

East Tennessee Packing Company/Selecto Meats, Inc. and United Food and Commercial Workers, District Lodge 405. Case 10-CA-18218

11 May 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 14 September 1983 Administrative Law Judge Leonard N. Cohen issued the attached decision. The General Counsel filed exceptions and a supporting brief, Respondent East Tennessee Packing Company filed cross-exceptions and an answering brief, and Respondent Selecto Meats, Inc. filed an answering brief.

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, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ We hereby correct certain inadvertent factual errors in the judge's decision which do not affect the result of the case. Under heading "A. East Tennessee's Operation," the statement that East Tennessee's sales amounted to "over 750 pounds per week" is changed to "over 750,000 pounds per week." Under heading "B. East Tennessee's Financial Problems," the total net loss of East Tennessee over a 2-1/4 year period is changed from "approximately \$813,000" to "approximately \$1,815,000." In fn. 12, the name of the second corporation is changed from "Selecto International Food, Inc." to "Selecto Institutional Food, Inc." Under heading "C. Selecto's Operation," the reference to Welton Shealy, Selecto's vice president, as a member of East Tennessee's board of directors is deleted; the record only reflects that he served as an officer of East Tennessee Packing Company.

DECISION

STATEMENT OF THE CASE

LEONARD N. COHEN, Administrative Law Judge. This case was heard before me on January 26, 1983, in Chattanooga, Tennessee. The charge and amended charge were filed on June 1, 1982,¹ and July 12, respectively, by United Food and Commercial Workers, District Lodge 405, herein called the Union. The complaint which issued on July 15 alleges that East Tennessee Packing Company, herein called East Tennessee, and Selecto Meats, Inc., herein called Selecto, violated Section 8(a)(5) and (1) of the National Labor Relations Act. The gravamen of the complaint is that Selecto is the alter ego

¹ Unless otherwise stated, all dates referred in 1982.

of East Tennessee and that, when East Tennessee ceased business operations under its own name on May 21 and thereafter commenced a new nonunion operation on May 23 under the name of Selecto, it did thereby violate Section 8(a)(5) by refusing to bargain over the scope and duration of employee layoffs, unilaterally changing the wages, fringe benefits, and other terms and conditions of employment, failing and refusing to give effect to the existing collective-bargaining agreement including those provisions relating to the selection and retention of employees and, finally, refusing to recognize and bargain with the Union as the representative of Selecto's employees. Respondent East Tennessee and Selecto by their respective answers denied any alter ego status and thereby denied the commission of any unfair labor practices.

All parties were afforded full opportunity to participate, to present relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file written briefs. Counsel for the General Counsel, counsel for East Tennessee, and counsel for Selecto each filed written briefs which have been carefully considered. From the entire record in this case and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Jurisdiction is not in issue. Respondent East Tennessee and Respondent Selecto each admit that it is a Tennessee corporation doing business in Knoxville, Tennessee. Further, each admits that it meets the Board's direct inflow standard. Accordingly, I find that Respondent East Tennessee and Respondent Selecto each were at all times material herein employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it would effectuate the purposes of this Act for the Board to assert its jurisdiction.

II. LABOR ORGANIZATION INVOLVED

East Tennessee and Selecto each admit, and I find and conclude, that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. East Tennessee's Operation

The material facts are not in dispute. At the time of its closure in May 1982, East Tennessee, under the direction of its president David Traver, operated as a large full-scale regional meat packer. As such, it slaughtered hogs,² prepared and sold fresh pork items, and manufactured and sold a full line of packing items such as sliced bologna, luncheon meats, smoked meats, and sliced bacon. Additionally, it produced and sold lard and off-line items such as hogs' tails and feet. East Tennessee employed approximately 275 production and mainte-

² In January 1980 East Tennessee discontinued its cattle slaughtering operation.

nance employees³ in one of the 25 separate and distinct departments located in the approximately 196,000-square-foot building which housed both its production facilities as well as corporated offices.⁴ East Tennessee sold all of the manufactured or processed meat products, which amounted to over 750 pounds per week, under the brand name "Selecto." Of its average monthly sales which were in excess of \$4-1/2 million, over 95 percent were directly attributable to products it prepared, manufactured, and processed.

With a sales force of approximately 40, East Tennessee operated primarily within a 250-mile radius of the Knoxville area, with much of its business coming from truck-load sized sales made to large retail chain stores located within both the primary service area as well as a limited portion of Florida. In fact, well over 35 percent of East Tennessee's total sales volume were the result of sales made to just some 20-odd customers.

East Tennessee was established in 1895 by J. B. Madden. The 1000 shares of East Tennessee stock are distributed as follows:

J. B. Madden Trust	510
D. G. Madden Trust-A	89
D. G. Madden Trust-B	101
R. E. Madden Trust	23
H. H. Slatery Jr.	80
David Traver	70
James Smith Jr.	62
University of Tennessee	10
Margaret Gillespie	40

The remaining 15 shares are owned by either various individuals or held as treasury stock.

David Traver, East Tennessee's president since 1972, and one of its four board members, was the grandson of the founder J. B. Madden, and the nephew of R. E. Madden and G. G. Madden. Traver and James Smith Jr., owner of 62 shares, are first cousins.

All of the trusts which control the majority of East Tennessee stock are administered by the trust department of Part National Bank of Knoxville, Tennessee, herein called Park National. The trustees for the J. B. Madden Trust and the D. G. Madden Trust-B were Traver, James Smith Jr., and Park National itself.⁵ While Traver owned only 7 percent of the stock in East Tennessee, his mother has a 20-percent interest in the J. B. Madden Trust. Under the terms of that trust, Traver and his brother each receive one-half of their mother's interest, or 51 shares each, at the time of her death.

Park National's interest in East Tennessee is not limited to its fiduciary role as a trustee of the several trusts owning East Tennessee stock. As will be discussed, *infra*, at all times Park National was a major creditor of East Tennessee with loans amounting to \$400,000 throughout the period in question. Traver served on the bank's

board of directors, while his cousin and co-trustee, James Smith Jr., served as chairman of the bank's board of directors. To confuse the situation further, East Tennessee owns 22,800 shares out of the approximately 400,000 shares of outstanding Park National stock.

B. East Tennessee's Financial Problems

In 1980, East Tennessee began experiencing serious financial problems. For that year it lost approximately \$467,000. These financial woes continued into 1981 at a disturbingly increasing rate. Thus, in the first 4 months of 1981, East Tennessee suffered losses in excess of \$370,000. For the next 3 months of 1981, East Tennessee suffered an additional loss of \$430,000. The final 5 months of 1981 showed only a slight improvement with a loss for that period amounting to approximately \$379,000. The financial picture for the first 3 months of 1982 were no better, with East Tennessee losing an additional \$169,000. Thus, over a 2-1/4 year period, East Tennessee suffered the total net loss of approximately \$813,000.

Commencing in about mid-1981 when the above-cited trend became truly alarming, East Tennessee and Park National, in its dual role as fiduciary and major creditor,⁶ took steps to attempt to save the situation.

Traver, as president and chief operating officer of East Tennessee, attempted to attack the situation of several fronts simultaneously. Thus, he took measures to reduce operating expenses. In this regard, he cut the work force by some 100 people, as well as instituting other less drastic cost-saving steps. Further, starting in August 1981 and continuing well into the spring of 1982, East Tennessee, through Traver and others not directly involved in East Tennessee's day-to-day management, sought major and significant concessions from the Union which had represented East Tennessee's production and maintenance employees since 1964. The concessions which it sought from certain terms and conditions of the last in the series of collective-bargaining agreements covering August 1980 through August 1983 amounted to a demand for a substantial rollback in wages and the elimination of future COLA increases. Despite the prediction of dire consequences that would befall if the Union failed to acquiesce in the sought-for concessions, East Tennessee was unable to secure any significant relief from the Union.⁷

³ While the Park National loan of \$400,000 was not insignificant, it was relatively minor when compared to the \$2.2 million debt owned to Citizen's Fidelity Bank of Louisville, Kentucky.

⁴ In a January 21 letter to all employees, Traver indicated the seriousness of the situation when he outlined three alternatives open to East Tennessee. Alternative one called for East Tennessee to cease all operations and liquidate its property. Alternative two was to operate as a distribution warehouse selling "Selecto" products manufactured by other companies and thus become merely a jobber of pork items. Alternative three was to continue its present operations on a profitable basis with reduced operating costs. It was in connection with this third alternative that Traver sought the wage concessions mentioned above.

As will be seen *infra*, Traver, in effect, adopted alternative two when he later formed Selecto.

³ This number had been reduced in the last year from a high of approximately 350.

⁴ The discontinued cattle kill area occupied only approximately 10,000 square feet or slightly more than 5 percent of the entire building.

⁵ The record is silent as to who the other trustees are in the other trusts owning East Tennessee stock.

East Tennessee also during this time frame sought to sell its business. In furtherance of this goal, in April 1981 it retained the services of a nationally known and experienced management consultant, W.W. McCallum. Despite McCallum's efforts over a year's time, only two prospects appeared.

The first of these was a firm proposal by Bluebird, Inc., a meat packing company located in Philadelphia, Pennsylvania. Bluebird offered to purchase the inventory of East Tennessee and collect its accounts receivable. It would not have continued East Tennessee's production operation in Knoxville. After 2 months of negotiations, Bluebird made a modified proposal which McCallum and Traver recommended to the special oversight committee created by the trust committee of Park National. The oversight committee, which was composed of three independent business/members of the bank's board of directors, recommended against the offer on the grounds that it called for East Tennessee and its shareholders to retain substantial risks. The recommendation of the oversight committee was thereafter adopted by the trust committee. Neither Traver nor James Smith Jr. participated in these decisions.⁸

The second possible buyer appeared in October 1981. At that time officials of John Morrell & Company of Chicago, Illinois, expressed an interest in purchasing East Tennessee apparently on a basis similar to Bluebird's proposal. However, at some unspecified point during late 1981, Morrell withdrew from these discussions. Although McCallum continued his efforts thereafter, he was unsuccessful in obtaining any other interested potential buyers.

On April 12 the trust committee of Park National convened a special meeting to discuss East Tennessee's deteriorating situation. At this meeting, the state of East Tennessee's financial condition was discussed in some detail. Among the factors mentioned was Citizen's Fidelity Bank's stated intention to terminate East Tennessee's credit and request a liquidation of its \$2.2 million loan.

After some discussion, the trust committee determined that in order to stop losses and preserve assets, it was "necessary to immediately curtail expenditures and bring the operation of the Company to a close as expeditiously as possible."⁹ The trust committee further resolved that

⁸ In setting up the trust, the will of J. B. Madden provided that its trustee and executor, the East Tennessee Savings Bank, an apparent predecessor of Park National, act along with J. B. Madden's three sons as trustees of the trust. The will further provided that the sons/trustees did not have the right to sell or dispose of the stock in East Tennessee, with those rights being lodged exclusively with the bank/trustee.

Both Traver and Smith Jr., served on the two trusts as successor trustees. It is not clear why neither participated with Park National as cotrustees in voting on the Bluebird proposition and the later April 12 proposition to cease operations. Whether Traver and Smith were prohibited from voting by the terms of the J. B. Madden will or whether they abstained out of some fiduciary responsibility is not clear. In any event, the record is clear that it was the trust department of the Park National, and not Traver and/or Smith Jr., who passed on these decisions as majority stockholder.

⁹ While the April 12 resolution called for this action to be taken within 30 days of the meeting, it was subsequently amended to expand the deadline to May 22.

the other trustees were requested to join in calling for a special board of director's meeting to authorize East Tennessee's management to carry out its desires and recommend to the stockholders a plan of liquidation covering, inter alia, "The possible sale of the HRI Division, the brand name and sales division, to third parties including Traver or assigns."¹⁰

By letter dated April 14, Traver notified the Union of East Tennessee's intention to cease all operations by May 22 and, by letter dated and posted on April 16, Traver informed the employees that East Tennessee would implement the phase-out previously outlined in its April 14 letter to the Union.

By letter dated May 12, Traver informed the Union and its members that its continuing efforts to sell East Tennessee had thus far proved futile and that it was, therefore, forced to permanently lay off nearly 100 production and maintenance employees effective May 14, with the remainder to be laid off effective May 21. This letter further states:

We are continuing our efforts to sell the "Selecto" brand and its "goodwill" in the hope that someone might warehouse and sell Selecto products in the present trade area. If we are successful, the purchaser will be able to consider the employment applications of former East Tennessee Packing Company employees and some jobs might be continued beyond the time of sale.

Traver did not indicate to the Union at this time that he was then considering becoming "the purchaser" mentioned above. As will be discussed *infra*, Traver resigned as president effective on May 20 to pursue just such a course of action.

On May 20 Traver, by notice posted to employees, informed them that effective on Sunday, May 23, he would become the president of the two newly formed corporations, Selecto Meats, Inc., and Selecto Institutional Foods, Inc. That same day he further notified East Tennessee's employees that Selecto Meats, Inc., was purchasing the "Selecto" trademark and would be leasing certain of East Tennessee's assets. The notice further stated that Selecto would need approximately 30 employees to be employed in the distribution, warehousing, and processing department and that former East Tennessee employees could apply and be interviewed on Saturday, May 22, for those positions.

On May 21, East Tennessee's final day of operation, the Union's business manager and secretary-treasurer Billy Atnip went to the plant and met with East Tennessee's secretary-treasurer W. E. Godwin to discuss the effects of the closing on the employees.¹¹ During the

¹⁰ The HRI Division was a separate manufacturing and sales division of East Tennessee which served hotel, restaurant, and institutional customers exclusively.

¹¹ During the hearing, counsel for the General Counsel categorically stated that the only predicate for the 8(a)(5) complaint allegations would be on the basis of a finding of alter ego status. She agreed that should alter ego status not be found, those portions of the complaint would be dismissed. There is no allegation that Respondent failed to bargain about the effects of East Tennessee's closure.

course of this discussion, Atnip asked if the plant had been sold. When Godwin replied that it had not, Atnip mentioned Traver's May 20 notice stating that Selecto would be hiring some 30 employees on May 22. Godwin, who Atnip knew had been out of town prior to the morning of May 21, denied at that time any knowledge of a sale.

C. Selecto's Operation

Following Park National's April 12 decision to cease East Tennessee's operation in late May, Traver began investigating the possibility of purchasing certain of the assets of East Tennessee and operating on a jobber basis. In furtherance of this plan, Traver explored the possibility of establishing a line of credit with a local bank. In mid-May when he was apparently satisfied he could secure the needed financing from both First American Bank of Knoxville and from a major supplier, he retained the services of a law firm with no connection to East Tennessee and authorized the formation of Selecto.¹² Traver owned all the shares of Selecto which he capitalized at \$20,000. About this same time, Traver submitted his resignation as president and chairman of the board of East Tennessee as well as from the several trusts owning East Tennessee stock on which he served as trustee.

Following these actions Traver and Godwin, serving as the representative of East Tennessee's board of directors, met between May 21 and May 23 and negotiated the purchase and/or lease of certain of East Tennessee's assets.¹³ Specifically, Selecto agreed to purchase both the brand or trade name "Selecto"¹⁴ and the inventory on hand,¹⁵ as well as a lease with an option to buy a small portion of East Tennessee's equipment.¹⁶ The full purchase price of these items amounted to between \$734,000 and \$749,000.¹⁷

Additionally, Selecto rented on a month-to-month basis approximately 37,000 square feet of East Tennessee's facility,¹⁸ and agreed to collect East Tennessee's

accounts receivable for a fee of one-half of 1 percent of the amount collected. Further, Selecto agreed to acquire by lease or purchase the automobiles and trucks East Tennessee had leased.¹⁹

These undertakings are reflected in a memorandum of understanding executed by Traver and Godwin on May 23. In late July the parties executed, effective back to May 23, separate and complete agreements covering each of these items in great detail.

Initially Selecto hired approximately 34 employees, with 13 being assigned to the HRI division. Of the five separate departments operating at its inception, only the HRI division or department engaged in any manufacturing at all.²⁰ There the manufacturing was limited to the preparation of hamburger patties, steaks, and chops which were cut from boxed meat. Sometime in late 1982, work in that division ceased and its employees laid off.

With the limited exception of the HRI division referred to immediately above, Selecto has from the start operated essentially as a wholesale distributor, merely re-packaging and placing its brand name Selecto on items manufactured and processed by others.

Selecto sales during the year 1982 ranged from between approximately 1 million pounds per month to approximately 690,000 pounds per month with the dollar amount received for such sales ranging from between \$1,325,850 per month and \$853,000. Unfortunately, both have declined in the months immediately preceding the hearing and, as of the time of the hearing, Respondent Selecto employed only approximately 12 production and maintenance employees.

Selecto has retained none of East Tennessee's major customers and does not service with its staff of some 12 salesmen many of the geographic areas previously served by East Tennessee.

As noted above, Traver owns 100 percent of the stock in Selecto. Other than Traver himself, only Welton Shealy, Selecto's vice president, served as an officer and a member of East Tennessee's board of directors.

D. Alleged 8(a)(1) Conduct

The complaint alleges one incident of independent 8(a)(1) conduct. In support of the allegation that Respondent unlawfully threatened employees with layoff because of their membership in or activities on behalf of the Union, counsel for the General Counsel called one witness, former employee Don A. Widener. Widener testified that, on May 21, he and another employee, Howard Davis, were working in the lard manufacturing department when Supervisor Ted Davenport came into the area. Davenport and Davis then had the following conversation regarding who Selecto might hire. Davis said to Davenport, "I don't guess they want anyone with age." Davenport answered "probably not." Davis then said, "Or anybody that's got anything to do with the

¹² A second corporation, Selecto International Food, Inc., was also formed at the same time. However, Traver was unsuccessful in obtaining interested investors so that corporation remained dormant and the hotel, restaurant, and institutional trade was initially made part of Selecto's operation.

¹³ Both Traver and Godwin testified as to the importance that any sale involving inventory be made immediately, and that no hiatus period be permitted to occur between East Tennessee's demise and Selecto's creation. First, the inventory was primarily composed of perishable food items bearing date stamps. Secondly, if timely deliveries were not made to customers as expected, Selecto brand products could lose shelf space in this highly competitive field.

¹⁴ The price set was \$.0175 per pound of meat sold during a 3-year period with a minimum of \$75,000 and a maximum of \$90,000.

¹⁵ Godwin, using established industrywide practices, priced the inventory at \$627,000.

¹⁶ The purchase price of the equipment first leased and then later purchased by Selecto in the summer of 1982 was \$32,000. The remaining 97 percent of East Tennessee's equipment was turned over to a Chicago, Illinois firm for sale.

¹⁷ In July, Selecto made payments to East Tennessee covering the full purchase price of the inventory and equipment.

¹⁸ This amounted to approximately 20 percent of the total space utilized by East Tennessee. In December 1982 Selecto moved all but its offices out of East Tennessee's building.

¹⁹ In an agreement with the leasing company, Selecto retained the leases on some of the cars and trucks previously leased by East Tennessee. These vehicles continued to display the Selecto name.

²⁰ All Selecto employees, whether they be production and maintenance employees, sales employees, clericals, and/or supervisors were former East Tennessee employees.

Union." Davenport nodded his head in apparent agreement. Davenport was hired by Selecto as rank-in-file.

While it is possible that a supervisor could be found to have engaged in an unlawful threat by the mere nodding of his head in response to a statement or question posed by an employee, this is not such a case. I do not find that Davenport's conduct amounts to an unlawful coercive intrusion into employees' Section 7 rights. Accordingly, I recommend that this complaint allegation be dismissed.

E. Conclusions

The Board in its recent decision in *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), reiterated the criteria required to support an alter ego finding:

... we must consider a number of factors, no one of which, taken alone, is the *sine qua non* of alter ego status.⁵ Among these factors are: common management and ownership;⁶ common business purpose, nature of operations, and supervision;⁷ common premises and equipment;⁸ common customers, i.e., whether the employers constitute "the same business in the same market";⁹ as well as the nature and extent of the negotiations and formalities surrounding the transaction.¹⁰ We must also 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.¹¹

⁵ *NLRB v. Tricor Products, Inc.*, 636 F.2d 266, 269 (10th Cir. 1980), affg. 239 NLRB 65 (1978); *Crawford Door Sales Company, Inc.*, 226 NLRB 1144 (1976).

⁶ *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965).

⁷ *Crawford Door Sales, supra*; *Farmingdale Iron Workers, Inc.*, 249 NLRB 98, 106 (1980).

⁸ *Davis Industries, Inc.*, 232 NLRB 946 (1977); *J. M. Tanaka Construction, Inc.*, 249 NLRB 238 (1980); *SFS Painting & Drywall, Inc.*, 249 NLRB 111 (1980).

⁹ *International Harvester Co. and Muller International Trucks, Inc.*, 247 NLRB 791 (1980); *Crawford Door Sales, supra*.

¹⁰ *Flite Chief, Inc.*, 230 NLRB 1112 (1975); *Scott Printing Corp.*, 237 NLRB 593 (1978).

¹¹ *Southport Co. v. NLRB*, 315 U.S. 100, 106 (1942); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1944). See also *House of Koscot Development Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64, 66 (5th Cir. 1972) wherein the court stated the traditional alter ego rule that it would "pierce the corporate veil" when "necessary to prevent injustice."

Applying these principles to the record before me, I find that the General Counsel has not established that Selecto was the alter ego of East Tennessee.

The differences in the nature of the operations of the two enterprises are real, significant, and material. East Tennessee operated as a full-scale regional packing house which, with a production force of some 275 employees, slaughtered, processed, and manufactured a full line of meat products. Selecto on the other hand commenced its operations with a production force of less than 35 employees. It operated solely as a jobber for meat products initially manufactured and processed by others. Selecto used only approximately 3 percent of East Tennessee's equipment and initially only physically occupied approximately 20 percent of its facility. While both entities sold

and shipped processed meat products bearing the brand name "Selecto," neither sold in the same market areas nor to the same large retail grocery outlet chains as did East Tennessee. Further, Selecto sales amounted in both poundage and dollars to no more than approximately 25 percent of East Tennessee's. Finally, East Tennessee had secured loans in excess of 2.6 million to Park National and to a Louisville Kentucky bank, while Selecto operated with a fraction of that amount of credit available for its use from two totally different sources.

Counsel for the General Counsel discounts the importance of such differences and instead urges that based on Traver's role in each company and certain other similarities discussed in previous subsections hereof, I find that Selecto is a mere continuation of East Tennessee, albeit operating on a more limited basis. I disagree. The differences noted are so significant that even assuming arguendo the presence of common ownership, they negate any conclusion that the two enterprises shared an identical or common business purpose, operation, equipment, or customers.

Counsel for the General Counsel argues that, notwithstanding any differences in the two enterprises' operations, Selecto was established by Traver "to escape the burdens imposed by a collective-bargaining agreement" and as such, was a "mere disguised continuance" or alter ego of East Tennessee, a company also owned or financially controlled by Traver. Again I disagree. Both companies have similar management and supervision with Traver clearly controlling the labor relations of each. This control, however, is not dispositive on the issue of common ownership or financial control.

Traver, the sole shareholder of Selecto, owned 7 percent of the stock in East Tennessee, with a potential of inheriting another 5 percent through his mother. Despite this minority interest, counsel for the General Counsel contends that Traver had actual control of East Tennessee by virtue of his serving along with his cousin, James Smith Jr., as successor cotrustees of the two trusts owning over 60 percent of the outstanding shares of East Tennessee.

For this contention to carry the day, several key factors must be found or inferred. First, Smith's interest in East Tennessee must be treated as totally under the influence and control of Traver, and secondly, Smith and Traver, as cotrustees of the two trusts, must process power of ownership. Neither factors are present or fairly inferable.

The Board has found substantially identical ownership situations where both enterprises were either wholly owned by members of the same family or nearly totally owned by the same individual.²¹ However, in making such findings the Board does not view legal ownership in a vacuum, but instead looks to the totality of the circumstances to determine where the real control exists. Thus, in finding substantial identical ownership, the Board considers the substantial identity of business purposes and operations of the two entities, the purpose of

²¹ See *J. M. Tanaka Construction*, 249 NLRB 238, 241 (1980), and cases cited in fn. 29. *Crawford Door Sales*, 226 NLRB 1144 (1976).

the formation of the second entity, the particular character of the closed or family corporation, and whether one individual or a group of individuals dominates the management of both entities. The record evidence regarding those factors is insufficient to warrant a finding of substantial identical ownership necessary to support an ultimate finding of alter ego status.

First, as noted above, there is not substantial identity of purpose or operations of East Tennessee and Selecto. Secondly, as will be discussed infra, Selecto was not formed or created for the purpose of avoiding its obligation under the collective-bargaining agreement. And third, no independent evidence was offered that Smith, as cotrustee of the trusts controlling East Tennessee, allowed his cousin a free and unfettered hand in all decisions affecting East Tennessee's management. In view of these circumstances, it would be improper to treat Smith and Traver's interest in East Tennessee as one.

Even a contrary conclusion would not, however, affect the ultimate question of who had financial control of East Tennessee. As noted above, according to the will of J. B. Madden, only the successor bank trustee had the right to sell or dispose of the stock in East Tennessee. Whether both Traver and Smith chose to withdraw from the decisionmaking process on East Tennessee's ultimate future based on this restriction or whether they withdrew to avoid any potential fiduciary conflict is not clear. What is clear is that neither of these trustees participated with the third trustee who made the decisions initially not to sell to Bluebird and subsequently to liquidate. Thus, neither Traver nor Smith even shared, other than in making recommendations that were rejected, in the key decisions relating to East Tennessee's very existence.

Finally, I turn briefly to the evidence relating to the purpose and circumstances surrounding the formation of Selecto. As previously discussed, the decision to liquidate East Tennessee was Park National's not Traver's. While Traver, as president of East Tennessee, sought wage concessions from the Union, this was done in an effort to enable East Tennessee to continue operations as a large regional packing house. When these efforts failed and the substantial losses continued to rise, Park National, as the trustee controlling financial interest, decided that in order to save shareholders' equity, East Tennessee should cease operations and liquidate all assets, including inventory and brand name.

Traver then resigned his position with East Tennessee and his membership on the trusts and proceeded to negotiate at arms length with East Tennessee's treasurer to buy certain of the assets at their market value. With this accomplished, Traver was then able to set up a new company. That the changeover from East Tennessee to Selecto was accomplished quickly and without any hiatus is clear. However, it is equally clear that time was of the essence and that any delay in this regard would have both damaged the perishable inventory as well as risked losing all-important shelf space then reserved for Selecto brand name products.

This simply is not a situation where a second entity is created as a "mere disguised continuance" of an old employer for the purpose of avoiding the effect of labor laws.²² Accordingly, I recommend this allegation be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent East Tennessee Packing Company and Respondent Selecto Meats, Inc., are each employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers, District Lodge 405, is a labor organization within the meaning of Section 2(5) of the Act.

3. Selecto Meats, Inc., is not an alter ego of East Tennessee Packing Company and, therefore, neither Respondent Selecto Meats, Inc., nor Respondent East Tennessee Packing Company has violated the Act as alleged.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended²³

ORDER

The complaint is dismissed in its entirety.

²² As the Board noted in a similar context, a contrary conclusion would have the effect of precluding a bona fide sale of a business to any new enterprise whose stockholders included one who formerly held a minority interest in a closed enterprise, since in all those situations there would be some continuity of direction and control. *Morton's I.G.A. Foodliner*, 240 NLRB 1246 fn. 2 (1979).

²³ 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.