was performing payroll and other clerical functions formerly performed by McAllister's office staff. Mann retained authority over hiring and firing, and Richard Gross, now Outreach's "vice president of operations," carried out his orders. Gross, assisted by dispatchers Franey and Johansen, continued to perform the same functions which they previously performed for McAllister as altered by the fact that Outreach was not operating under union con ***612** tracts. [16] Gross continued to function as the highest management representative who normally dealt with the boat personnel on a day-to-day basis. Gross contacted the boat personnel who Mann decided to hire, offered them jobs, and explained the terms of their employment. Gross and Ray Jankowiak made recommendations with regard to hiring, at least some of which were followed by Mann. Gross and the dispatchers gave out work schedules, authorized time off, and adjusted employee grievances. William Davis, now called "port superintendent," and Richard Efford, now called "port engineer" continued to perform the same functions which they had previously performed for McAllister. In sum, viewing McAllister and Outreach as components of one coordinated operation (which they were), McAllister's shore-based complement remained intact, from top to bottom, performing substantially the same functions which they had previously performed, except that Alcide Mann was inserted into the managerial hierarchy between Rollins Bishop and Richard Gross, and his wife Audrey performed clerical functions which enabled McAllister to dispense with one clerical employee.

****16** On the evening of Friday, April 13, when the boat crews called in for their assignments, Rollins Bishop informed them that "the Company has been sold and you no longer have a job." This was the employees' first notice that the boats had been sold. That weekend Gross contacted those employees who Mann decided to hire. In the meantime Outreach commenced operations with the purchased tugs, without any interruption in service to McAllister's customers. Outreach made substantial changes in staffing and other terms and conditions of employment, most of which were contrary to terms and conditions established in the union contracts, and therefore invalid if Outreach was bound by those contracts. Outreach hired boat personnel in four categories: docking pilot, captain, engineer-utility, and deckhand. The first three categories were all licensed personnel. The boat personnel were no longer regularly assigned to one boat, but were assigned from day-to-day as directed by Gross and the dispatchers. As of May 15 Outreach utilized three docking pilots: Ray Jankowiak and Edward Covacevich, who had been employed by McAllister, and Richard Kestler, who had not. Covacevich, a McAllister captain, was hired by Richard Gross on April 14, at a flat rate of $175 per day, but only for days on which he actually worked. Covacevich was not paid for days on which he was required to be available on a standby basis but was not called. [17] The pilots were not regularly assigned to a boat. Instead they boarded the boats for the purpose of going to and from docking or undocking assignments. As had McAllister's captains, they prepared for the job enroute, including paperwork, boarded the ship for the purpose of directing the docking or undocking operation, and returned to the tug when the job was completed. However, instead of remaining with the tug, they returned to port to await their next assignment, unless they were off duty. In sum, Outreach did not regard the pilot as a member of the crew. Rather the crew, now reduced in size, consisted of a captain, one engineer-utility, and one deckhand. The captain,

who was now nominally at least in charge of the tugboat, performed the same functions as had McAllister's mate during the docking or undocking operation. By May 15 Outreach had five captains, three of whom (Leon Mach Jr., Paul Straszynski, and Chester Vikell) had previously been McAllister mates, one (Gregory Lukowiski) who had worked for McAllister as a deckhand on an irregular basis because of his low seniority, and one (Mark Adams) who had not previously worked for McAllister. As of May 15 Outreach had six employees in the category of engineer-utility, of whom one (Gerard Freburger) had been working as engineer for McAllister on a regular basis, two (Robert Zientak and Terry Pakula) had been working as engineers for McAllister on an irregular or relief basis, and three (Kevin Bailey, Jacob Bryan, and Vincent Robinson) had not previously worked for McAllister. Outreach's engineer-utility employees performed the same functions as McAllister's engineers, and in addition functioned as second deckhands. As of May 15 Outreach employed seven deckhands, of whom three (Mark Jankowiak, James Kabakovich, and Morris Superczynski) had been working regularly for McAllister, one (Thomas Lukowski) was low man on the deckhand seniority list, and worked only sporadically, one (Scott Lee) had worked for McAllister, but not enough to make the seniority list, and two (Mark Bull and Richard Efford Jr.) who had not previously worked for McAllister. They performed the same work as McAllister's deckhands. Outreach also did not hesitate to use shore-based personnel on its boats, or to cut across job categories. Thus, on April 14 Outreach commenced operations with a boatcrew consisting of Ray Jankowiak, his brother Mark, his brother-in-law Scott Lee, and port engineer Richard Efford.

****17** Outreach operated two tugs on a 24-hour basis and two on a dayboat basis. Wages, hours, and other working conditions were drastically altered from those under McAllister's union contracts. Crews on 24-hour boats were paid a flat daily wage, and day boatcrews were paid an hourly rate. Excluding pilots, the wage rates were substantially lower than those paid under the union contracts with increasing disparity as one went down the occupational ladder. The hourly rate for Outreach captains was $10, compared to an $11.91 basic rate for McAllister mates, notwithstanding Outreach's present contention (which will be discussed) that its captains are supervisors. Engineer-utility personnel were paid $8.60 per hour compared to $13.20 for McAllister engineers. Outreach deckhands were paid $6.10 per hour, compared to a basic rate of $11.01 under the union contract. All forms of premium pay were eliminated except for time and one-half over 40 hours per week for day boatcrews only. The union contracts provided for various premium hours or days ranging from time-and-a-half to triple time. Monetary fringe benefits, including pension and welfare funds, vacation plan, and paid holidays, were eliminat ***613** ed. [18] On April 15 Outreach informed its personnel that it had not yet established a policy concerning such matters. On May 27 Outreach informed the personnel that it was establishing a temporary medical insurance plan at the employees' own expense.

Although Outreach's docking pilots received pay which was ostensibly equal to or greater than that paid by McAllister to its captains, it is evident from Outreach's new system, including the fact that the docking pilots, unlike McAllister's captains, did not work on a full-time basis, that Outreach was paying less to its pilots than McAllister paid to its captains. In particular, Outreach deprived its pilots of the contractually guaranteed workweek, which McAllister captains shared with other personnel. Thus Edward Covacevich testified that pilot fees now comprised about one-half of his earnings, whereas they previously comprised about 20 percent. This, notwithstanding that Outreach's volume of business remained substantially the same as that projected by McAllister under its own operation. Outreach contends (Br. 36-38) that by reason of its new methods of operation, the docking pilots are independent contractors. However, Outreach's position is inconsistent with its own words, actions, and method of operation. Since April 14, Outreach operated under a service and sales agreement which specifically provided that licensed personnel were “servants of the owner,” and imposed a mutual obligation on McAllister and Outreach to supervise their performance. Outreach operated under McAllister's tariff, which contractually provided that the pilots were borrowed servants when directing a docking or undocking operation. Outreach paid its pilots their wages, with appropriate deductions in the same manner as McAllister paid its captains. Outreach never told its pilots that they were independent contractors. As an adverse witness for the General Counsel, Alcide Mann testified without explanation that he could not discipline his pilots for objectionable conduct aboard a ship. However as a witness for Outreach, Mann admitted, with respect to three accidents in which pilot Covacevich was involved, that he could have penalized Covacevich if he determined that Covacevich was clearly at fault. Certain evidence concerning Charles Rogers is also illuminating on the status of Outreach's pilots. Rogers had been employed

by McAllister and its predecessor Baker-Whitely for over 20 years, and he was second on the seniority list of captains. When Mann met with Ray Jankowiak and Carl Cudworth in February, Mann mentioned that Rogers was highly recommended, but Jankowiak said that he could not work with Rogers. Therefore Mann did not offer Rogers a job. In mid-May, after the Union's attorney had sent a letter to Mann asserting that McAllister and Outreach were alter egos and a single employer and therefore bound by the union contracts, Rogers sent a letter to McAllister Vice President Stephens requesting his assistance in obtaining a docking position with Outreach. Stephens sent a letter of recommendation to Mann, together with a copy of Rogers' letter, and also sent copies of the correspondence to McAllister's attorney. In the meantime Outreach's attorney sent a letter to the Union's attorney, denying that Outreach was obligated to recognize the Union or bound by the union contracts. Mann did hire Rogers. In late May Rogers met with Mann, and proposed that if Mann was unwilling to hire the older McAllister pilots like himself, that Rogers would supply their services without wages, with the pilots retaining only their docking fees. Rogers testified without contradiction that Mann rejected the proposal, asserting that such an arrangement would deprive him of control over the docking pilots. I find that Mann's explanation constitutes an admission that he did in fact have control over Outreach's docking pilots. [19]

****18** Outreach further contends that its captains are supervisors under the Act. If so, then Outreach would have almost as many supervisors as rank-and-file boat personnel. Specifically, Mann, Gross, and the two (later three) dispatchers all exercised supervisory authority. Together with the five captains, this would constitute a total of 9 or 10 supervisors over 13 boatcrew personnel (6 engineer-utility and 7 deckhands). This would be in addition to Rollins Bishop, who exercised control over day-to-day operations in Baltimore, the three docking pilots, who directed the crews during the docking and undocking operations, and the port superintendent and port engineer, who directed maintenance and repair work. Mann made statements which ostensibly suggested that the captains should exercise more authority. Thus, Mann told the captains that they should make independent judgments, tell the crews what to do, and tell the crews that there should be no drinking aboard the boats, and that if they failed to do these things the Coast Guard would go after their licenses. However, Leon Mach Jr. and Chester Vikell, both former McAllister mates who were now Outreach captains, testified in sum that they continued to perform the same functions which they had performed for McAllister; that Gross and the dispatchers continued to assign jobs, handle requests for time off, and resolve other personnel problems; and that as captains they did not hire, fire, suspend, lay off, promote, or discipline employees, or recommend such action, and that they were not told that they were supervisors. The captains' testimony was corroborated by Gerald Freburger, former McAllister engineer and now Outreach engineer-utility.

I find that as of April 13 the recognized bargaining units were units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act, and I specifically find that McAllister's captains were employees within the meaning of Section 2(3) of ***614** the Act. I further find that even assuming the propriety and legality of the operational changes introduced by Outreach on and after April 14, that Outreach's docking pilots and captains were employees within the meaning of Section 2(3) of the Act, and specifically that the docking pilots were not independent contractors and the captains were not supervisors. The fact that McAllister voluntarily recognized the Union as bargaining representative for units which included the captains, and negotiated collective-bargaining contracts covering those units, may properly be considered as demonstrating both the propriety of the units and the status of the captains as employees under the Act. *Tri-County Electric Cooperative*, 237 NLRB 968 (1978). Outreach's captains, like those of McAllister, were responsible as a matter of law for the safe and proper operation of their boats by virtue of their licenses. However such responsibility does not confer supervisory status under the Act, where as here the captains do not exercise supervisory authority in the interests of the employer. *Graham Transportation Co.*, 124 NLRB 960, 962 (1959). To the extent that captains did and still do exercise control over other crewmembers "the type of direction involved is not that of the supervisor but that exercised by the more experienced employee over one who is less skilled," *Southern Illinois Sand Co.*, 137 NLRB 1490, 1492 (1962). Moreover, a finding that the captains were or presently are supervisors would result in a disproportionate and highly unlikely ratio of supervisors to employees. *Ross Porta-Plant*, 166 NLRB 494, 496 (1967), enfd. 404 F.2d 1180 (5th Cir. 1968). As for Outreach's docking pilots, Outreach was contractually required to supervise the manner in which they performed their duties, and was bound by contracts (the service and sales agreement and the McAllister tariff), which defined their status as that of servants, i.e., employees. The docking pilots derived all of their income, including docking

fees, by virtue of their jobs with McAllister. Like other Outreach boat personnel, they received their assignments from Gross and the dispatchers, and they were subject to Mann's disciplinary action. Therefore, they were employees within the meaning of Section 2(3) of the Act.

**19 On and after April 14 McAllister maintained its Baltimore office, but reduced the amount of leased space. Outreach's dispatchers operated from their homes, using radio equipment, until Outreach leased an office. Outreach continued to use McAllister's docking facility at the recreation pier until July 1 without paying any rent to McAllister (McAllister leased the facility). As of July 1 Outreach leased a facility at a nearby pier. According to Mann, Assistant General Manager Bishop agreed that Outreach could use the recreation pier facility free of charge for the remaining period of McAllister's lease, and could keep any and all equipment and material on the pier (which Mann described as mostly "junk") without paying McAllister, if Outreach cleaned the pier and restored it to a satisfactory condition. If so, then Outreach received a windfall, at least if Outreach were regarded as a separate operation from McAllister. The pier contained valuable machinery, spare parts, equipment, and supplies for the boats including a welding machine, drill press, and hydraulic press which were needed for maintenance and repair. Respondents argue (Outreach Br. fn. 15) that all this equipment was included in the sale of the boats to Outreach. However the boats were each sold as individual units, whereas the machinery on the pier was utilized in common for McAllister's entire fleet. Therefore, it is evident that McAllister transferred the machinery on the pier to Outreach without any cost to Outreach.

Outreach continued to service McAllister's customers, and until October, 1983, i.e., a period of about 6 months, this work comprised all of Outreach's operations. McAllister, and consequently Outreach, lost McAllister's biggest customer, Atlantic Container Line. However, this loss came about as a result of McAllister's decision to remove the *Grace McAllister* from Baltimore, and not as a result of any decision or action by Outreach. McAllister even reserved the right to decide which work Outreach would perform for its customers. Thus, Assistant General Manager Bishop had authority to and sometimes did refer work to Curtis Bay Towing (usually in exchange for work for Curtis Bay's customers), without consulting Outreach. In the fall of 1983 Outreach obtained some additional work, including towing of coal and oil barges and an ice breaking contract with the Baltimore Port Authority. However this work constituted and continues to constitute only a minute portion of Outreach's total operations. Alcide Mann admitted that he could not have obtained the barge hauling work if he adhered to McAllister's cost structure, i.e., cost structure under the union contracts. (Indeed, McAllister did not bid for such work for this very reason.) However Outreach made its own choice of suppliers and, specifically, did not purchase supplies from a McAllister Transportation subsidiary which had been McAllister's principal supplier.

Throughout 1983 McAllister deliberately concealed the existence of Outreach, and steadfastly represented to the public and its customers that McAllister was continuing to provide tugboat services in Baltimore Harbor. By telegram to foreign shipowner agents in March, McAllister told them that rumors circulated by Curtis Bay Towing to the effect that McAllister was selling or terminating its Baltimore operations were false, that "McAllister remains in Baltimore servicing our clients in the usual professional manner," but that because of substantial losses, McAllister would "initiate an unusual but effective operational change to insure McAllister service and commitment to the Port in the future." William Lukowski, general manager of an agency which arranged dockings with tugboat companies, testified that in April, when he heard about Outreach, he contacted Rollins Bishop. Bishop told him: "[d]on't worry, its business as usual, you call me and give me the order." Bishop told Lukowski that he should not deal with Outreach, and that if he needed any information he should call Bishop.[20] After April 14 McAllister continued to advertise *615 for business in maritime publications, including Port of Baltimore magazine, representing that it offered four-port service, including Baltimore, listing its own telephone number, and neither expressly nor impliedly referring to Outreach. McAllister instructed Mann that McAllister forms should be used for shifting reports (reports filled out by the captain concerning towing of lash barges). Copies of these reports were sent to McAllister's cutomers. The most flagrant illustration of the lengths to which McAllister would go in this regard occurred in late August, shortly before the union contracts were scheduled to expire in the four eastern ports. McAllister, by Bishop, sent a letter to McAllister's customers, concerning "Schedule of Rates and Terms-Port of Baltimore," informing them that its union contracts for Baltimore were scheduled to expire on

September 30, that "we are presently negotiating a new labor contract," and "we will in the near future keep you apprised of the progress of negotiations." In fact, McAllister had no intention of negotiating with the Union concerning its ostensibly nonexistent Baltimore operation. Vice President Stephens testified that the letter was a mistake. However, although by letter dated September 11 the Union protested and questioned McAllister's letter to its customers, McAllister never retracted its letter. Stephens testified that he took no further action because "it would do more harm." In sum, as far as customers and the general public were concerned, McAllister wished to make clear that nothing had changed, even to the point of pretending that McAllister was still running a union operation in Baltimore. However as far as the Union and the employees were concerned, Baltimore was an Outreach nonunion operation for which McAllister bore no responsibility.

E. *Motivation for the Sale*

****20** McAllister sold its boats to Outreach in order to evade its obligations under the union contracts, which McAllister regarded as an intolerable financial burden. McAllister wanted to maintain a four-port operation, including Baltimore, without Baltimore being a financial drain on its resources. McAllister concluded that this could only be done under nonunion conditions. Therefore, McAllister sold its boats and transferred the Baltimore operation to Outreach, with the understanding that Outreach would run a nonunion operation. McAllister was perfectly willing to let Alcide Mann enjoy the profits of such an operation, i.e., make as much as he could by lowering wages and working conditions, so long as McAllister could offer its customers a four-port operation and break even (or at least suffer only a minimal loss) in Baltimore. This was the predictable result of the transfer, and this in fact is what occurred. These findings are virtually a matter of simple arithmetic. Compare *Big Bear Supermarkets No. 3*, 239 NLRB 179, 183 (1978), enfd. 640 F.2d 924 (9th Cir. 1980), cert. denied 449 U.S. 719 (1980). McAllister suffered losses in Baltimore which steadily rose from $250,000 to $750,000 annually, which McAllister regarded as intolerable. After exploring or attempting various possibilities, McAllister was unsuccessful in reducing its losses. McAllister then concluded that it could not reduce its losses except by reducing or eliminating its obligations under the union contracts. McAllister initially sought to accomplish this result with the cooperation of the Union and the employees, first by requesting substantial wage concessions, and next by offering to sell the operation to the employees. When the employees rejected these proposals, Anthony McAllister persuaded Alcide Mann to buy the boats and run the Baltimore operation. Mann did not buy the boats in order to sustain an annual loss of $750,000. In fact Mann, who had never been in business for himself and had worked for a salary throughout his career, could not afford to sustain any loss even temporarily. Mann conceded that he had no way of eliminating the loss, let alone of making a profit, except by operating on a nonunion basis. Mann testified, with respect to other cost factors, that he projected higher maintenance and repair, fuel, and general and administrative expense costs (but lower insurance costs) than McAllister. As indicated, Mann anticipated bidding for barge towing work, but he admitted that he could not compete for such work under McAllister's labor cost structure. Mann admitted that he projected lower labor costs than McAllister, that his projections were not based on the union contracts, and that he intended to take the position that if he purchased the tugs he would have no obligation to honor the union contracts. Significantly, although Anthony McAllister conceded that labor costs accounted for about 50 percent of the cost of the Baltimore operation, Mann testified that this was not necessarily true. As labor costs were fixed by the union contracts, Mann plainly contemplated operating without the contracts. Mann testified in an evasive fashion that he did not think that he discussed labor costs with Anthony McAllister. However, McAllister admitted that they discussed the union contract and lowering costs under the contract. Nevertheless McAllister asserted that he did not think that they discussed whether Mann would go along with the union contracts, and that he could not remember whether he made any recommendations to Mann. McAllister's assertions are incredible. The transaction between McAllister and Mann was totally dependent on elimination of costs imposed by the union contracts. I find that Anthony McAllister and Mann understood at all times Mann would repudiate the union contracts, and that such action was essential to the success of their arrangement. In these circumstances, it seems almost superfluous to look to express admissions as to McAllister's motivation for the transaction. However there is uncontroverted evidence concerning such an admission. Under the union contracts, tugs had to be tied up by 8 p.m. on Christmas Eve. Prior to 8 p.m. on December ***616** 24, 1983, Captain Canavavino's tug was assigned to a job. However, the tug could not complete the job before 8 p.m. because an injured crewmember had to be taken ashore. Canavino so informed Operations Manager Gross, and they expected McAllister to abide by the contracts. As a result the job went to Curtis

Bay Towing. Gross, who was visibly angry, told Canavino that "because of these union contracts, that's why we're going out of business." As discussed, Gross was the highest ranking supervisor who normally dealt with the employees on a day-to-day basis. He was obviously knowledgeable concerning McAllister's policies, particularly as they affected the employees. I find that Gross' statement may properly be considered as evidence of McAllister's motivation for transferring the operation to Alcide Mann. In light of the evidence as a whole, I find that McAllister sold the boats and transferred the operation to Outreach in order to evade its obligations under the union contracts and thereby eliminate its financial losses, and that this was the predictable result of the transaction.

F. *Concluding Findings with Respect to Alleged Status of McAllister and Outreach as Alter Egos and Single Employer*

****21** The Board and the courts have held that ostensibly separate firms may be regarded as a single employer under the Act where there is interrelation of operations, together with centralized control of labor relations, common management, and common ownership or financial control. *NLRB v. M. P. Building Corp.*, 411 F.2d 567 (5th Cir. 1969). The alter ego doctrine is an extension of the concept of single employer. Thus, two nominally separate business entities may be regarded as a single employer if one is the alter ego or "disguised continuance" of the other. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). In determining "whether two facially independent employers constitute alter egos" under the Act, the Board has long held that "[a]lthough each case must turn on its own facts, we generally have found *alter ego* status where the two enterprises have 'substantially identical' [ownership], management, business purpose, operation, equipment, customers and supervision...." *Advance Electric*, 268 NLRB 1001, 1002 (1984). However actual common ownership is not an essential element of an alter ego relationship. *All Kind Quilting*, 266 NLRB 1186 fn. 4 (1983). Nor is nominal, as distinguished from real common management and supervision. *American Pacific Concrete Pipe Co.*, 262 NLRB 1223, 1226 (1982), enfd. 709 F.2d 1514 (9th Cir. 1983). Rather, "the crucial element in a decision to apply the alter ego doctrine is a finding that the older company continued to maintain a substantial degree of control over the business claimed to have been sold to the new entity." *NLRB v. Scott Printing Corp.*, 612 F.2d 783, 786 (3d Cir. 1979).

In *Advance Electric*, supra, the Board held that in determining whether an alter ego status was present, it would consider "whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act," but that such intent is not an essential element of an alter ego relationship. See also *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1983). However in *Denzils Alkire v. NLRB*, 716 F.2d 1014, 1020 (4th Cir. 1983), the court, Judge Sprouse dissenting, held that in determining alter ego status when business operations are transferred: "[T]he initial question is whether substantially the same entity controls both the old and new employer. If this control exists, then the inquiry must turn to whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations." In *Alkire*, the court denied enforcement of the Board's order because the evidence failed to demonstrate such benefit. The circuit courts are not in agreement on this point. Recently the Second Circuit Court held that the Board is not required to find antiunion animus or intent to evade union obligations before it can impose alter ego status. *Goodman Piping Products v. NLRB*, 741 F.2d 10 (2d Cir. 1984). However in light of *Advance Electric*, and the fact that the present case arises within the geographical venue of the Fourth Circuit, I have considered employer motivation in determining the relationship between McAllister and Outreach.

****22** For the reasons discussed above, I have found that McAllister sold its boats and transferred its Baltimore Harbor operation to Outreach in order to evade its collective-bargaining obligations. Therefore, in determining whether an alter ego relationship exists, the remaining question is, with due consideration to the factors discussed in *Advance Electric*, supra, whether McAllister maintains a substantial degree of control over the opeations of Outreach. Upon consideration of the evidence, and in light of pertinent Board and court authority, I find that it does, and that McAllister and Outreach are alter egos and a single employer under the Act. [21] Outreach existed almost exclusively for the purpose of servicing McAllister's customers in Baltimore Harbor. The terms of the agreements between McAllister and Outreach, particularly the service and sales representation agreement,

effectively precluded Outreach from performing more than a token amount of its own business. Thus Outreach was required to give first priority to McAllister's customers, but could not add to its fleet without the permission of McAllister. That fleet, with removal of *Grace McAllister*, was smaller than the fleet which McAllister had been using prior to April 14. Moreover, by the terms of the service and sales agreement, McAllister could claim the right to act as sales agent for any other work which Outreach might wish to obtain. Therefore it is not surprising that for the first 6 months of its existence, Outreach worked exclusively for McAllister's customers. Outreach had no involvement in setting the rates for its services in docking and undocking ships, which comprised nearly all of its work. Rather Outreach was required, in furtherance of McAllister's interests, to provide services in accordance with McAllister's tariff. In sum, McAllister "controlled the workload ***617** of [Outreach], thereby controlling the very existence of the new company and income of its owners." *NLRB v. Scott Printing Co.*, supra, 612 F.2d at 786. Outreach was created and existed for the purpose of furthering McAllister's business purpose, namely, to offer four-port service to McAllister's customers, but without Baltimore being a financial drain on the overall operations of McAllister Transportation and its subsidiaries. To this end, McAllister represented to its customers and the general public that Baltimore remained a McAllister operation, and the new customers were required to deal exclusively with McAllister. As far as they were concerned Outreach did not even exist. Outreach performed its services with McAllister's equipment, i.e., with the four boats which it purchased from McAllister, and shore-based equipment which McAllister furnished without charge, and could not add to or replace the boats in the fleet without McAllister's approval. Outreach conducted its operations in the same manner as McAllister, in accordance with McAllister's requirements, without any break in service, except insofar as Outreach instituted operational charges which could not have been made if Outreach adhered to the union contracts. McAllister, through its Assistant General Manager Rollins Bishop, maintained tight control over Outreach's day-to-day operations. Under the services and sales agreement, McAllister jointly supervised the performance of Outreach's licensed personnel. Bishop assigned jobs to Outreach, and in performing that function, exercised discretion to transfer or exchange work with Curtis Bay Towing without prior consultation with Outreach. The shore-based staff, including supervisors, remained virtually intact, with the insertion of Alcide Mann into the management hierarchy. Mann hired most of his shore-based personnel on Anthony McAllister's recommendation, without interviewing other persons for their positions. In light of the service and sales agreement, and Bishop's functions as described above, it is evident that Alcide Mann functioned in a subordinate capacity to Bishop. See *Big Bear Supermarkets No. 3*, supra, 239 NLRB at 184.

****23** Alcide and Audrey Mann were the sole shareholders of Outreach. However, they enjoyed few of the benefits and bore few of the risks of entreprenurial status. They invested none of their own money in Outreach. Rather McAllister and its bank provided all of the capital. McAllister obtained and provided Outreach with its work, at rates fixed by McAllister. By reason of its commitments to Westminister, Outreach could not engage in any business except the operation of vessels, declare dividends, or incur any significant indebtedness. McAllister assumed all credit risks. McAllister permitted Outreach to retain the profits of the operation (after McAllister collected its commissions), but Outreach could make a profit, or enhance its profit, only to the extent that it could reduce its labor costs. This was consistent with McAllister's business purpose. McAllister was not concerned with whether Baltimore operated at a profit. Rather, McAllister was concerned only that it could offer four-port service to its customers without significant financial loss to itself in Baltimore. However, McAllister did require Outreach to conform to its detailed standards of operation. If McAllister determined that Outreach was failing to measure up to those standards, McAllister was empowered to take action to put Outreach out of business by forcing Outreach to resell the boats to McAllister, without profit or loss to Outreach, through a procedure which was stacked in favor of McAllister. Thus Outreach "virtually exists at the sufferance of" McAllister. *Fugazy Continental Corp.*, supra, 265 NLRB at 1302-1303. [22] As for labor relations, ostensibly handled in an autonomous fashion by Alcide Mann, Outreach was in reality carrying out a joint understanding that Outreach would operate nonunion, and thereby effectuate McAllister's goal of eliminating its losses in Baltimore. In sum, McAllister and Outreach have common financial control, integrated management, and common supervision, identity, business purpose, operation, equipment, customers, and labor relations policy, and McAllister effectively controls the operations of Outreach. Therefore, McAllister and Outreach are alter egos and a single employer under the Act.

G. *Alleged Violations of Section 8(a)(1), (3), and (5) of the Act*

As McAllister and Outreach were and are alter egos and a single employer under the Act, it follows that Outreach was bound by McAllister's union contracts, and that Respondents violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union as representative of the employees in the licensed and unlicensed units, repudiating and failing to adhere to the union contracts, unilaterally changing wages and other terms and conditions of employment, and bypassing the Union and dealing directly with employees concerning wages and other terms and conditions of employment. In *Walter N. Yoder & Sons*, 270 NLRB 652 fn. 2 (1984), the Board recently held:

****24** "A double breasted" operation is one in which a contractor operates two companies, one unionized and the other nonunionized. Depending on how the companies are structured and operated, each may be a separate corporation or else both may be so interrelated that they constitute a single employer or one may be the alter ego of the other. A collective-bargaining contract signed by one of the companies would not bind the other if each were a separate corporation, but would bind the other if both constituted a single employer and the employees of both compaines constituted a single appropriate bargaining unit or the nonsignatory company is an alter ego of the signatory company. [Citations omitted.] ***618** See also *Big Bear Supermarkets No. 3*, supra, 239 NLRB at 184; *Advance Electric*, supra, 268 NLRB at 1004. I do not agree with McAllister's argument (Br. 39-43) to the effect that the alter ego doctrine was nullified, sub silentio, by the Board's recent decision in *Milwaukee Spring Division*, 268 NLRB 601 (1984) (*Milwaukee Spring II*). That decision, and the Board's earlier decision in the same case, reported at 265 NLRB 206 (1982) (*Milwaukee Spring I*), dealt with the narrow question of whether an employer, after engaging in decision bargaining and while offering to engage in further effects bargaining, may without union consent relocate bargaining unit work during the term 4 an existing collective-bargaining agreement from its unionized facility to its nonunionized facility, and lay off employees, solely because of comparatively higher labor costs in the collective-bargaining agreement at the unionized facility which the Union declined to modify, where the contract does not expressly prohibit the contracting out of such work. The Board in *Milwaukee Spring I* held that it could not because the employer thereby violated its contractual obligation to provide the wages, benefits, and other terms and conditions of employment set forth in the contract. The Board in *Milwaukee Spring II* disagreed with this premise. McAllister's reliance on *Milwaukee Spring II* in the present case begs the question. If, as found, McAllister and Outreach are alter egos, then the work was never transferred out of the bargaining unit, and the union contracts remain applicable to the Baltimore Harbor operation, whether nominally run by McAllister or Outreach. See also *Otis Elevator Co.*, 269 NLRB 891 (1984), in which the Board indicated that an employer would be prohibited even from contracting out work in furtherance of a decision which "turned on a fundamental change in the scope and direction of the enterprise" (a situation not here present), if "alter ego or other sham devices were employed to disguise a unilateral reduction in labor costs in an operation over which the employer maintained surreptitious control." [23]

****25** The complaint alleges that on April 13 McAllister violated Section 8(a)(1) and (3) of the Act by discharging 38 employees who were actively employed and/or on McAllister's seniority roster as of that date, and that Respondents have violated and are violating Section 8(a)(1) and (3), since April 14, by failing and refusing to rehire 27 of those employees as positions became available. The 27 employees so named are:

Ralph A. Kirchner	Robert Henniger
Charles H. Rogers	Ronald Neibert
Leon J. Mach Sr.	Robert Machlinski
Charles J. Dougherty	Paul Pusloskie
Mark Garayoa	Joseph A. Rakowski
Manuel R. Alvarez	William H. Miller

Peter L. Messina	William P. Bobac
Alvin F. Hirsch	Karl Dlabich
Joseph L. Zorback Jr.	Raymond Kuta
Robert F. Schwatka	Steven A. Hardin
James C. Perry	Norman H. Gifford
George T. LaMaire	Steve August
Louis A. Canavino	Larry K. Neibert
Jerome J. Lukowski	

As discussed, the union contracts spelled out job categories and minimum staffing requirements for boat personnel. The contracts further provided for job referrals, layoff, recall for layoff, promotion, and transfer in accordance with McAllister's seniority roster. Therefore Respondents violated their contracts, and consequently violated the Act, by altering job categories, reducing crew sizes, and failing to retain or reemploy employees in accordance with the contract requirements. As of April 13, Ralph Kirchner, Charles Rogers, and Louis Canavino were regularly employed as captains, and were first, second, and fourth, respectively, on McAllister's seniority list of captains. Therefore they are entitled to reinstatement to their former positions as of April 13. Steven Jardin, who was fifth on the seniority list of captains, was working as a relief man. He was entitled to employment ahead of Ray Jankowiak, who was sixth on the seniority list of captains, and Richard Kestler, who was not on the seniority list, both of whom were hired by Outreach as docking pilots, i.e., performing the work of captains. Hardin was also entitled to employment as a mate in accordance with his seniority rights. As of April 13, Jerome Lukowski and Leon Mach Sr. were fist and second, respectively, on the seniority list of mates, and were working regularly as mates. They are entitled to reinstatement to their former positions. Charles Dougherty was fourth on the seniority list of mates, and Mark Garayoa was seventh and last on the list. (In addition, Leon Mach Jr., as shop steward for the mates, was entitled to superseniority in this category. Bernard Freburger Jr., nominally on the list, retired before April 13.) Dougherty worked infrequently. He had lower seniority than Leon Mach Jr. and Chester Wikell, who were hired by Outreach as “captains.” However he was entitled to employment ahead of Paul Straszynski, who was next in seniority, and Gregory Lukowski and Mark Adams, who had no seniority as mates. Charles Rogers testified that in 1983 Garayoa took a job with the Maryland Pilot Association. However deckhand Robert Machlinski testified that on May 21, 1984, he worked on an Outreach boat when Garayoa was “captain.” Although Garayoa retained his position on the seniority list and was entitled to contract wages, benefits, and other conditions when he worked for Outreach, I find that having obtained other employment Garayoa was not an employee of McAllister as of April 13, and therefore was not entitled to reinstatement by reason of such status.

****26** Peter Messina, Alvin Hirsch, and Manuel Alvarez were first, second, and third, respectively, on the seniority list of engineers, and Joseph Zorbach Jr. was entitled to superseniority by virtue of his status as engineer steward. They were working regularly as of April 13, and are entitled to reinstatement to their former positions. Robert Schwatka and James Perry were fifth and sixth on the seniority roster of engineers. They did not work regularly, ***619** but they were entitled to employment ahead of all of Outreach's “engineer-utility” personnel except Gerard Freburger, who had higher seniority. Joseph Rakowski, Paul Pusloskie, Robert Machlinski, Ronald Neibert and Robert Henniger Sr. were first, third, fourth, sixth, and seventh respectively on the deckhand seniority list, and were working regularly as deckhands as of April 13. They are entitled to reinstatement to their former positions. The remaining employees who were allegedly denied reemployment (George LeMaire, William Miller, William Bobac, Karl Blabich, Ramond Kuta, Steve August, Larry Neibert, and Norman Gifford) were on the seniority list of deckhands but did not work regularly. However, they were entitled to employment ahead of all of Outreach's deckhands

except Mark Jankowiak, James Kabakovich, and Morris Superczynski, who had high seniority which entitled them to regular employment. [24]

CONCLUSIONS OF LAW

1. McAllister and Outreach are alter egos and constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. The following units constitute units appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:
Unit I

All licensed tugboat personnel, including docking pilots, employed by Respondents in connection with towing in and from the Baltimore Harbor, including inland waters.

Unit II

All unlicensed tugboat personnel employed by Respondent in connection with towing in and from the Baltimore Harbor, including inland waters.

4. At all material times, the Union has been and is the exclusive representative of the employees of Respondents in the appropriate units.

5. By discriminatorily discharging its unit employees in order to avoid its collective-bargaining obligations, thereby discouraging membership in the Union, McAllister violated and is violating Section 8(a)(1) and (3) of the Act.

6. By discriminatorily failing and refusing to reinstate Ralph Kirchner, Charles Rogers, Louis Canavino, Jerome Lukowski, Leon Mach Sr., Peter Messina, Alvin Hirsch, Manuel Alvarez, Joseph Zorbach Jr., Joseph Rakowski, Paul Pusloskie, Robert Machlinski, Ronald Neibert, and Robert Henninger to their former positions, by further failing and refusing to recall Steven Hardin, Charles Dougherty, Robert Schwatka, James Perry, George LeMaire, William Miller, William Bobac, Karl Dlabich, Raymond Kuta, Steve August, Larry Neibert, and Norman Gifford for work in accordance with their seniority rights, by failing to recall employees in accordance with contractual seniority, and by failing to maintain terms and conditions of employment as provided in the collective-bargaining contracts between McAllister and the Union, thereby discouraging membership in the Union, Respondents have violated and are violating Section 8(a)(1) and (3) of the Act.

****27** 7. By withdrawing recognition of the Union, by dealing directly with unit employees concerning wage reductions and reduction of other terms, benefits and conditions of employment, by unilaterally reducing or eliminating employees' wages, crew sizes, fringe benefits, and premium pay, and failing to recall employees in accordance with contractual seniority, and by otherwise failing to abide by terms and conditions of employment as set forth in the collective-bargaining contracts between McAllister and the Union, Respondents have violated and are violating Section 8(a)(5) and (1) of the Act.

***620** 8. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have committed violations of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that they be required to cease and desist therefrom, and from like or related conduct, and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that Respondents be ordered to maintain and give full effect to the collective-bargaining contracts covering the unit employees which were effective by their terms through September 30, 1984, and from year thereafter until terminated upon proper notice; unless and until Respondents and the Union negotiate a new agreement or agreements or bargain to impasse after compliance with the requirements of Section 8(d) of the Act. I shall recommend that Resondents be ordered to offer Ralph Kirchner, Charles Rogers, Louis Canavino, Jerome Lukowski, Leon Mach Sr., Peter Messina, Alvin Hirsch, Manuel Alvarez, Joseph Zorbach Jr., Joseph Rakowski, Paul Pusloskie, Robert Machlinski, Ronald Neibert, and Robert Henninger immediate and full reinstatement to their former positions, or if, for lawful reasons, such positions no longer exist, to substantially equivalent positions in accordance with their seniority rights, without prejudice to their seniority or other rights, privileges, and benefits previously enjoyed, and to offer Steven Hardin, Charles Dougherty, Robert Schwatka, James Perry, George LeMaire, William Miller, William Bobac, Karl Dlabich, Raymond Kuta, Steven August, Larry Neibert, and Norman Gifford employment in accordance with their seniority rights, without prejudice to their seniority or other rights, privileges, and benefits previously enjoyed, displacing if necessary employees hired by Respondents with less or no seniority rights. I shall further recommend that Respondents be ordered to make whole all of the above-named employees for any loss of earnings they may have suffered from the time of their termination on April 13, 1984, to the date of Respondents' offer of reinstatement or appropriate employment, including loss of docking pilot fees. See *Dependable Truck Leasing*, 190 NLRB 422, 424 (1971). Backpay for the above-named employees shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner and amount prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). [25] I shall further recommend that Respondents be ordered to make whole former McAllister employees employed at Outreach for the difference between the contract terms and what they were actually paid, to the extent that they had sufficient seniority to be employed if the seniority provisions of the McAllister contracts had been following. *H. S. Brooks Electric, Inc.*, 233 NLRB 889 (1977). Such reimbursement, with interest, shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), and *Florida Steel Corp.*, supra. See *European Parts Exchange*, 270 NLRB 1244 fn. 2 (1984). For remedial purposes, the 22 unit employees who were regularly employed by McAllister as of April 13 (8 of whom were hired by Outreach) shall be considered as entitled to regular employment on and after that date by reason of their seniority status. I shall recommend that Respondents be ordered to take such further actions as are necessary to fulfill their contractual obligations, including but not limited to the following: Respondents shall pay wages and overtime and other premium pay and maintain crew sizes as required by the contracts. Respondents shall make the contractually established payments to the various trust funds established by the collective-bargaining agreements on behalf of all employees who were entitled to employment. In accordance with Board policy, the amount of interest if any due on such payments shall be determined at the compliance stage of this proceeding. *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Respondents shall reimburse those employees for any medical or dental bills they have paid to health care providers that the contractual policies would have covered, for any premiums they may have paid to third party insurance companies to continue medical and dental coverage in the absence of Respondent's required contributions, and for contributions they themselves may have made for the maintenance of the contractual trust funds after Respondents' unlawfull discontinued or failed to make contributions to those funds. *Kraft Plumbing Co.*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Reimbursement shall be with interest in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, supra. Respondents shall also be required to reimburse the Union for any dues which, pursuant to dues-checkoff authorizations, they failed to deduct or would have been required to deduct from those employees' paychecks and transmit to the Union as required by contract, insofar as the Union has not obtained such dues directly from employees, with interest.

****28** On these findings of fact and conclusions of law and on the entire record, I issue the following recommended. [26]

ORDER

The Respondents, McAllister Brothers, Inc. and Outreach Marine Corporation, alter Egos, Baltimore, Maryland, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District; Seafarers International Union of North America, AFL-CIO, or any other labor organizaiton, by discharging employees in orer to avoid their collective-bargaining obligations, failing or refusing to reinstate or recall employees to work in accordance with their contractual seniority rights, failing to maintain terms and conditions of employment as provided in Respondents' ***621** collective-bargaining contracts, or in any other manner discriminating against employees with regard to their hire or tenure of employment or any term or condition of employment.

(b) Failing or refusing to recognize and bargain collectively in good faith with the Union as the exclusive bargaining representative of their employees in the appropriate units, failing or refusing to honor collective-bargaining agreements applicable to those employees, unilaterally changing the wages, hours and other terms and conditions of employment of the unit employees without prior notice to the Union and without affording the Union an opportunity to meet and bargain concerning such matters as such representative, or bypassing the Union and dealing directly with unit employees concerning changes in wages or other terms and conditions of employment.

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

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

(a) Offer Ralph Kirchner, Charles Rogers, Louis Canavino, Jerome Lukowski, Leon Mach Sr., Peter Messina, Alvin Hirsch, Manuel Alvarez, Joseph Zorbach Jr., Joseph Rakowski, Paul Pusloskie, Robert Machlinski, Ronald Neibert, and Robert Henninger immediate and full reinstatement to their former jobs, or if, for lawful reasons, such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights, privileges, and benefits previously enjoyed.

(b) Offer Steven Hardin, Charles Dougherty, Robert Schwatka, James Perry, George LeMaire, William Miller, William Bobac, Karl Dlabich, Raymond Kuta, Steve August, Larry Neibert, and Norman Gifford employment in accordance with their seniority rights, without prejudice to their seniority or other rights, prvileges and benefits previously enjoyed, displacing if necessary employees hired by Respondents with less or no seniority rights.

(c) Make whole the above-named employees for losses they suffered by reason of Respondents' unlawful failure and refusal to employ them in accordance with their seniority and other rights under the contracts between McAllister and the Union, as set forth in the section of this decision entitled “The Remedy.”

****29** (d) Make whole former McAllister employees employed at Outreach for the difference between the contract terms and what they were actually paid, to the extent that they had sufficient seniority to be employed if the seniority provisions of the McAllister contracts had been followed, as set forth in the remedy section of this decision.

(e) Maintain and give full effect to the collective-bargaining contracts covering the unit employees which were effective by their terms through September 30, 1984, and from year to year thereafter until terminated upon proper notice, unless and until Respondents and the Union negotiate a new agreement or agreements or Respondents bargain in good faith to an impasse in

accordance with the requirements of Section 8(d) of the Act, including but not limited to: paying wages and overtime pay, and maintaining crew sizes as required by the contracts; making the contractually established payments to the various trust funds established by the contracts on behalf of all employees who were entitled to employment, reimbursing those employees for any expenses ensuing from Respondents' failure to make such contributions; and reimbursing the Union for any loss of dues caused by Respondents' failure to deduct dues pursuant to checkoff anuthorizations and remiting same to the Union as required by contrat; all as set forth in the section of this decision entitled "The Remedy."

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

(g) Post at their Baltimore, Maryland offices and places of business, the attached notice marked "Appendix."[27] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondents' authorized representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced, or covered by any other material.

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

Footnotes

1 The Respondents have requested oral argument. The requests are denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

Respondent Outreach Marine has also filed a motion to reopen the record for newly discovered evidence. That motion is denied as the evidence proffered by Outreach, even if adduced and credited, would not require a different result in this case. See Sec. 102.48(d) of the Board's Rules and Regulations.

2 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.

The judge states in fn. 3 of his decision that the Board has historically taken a dim view of personnel who tape-record meetings with their employer, citing *Swinick (W. T. Grant Co.) v. NLRB*, 528 F.2d 796 fn. 13 (3d Cir. 1975). We do not adopt the judge's comments in this regard, because the Board has sometimes found tape recordings of employee meetings to be the best evidence of what was said. See, e.g., *Algreco Sportswear Co.*, 271 NLRB 499, 505 (1984); *East Belden Corp.*, 239 NLRB 776, 782 (1978). In this case, Anthony McAllister himself suggested that the tape recording of a meeting about which he was testifying be played in order to ascertain exactly what he had said, and the parties stipulated to the authenticity of that portion of the tape introduced into the record.

The judge found that the loan transaction, in which McAllister sold its four tugboats to Outreach but remained liable to the National Westminister Bank for the repayment of a $1.4 million loan to Outreach secured by a first preferred fleet mortgage on the vessels, was nothing but a paper-shuffling device; that for all practical purposes Westminister substituted one mortgage guaranteed by McAllister for another mortgage guaranteed by McAllister. We agree. The judge, however, further found that Westminister actually loaned nothing and McAllister received nothing, at least not

from the transaction. Whether viewed as a part of this transaction or as a separate transaction, we note that, simultaneous with the loan to Outreach, Westminister required that McAllister substitute other collateral obtained from the proceeds of that loan to secure a separate loan, or letter of credit agreement, to a McAllister subsidiary company which had previously been secured by a mortgage on the tugboats. Thus, Westminister Bank may have loaned additional money as the overall result of these related transactions. The fact remains, however, that before the transaction McAllister was liable for $1.4 million secured by the tugboats and after the transaction McAllister remained liable for $1.4 million secured by the tugboats.

The judge at one point in his decision states that McAllister deliberately concealed the existence of Outreach, and steadfastly represented to the public and its customers that McAllister was continuing to provide tugboat services in Baltimore Harbor throughout 1983, whereas it is apparent from the record and other parts of his decision that the judge meant throughout 1984.

3 In adopting the judge's conclusion that McAllister's captains are employees within the meaning of Sec. 2(3) of the Act, we note that over 90 percent of McAllister's work was performed within Baltimore Harbor where the captains maintain constant radio contact with McAllister's shore-based supervisors.

We do not find the record evidence sufficient to establish whether or not Mark Garayoa continued to be a McAllister employee as of 13 April 1984. Accordingly, we do not adopt the judge's conclusion that Garayoa was not an employee of McAllister on the relevant date, but shall defer the issue of Garayoa's status to the compliance stage of this proceeding.

4 Since we agree with the judge's conclusion that McAllister and Outreach are alter egos, we find it unnecessary to pass on his alternative finding that Outreach would be McAllister's successor if it were not its alter ego, or on issues related to that finding.

1 All dates herein are for the period from September 1, 1983, through August 30, 1984, unless otherwise indicated.

2 Certain errors in the official transcript of proceedings is noted and corrected, two of which (Tr. 679 and 725) affect the substance of evidence. Respondent Outreach has requested that I make the correction at p. 725 of the record (Br. fn. 7). In the context of Mann's testimony, the correction is warranted. My notes are also consistent with the proposed correction. With regard to my correction, Tr. 679, my notes indicate that the parties stipulated that the first five persons on G.C. Exh. 29 did not work for McAllister in 1983 or 1984. They do not appear on McAllister's seniority lists. It is evident that the period on L. 3 was misplaced.

3 My findings concerning McAllister's statements at the October 3 meeting are based on a tape recording of the meeting by Robert Schwatka, one of the unit employees. Prior to my receipt of the tape recording in evidence, Anthony McAllister's testimony was evasive as to whether he made the above-quoted statement. The General Counsel argues (Br. fn. 7) that this testimony reflects adversely on McAllister's credibility. Schwatka recorded the meeting with McAllister's knowledge and consent. However, the Board has historically taken a dim view of personnel who tape-record meetings with their employer. See, e.g., *Swinick (W. T. Grant Co.) v. NLRB*, 528 F.2d 796 fn. 13 (3d Cir. 1975). In deference to this policy consideration, I have not drawn any adverse inferences from conflicts if any between the testimony of McAllister officials and employee recordings of their meetings.

4 Anthony McAllister testified that at the October 3 meeting employees suggested that they purchase the tugboats. Schwatka testified that no employee said anything about buying the boats, although they suggested that they could buy stock in the Company. In view of the employees' subsequent rejection of McAllister's proposal that they buy the boats, I find it unnecessary to resolve what the employees proposed at the October 3 meeting.

5 McAllister's largest tugboat, the *Grace McAllister*, was not included in the proposed sale. The Company concluded that the *Grace McAllister* was too expensive to use in the Baltimore operation, and so informed the employees. McAllister subsequently transferred the *Grace McAllister* to Norfolk and it was not included in the sale to Outreach.

6 As an adverse witness for the General Counsel, McAllister testified that after the November 21 meeting he considered selling the tugboats to an outsider, contacted a broker, who failed to produce a prospective purchaser, and about December 1 contacted Mann. According to McAllister they “got specific” before Christmas. However, McAllister's testimony concerning the dates of their contacts was contradicted by Mann, who testified concerning the sequence of events as described above. McAllister's testimony was also contradicted by his November 14 letter forwarding financial

information to Mann. It is evident that McAllister was negotiating with Mann during the same period that he was attempting to obtain concessions from the employees.

7 Because of illness, Anthony McAllister was not recalled as a Respondent witness. With the agreement of the parties I received his investigatory affidavit in lieu of oral testimony. In that affidavit, McAllister stated that between November 21 and January 16 he discussed the sale of the tugboats with his competitor Moran and with a Florida broker. According to McAllister, Moran said there might be antitrust problems (as sale to Moran would result in a monoply on tugboat service in Baltimore Harbor), and other prospective buyers were either not interested or lacked the requisite experience. As an adverse witness, McAllister admitted that he was not even contacted by a prospective buyer. It is evident from McAllister's own repeated statements, which have been and will be discussed, that McAllister had no intention of abandoning its status as a four-port operator, and consequently determined to sell its boats only to a purchaser over whom it could exercise continuing economic control, and on terms which would first and foremost protect its interests as a four-port operator. The evidence indicates that McAllister never considered any prospective purchaser other than its own employees or Alcide Mann.

8 Anthony McAllister testified that he did not know how Mann got in touch with Westminister. In his investigatory affidavit, McAllister stated that McAllister Transportation Official Larry Chan put Mann in touch with Westminister. In fact, as testified by Mann, Anthony McAllister referred him to Gumbrecht, and by late December Mann was already in touch with Gumbrecht and discussing the manner in which the sale could be financed. Mann testified that he also discussed financing with another bank, Union Trust. In fact, although Mann was interested in and subsequently established a business relationship with Union Trust after Outreach commenced operations, there was never any question that the sale would be financed, if at all by Westminister. Not only did Westminister have expertise in the maritime industry, a continuing relationship with McAllister, and a knowledge of its boats, but most significantly, Westminister held a mortgage on McAllister's boats by reason of a loan to the Bridgeport and Port Jefferson Steamboat Company, another McAllister Transportation subsidiary. Therefore it would have been impossible to finance the sale without Westminister. Indeed, Mann initially talked with Gumbrecht about assuming this mortgage. As will be discussed, Westminister preferred that the sale not be financed in this manner.

9 The loan agreement prohibits Outreach from engaging in any business except the operation of vessels, declaring dividends, or incurring liens (with limited exceptions).

10 The appendix stated that this objective was necessary "as, *regardless of the fact that these licensed personnel are servants of the owner*, it will have a bearing on McAllister's customer relations." (Emphasis added.) In addition to the issue of alter ego status, these provisions are also evidentiary with respect to Outreach's contention that its docking pilots are independent contractors.

11 According to Mann, this provision reflected a compromise, because McAllister wanted the right to terminate the agreement upon obtaining a favorable decision from the arbitrator. The distinction is illusory rather than substantive, because Outreach would have no recourse if McAllister, for whatever reason, decided that Outreach was failing to perform pursuant to the arbitrator's decision.

12 This arrangement was plainly designed to benefit McAllister, at the expense of Outreach. For example, if Outreach could establish rates in Baltimore, and decided to undercut Curtis Bay, such action might trigger a price war which would place McAllister at a disadvantage in other ports where it directly operated tugboats.

13 Stephens subsequently attempted to back away from this admission, asserting that the boat captains, but not Gross, had the authority to discipline employees. In view of the fact that the captains took their orders from Gross and the dispatchers, this assertion was demonstrably incredible.

14 Licensed personnel who have served as mate and captain may accumulate seniority in both categories. Mark Garayoa, who is listed at the bottom of McAllister's seniority roster of mates, left McAllister in late 1983 in order to take other employment.

15 In his investigatory affidavit, Anthony McAllister stated that McAllister terminated its entire office staff except Bishop and Geeson. However, in his testimony McAllister admitted that Goldrick was still working for McAllister.

16 Some time after May 15 Outreach hired a third dispatcher. As indicated, McAllister had not replaced a dispatcher who retired in 1983. On May 14 Outreach also hired two watchmen.

17 Jankowiak, by virtue of his special status as a key person in Outreach's ration, may have had a different salary arrangement.

18 The union contracts also provided for payments to trust funds which performed service functions, i.e., School of Seamanship, Transportation Institute, and hiring hall.

19 I am not persuaded that the Rogers matter is particularly significant with respect to the alter ego issue. At the time Rogers pursued his quest for employment, carefully recording the same, both sides anticipated the present litigation, and it is evident that both were grandstanding. Mann had already decided not to hire Rogers, and Stephens and Mann were obviously not inclined to engage in any action which might be construed as evidence that McAllister controlled Outreach's hiring practices. In fact, Outreach tended to hire personnel with relatively low seniority, i.e., employees who lacked job security and therefore might be more amenable to working under nonunion conditions. However, as indicated I find that the Rogers matter is evidentiary on the question of alleged independent contractor status.

20 Respondents suggest (McAllister Br. 15, Outreach Br. 24) that McAllister's customers and their agents could not have been misled because McAllister's tariff provided that: "if at any time McAllister Brothers, Inc. tugs are not conveniently available for the required services, the said agent, McAllister Brothers, Inc. shall have the right to designate or engage other tugs for such services; and such other tugs, together with any additional tugs hereafter added to the fleet, shall be covered by this contract/schedule." However, the tariff language indicates that this would be an exception rather than the usual situation. Respondents also attach significance to the fact that Outreach eventually painted the tugs with different colors and symbols than those utilized by McAllister. However, the foreign agents had little if any occasion to observe operations in Baltimore Harbor, and in view of McAllister's insistent representations to the contrary, and the fact that they continued to deal only with McAllister, they had no reason to believe that any firm other than McAllister was operating the tugs.

21 McAllister contends (Br. 18) with respect to the alter ego question that the General Counsel must bear "a heavy burden of proof." The General Counsel's burden with respect to this issue is the same as that in most civil and administrative litigation, namely, to prove its case by a preponderance of the credible evidence. See Sec. 10(c) of the Act.

22 Respondents attach significance to the allegedly prolonged negotiations and the elaborate nature of the documents executed by the parties involved in the April 13 transactions. Compare *Fugazy Continental*, supra, 265 NLRB at 1302. Their arguments might be persuasive if one did not carefully examine those documents. It is evident from those documents, and testimony and evidence concerning the developments which led up to the April 13 transactions (previously discussed) that the transaction took place substantially on terms originally contemplated by McAllister, subject to the requirements of Westminister, and that the agreements were carefully crafted to assure that McAllister effectively controlled the Baltimore Harbor operation.

23 In his opening statement, union counsel made an argument based in part on the asserted equities involved in this case. In the present case, the equities are by no means one-sided. The employees could have been more understanding and cooperative when McAllister presented them with its financial situation. However McAllister negotiated the union contracts, the employees were entitled to their rights under those contracts.

24 Assuming, arguendo, that McAllister and Outreach were not alter egos, I would find that Outreach is the successor to McAllister and obligated to recognize and bargain with the Union in accordance with the principles established in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and that Outreach violated Sec. 8(a)(1) and (5) of the Act by failing to do so. First "there is substantial continuity of the employing industry," *Saks Fifth Avenue*, 247 NLRB 1047, 1050-1051 (1980), enfd. in pertinent part 634 F.2d 681 (2d Cir. 1980). Specifically, Outreach performed the same work as McAllister, servicing the same customers in the same manner without any break in service, using the same equipment and operating initially at the same location and later at a nearby location. Moreover, McAllister represented to its customers and the general public that this was a McAllister operation. Second, as of May 16, when the Union sent a letter to Outreach, asserting its status as representative of Outreach's employees and demanding recognition and bargaining, a majority of Outreach's employees were former employees of McAllister. In this regard, an appropriate unit would consist

of all personnel employed in connection with towing, including docking plots, captains, engineer-utility personnel, and deckhands, but excluding supervisors and shore-based personnel. See *A. J. Mechling Barge Lines*, 192 NLRB 1118, 1120 (1971). As previously discussed, I have found that the docking pilots and captains are employees under the Act. Therefore they would be included in the unit. The watchmen hired by Outreach would also be excluded as guards under Sec. 9(b) of the Act. In addition, Ray Jankowiak would be excluded as a supervisor, by reason of his substantial involvement in making effective recommendations to Alcide Mann with regard to hiring of personnel. Outreach's records indicate that as of May 16, there are 20 employees in the appropriate unit. Of these, eight (Edward Covacevich, Gerard Frebuger, Mark Jankowiak, James Kabakovich, Leon Mach Jr., Paul Straszynski, Morris Superczynski, and Chester Vikell) were regularly employed by McAllister, and four (Gregory Lukowski, Thomas Lukowski, Jerry Pakula, and Robert Zientak) had performed sufficient work for McAllister to obtain and maintain places on McAllister's seniority roster, and they worked on an irregular basis for McAllister in acordance with their seniority rights. Therefore they had a reasonable expectancy of recall to work, and should be recognized as employees of McAllister for successorship purposes. *Pacific Hide & Fur Depot*, 223 NLRB 1029, 1030 (1976), enfd. denied on other grounds 553 F.2d 609 (9th Cir. 1977). "A layoff, by definition, is not a termination of the employment relationship. The employee retains his or her status as an employee, but is placed in an 'inactive' status for the period of the layoff." *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926, 931 (7th Cir. 1982). Moreover, McAllister regarded all persons on its seniority roster as its employees, as demonstrated by the fact that McAllister invited all personnel on its seniority roster, whether working or on layoff status, to the meetings in which it submitted proposals to deal with its financial problems. Additionally, it is significant that an employee established seniority under the union contracts by working 30 days in a 60-day period, and thereafter retained seniority by working at least 1 day in each 6-month period. The union-security clauses further provided for union membership within 31 days of the initial date of hire. Therefore all employees on the seniority list were covered by the union-security clause, and were presumably union members. For this additional reason, employees on the McAllister seniority list who were hired by Outreach, should be regarded as union represented employees. *Saks & Co. v. NLRB*, 634 F.2d 681, 686 (2d Cir. 1980). Assuming that separate licensed and unlicensed units should be deemed as appropriate, former McAllister employees would constitute a majority of both units (8 of 13 licensed employees and 4 of 7 unlicensed employees).

25 See generally *Isis Plumbing Co.*, 138 NLRB 716, 717-721 (1962).

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

27 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."

278 NLRB No. 91 (N.L.R.B.), 278 NLRB 601, 123 L.R.R.M. (BNA) 1040, 1985-86 NLRB Dec. P 17750, 1986 WL 54168