

**The Kroger Company and Mary Jane Friar
Local 876, United Food & Commercial Workers
International Union, AFL-CIO, CLC and
Mary Jane Friar.** Cases 7-CA-33341 and 7-
CB-9027

August 31, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On December 2, 1992, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondents filed exceptions and supporting briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.

AMENDED REMEDY

The Union argues with respect to the recommended remedy that there is an inconsistency between finding that Mary Jane Friar was discriminated against after October 28, 1991, yet ordering the Employer to assign work to her on the same basis that it had before February 28, 1992. The Union argues further that, in any event, its backpay obligation should be tolled after February 28, 1992, because there is no allegation or finding that it was responsible for any discrimination against Friar after that date. These points have merit. We shall amend the remedy to provide that the Union make Mary Jane Friar whole for wages lost as a result of its unfair labor practices, commencing on October 28, 1991, and terminating on February 8, 1992, 5 days after the Union's letter advising the Employer that it had no further objection to assigning Friar work,² with interest. The Employer shall be required immediately to resume assigning Mary Jane Friar work as a relief assistant customer service manager on the same basis the Employer was assigning her that work before October 28, 1991,³ and make her whole for wages lost as

¹ Both the Respondent Employer and Respondent Union have accepted 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.

² We find the Union's letter sufficient to toll its backpay liability under applicable Board precedent. See, e.g., *Claremont Resort Hotel*, 260 NLRB 1088 *fn.* 2 (1982).

³ As indicated above, the Respondent Union by letter dated February 8, 1992, to the Respondent Employer, stated that it had no objection to the Employer's assignment of Friar consistent with the Employer's practice predating October 28, 1991. Accordingly, we

a result of the Employer's unfair labor practices, with interest.

ORDER

The National Labor Relations Board orders that

A. Respondent the Kroger Company, Monroe, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to utilize Mary Jane Friar as a relief assistant customer service manager because she filed and pursued grievances with the Union and because she filed and pursued charges with the National Labor Relations Board.

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

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

(a) Assign Mary Jane Friar to work as a relief assistant customer service manager on the same basis that she was assigned that work before October 28, 1991.

(b) Make Mary Jane Friar whole for loss of earnings she may have suffered by reason of the Employer's discrimination against her commencing February 28, 1992, with interest as set forth in the remedy section of the judge's decision.

(c) 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.

(d) Post at its Monroe, Michigan store copies of the attached notice marked "Appendix A."⁴ Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent Employer's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material.

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

B. Respondent Local 876, United Food & Commercial Workers International Union, AFL-CIO, CLC,

find that in the absence of the Respondent Employer's February 28, 1992 unfair labor practices, Friar would have been reinstated to the hours that she was working before October 28, 1991.

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

Monroe, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause the Employer to discriminate against Mary Jane Friar by denying her work as a relief assistant customer service manager because she pursued a grievance the Union did not want pursued and because union officials harbor ill will toward her.

(b) Failing or refusing to freely and fairly represent Mary Jane Friar in the filing and processing of grievances.

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

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

(a) Make Mary Jane Friar whole for any loss of earnings she may have suffered by reason of the union-caused discrimination against her commencing October 28, 1991, and terminating on February 8, 1992, with interest as set forth in the amended remedy section of this decision.

(b) Post at its offices and meeting halls a copy of the attached notice marked "Appendix B."⁵ Copies of the notice on forms provided by the Regional Director for Region 7, after being signed by the Respondent Union's authorized representative, shall be posted by Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Forward to the Regional Director for Region 7, signed copies of the notice for posting by the Employer, if it be willing, for 60 consecutive days, in places where notices to employees are customarily posted.

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

APPENDIX A

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

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

⁵ See fn. 4, above.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discriminate against Mary Jane Friar by refusing to assign her as a relief assistant customer service manager because she filed and pursued grievances or filed and pursued charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by the National Labor Relations Act.

WE WILL assign Mary Jane Friar to work as a relief assistant customer service manager on the same basis she was assigned before October 28, 1991, and WE WILL make her whole for any loss of earnings she may have suffered by reason of our refusal to so assign her on and after February 28, 1992, with interest.

THE KROGER COMPANY

APPENDIX B

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

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

WE WILL NOT cause or attempt to cause the Kroger Company to discriminate against Mary Jane Friar because she pursued grievances we did not wish to be pursued or because we harbor ill will toward her.

WE WILL NOT fail or refuse to fully and fairly represent Mary Jane Friar in the filing and processing of grievances.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL make Mary Jane Friar whole for any loss of earnings she may have suffered by reason of our causing the Kroger Company to cease using Mary Jane Friar as a relief assistant customer service manager

from October 28, 1991, to February 8, 1992, with interest.

LOCAL 876, UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

John Ciaramitaro, Esq., for the General Counsel.
John M. Flynn, Esq., for Respondent Kroger Company.
Mary Ellen Gurewitz, Esq., for Respondent Local 876, United Food & Commercial Workers International Union, AFL-CIO, CLC.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This consolidated proceeding was litigated before me at Detroit, Michigan, on August 13, 1992, pursuant to charges timely filed and complaints issued alleging (1) that Local 876, United Food & Commercial Workers International Union, AFL-CIO, CLC (the Union) violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act) by attempting to cause and causing the Kroger Company (Employer) to discriminate against Mary Jane Friar, by breaching its fiduciary duty to fairly represent her, and by such conduct restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act; and (2) that the Employer violated Section 8(a)(1), (3), and (4) of the Act by failing and refusing to utilize Mary Jane Friar as a relief backup assistant head cashier because she engaged in union and protected concerted activities including filing and pursuing grievances, and because she filed and pursued the charge against the Union in Case 7-CB-9027 and gave testimony to the Board in that proceeding. The Union and the Employer deny the commission of unfair labor practices.

On the entire record, and after considering the posttrial briefs filed by parties and the testimonial demeanor of the witnesses testifying before me, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS

The Employer is a corporation with its principal office and place of business in Cincinnati, Ohio. It is engaged in the operation of retail supermarkets located in various States including Michigan and Ohio. The Employer's facility involved in this consolidated proceeding is store 167 located in Monroe, Michigan. During the calendar year 1991, a representative period, the Employer derived gross revenue in excess of \$500,000 from its supermarket operations in Michigan and purchased and received at the Michigan supermarkets goods valued in excess of \$50,000 delivered directly from points located outside the State of Michigan. At all times material to this proceeding the Employer has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union has been a labor organization within the meaning of Section 2(5) of the Act at all times material to this proceeding.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Supervisors and Agents

At all times material to this proceeding, Richard H. Hodgkins has been the store manager of store 167 in Monroe, Michigan, and has been a supervisor of the Employer within the meaning of Section 2(11) of the Act and the Employer's agent within the meaning of Section 2(13) of the Act.

At all material times the following individuals held the positions set forth opposite their respective names and have been agents of the Union within the meaning of Section 2(13) of the Act: Ronald L. Brown, president; Ruth Davis, executive assistant to the president; Gerald Omstead, senior vice president; Jack Adams, business representative; and Rodney Bradford, steward, Dixie Highway Store.

B. Collective-Bargaining Relationship and Various Stipulations

The Employer and the Union are party to a collective-bargaining agreement covering a unit of the Employer's employees. Mary Jane Friar is a member of that bargaining unit.

The parties stipulated to the following facts:

1. Within the bargaining unit at each store is a customer service manager and one or more assistant customer service managers. The latter are also known as backup head cashiers or backup head checkers. These positions known as "back up" jobs are permanent full-time positions whereas "relief" head checkers or head cashiers only work in that capacity on a temporary basis when the permanent job incumbent is unavailable for work.

2. Mike Siebarth began his employment on October 8, 1977, and worked as a bagger part time until March 3, 1980, when he became a full-time employee as a clerk/cashier. March 3, 1980, is his beginning date of continuous service, sometimes referred to as the BDCS date or job date. Siebarth became an assistant customer service manager on November 1, 1991.

3. Mary Jane Friar was hired as a part-time clerk/cashier on December 7, 1988, and has no BDCS date because she is still part time. Her job date is December 7, 1988.

4. Jan Reaume was hired on June 10, 1974, and became an assistant customer service manager on August 17, 1979. She has been on medical leave since April 2, 1992.

5. Terry Waterson was hired June 20, 1977. For at least 2 years prior to September 13, 1991, she was an assistant customer service manager. On or about September 13, 1991, she became a clerk/cashier. Her BDCS date is August 21, 1977, because she is a full-time employee. She has been serving as a relief assistant customer service manager in Jan Reaume's absence, and similarly relieved in the absence of other permanent assistant customer service managers prior to April 2, 1992, at various times.

6. Jim Benier was hired February 7, 1984, has a job date of June 26, 1987, and a prospective classification date of Au-

gust 3, 1992, because he has since that date been performing the duties of assistant customer service manager on a 60-day trial basis. If he successfully completes his trial period his classification date will be August 3, 1992.

C. *Relevant Facts*¹

On or about March 2, 1990, Friar started working 15 hours or more each week, as much as 30 hours some weeks, as a relief assistant customer service manager (relief ACSM), and continued to so do until June 1991. Prior to June 1991, Hodgkins had told Friar in March 1991 that she would have to start rotating with Jim Benier, a college student, in this relief work effective in June. Bradford, the Union's steward at the Employer's Monroe store, was aware Hodgkins so instructed Friar. Bradford opined Friar might not have to start this rotation, and said he would talk to Jack Adams, the Union's business representative. That same day, Friar called Adams concerning the matter. Adams advised that Bradford had not as yet talked to him, but he would look into the situation.² A few days later, Hodgkins told her to call Adams. She did. Adams accused her of lying about her length of service, and told her the rotation would go into effect under an agreement with Hodgkins that only she and Benier would be used in the rotation. Hodgkins was standing by during the phone conversation and agreed that only the two would be used in that work. Adams concluded by telling Friar, "You either do things the manager's way or I will come down and pull you out of the office altogether."

Bradford later told Friar that he had indeed talked to Adams about the rotation, and Adams had lied when he denied talking to Bradford. In closing, Bradford said that he had told her that going to Adams would not do any good.

¹ Of the witnesses appearing before me Friar was the most impressive. She was the most certain, detailed, and believable. In terms of demeanor she was composed and appeared to be truthfully reciting only that which she recalled without embroidery or invention. With respect to this last item, the fact that she continues in the employ of Kroger makes it rather unlikely that she would deliberately concoct falsehoods contrary to the interests of her employer who controls her future working history, see, e.g., *Unarco Industries*, 197 NLRB 489, 491 (1972), or the interests of the Union to whom she must look for representation in grievance and other contractual matters affecting her working conditions. Her testimony which is consistent with her previous writings to the Union and Employer concerning matters now before me is in large part uncontroverted and is credited in those instances where it is contradicted by other witnesses. The only other witnesses appearing were Bradford, Davis, and Hodgkins. Bradford is not credited where it is a choice between his testimony and that of Friar because he was neither as certain nor believable as she, particularly when he stated he was not bothered by the fact that she had previously gone over his head to higher union officials, which is inconsistent with his testimony and hers that he had cut a conversation with her short by telling her that she was going over his head anyway when she asked what he would do for her in the way of representation concerning her job bid. Davis was a pleasant, intelligent witness whose testimony suffered by reason of her assertions at various times that she could not recall, something might have been, or she was not quite sure. These representations are not denials and do not serve to rebut Friar's testimony. Here again Friar's testimony was the more impressive in terms of certainty and contained no hint of evasion. Hodgkins did not impress me as a witness of candor equal to that of Friar, and he is not credited where their testimony differs.

² Adams did not testify.

It is not clear in the record whether Bradford had previously so told her.

In late August or early September 1991, a full-time ACSM position became open. Friar, Mike Siebarth, and Linda Pietscher bid for the job. After interviewing the three applicants, Hodgkins told Friar on September 10 that the job had been awarded to an employee at another store who had subsequently turned the offer down and, therefore, Hodgkins was giving the job to her. Friar asked what he would do if Siebarth, who had more seniority, grieved. Hodgkins replied he had been advised by the Employer's human resources department that he could give the job to Friar on the basis of her skills and her relief performance in the job for a year and a half. He added that in interviewing Siebarth he found no evidence Siebarth was capable of doing the job. Friar began working as a full-time ACSM on September 15, 1991.

On about September 7, prior to her talk with Hodgkins on September 10, Bradford asked Friar if her interview had been done correctly. When Friar responded it had, he advised he did not believe Siebarth and Pietscher had been correctly interviewed and that he would help them file a grievance if the bidder from the other store got the job as expected. Friar then asked what the basis for a grievance would be. Bradford replied he did not know why she asked because she would do things her way in any case. He added that he would help the other two file a grievance but not her, and that by going over his head before she had found she could not do anything. I conclude and find Bradford was referring to the time Friar had gone directly to Adams concerning the rotation of her and Benier.

Siebarth did file a grievance. Bradford and Adams persuaded Hodgkins to reinterview Siebarth. That interview consisted of one question, "Why should I choose you above Mary Friar to fill this position?" When Siebarth replied that he wanted the challenge and the opportunity, had been with the Company a long time, felt like he could do a good job, and wanted to fill the position, this, says Hodgkins, persuaded him to replace Friar in the job with Siebarth. I do not believe this was the real reason. Noting that Hodgkins says he had told Friar that he did not think Siebarth would make it through a 30-day trial and did not have the necessary skills and ability, Siebarth's response to the question contains nothing that comes close to evidence of skill or ability. The Employer's posttrial brief states Hodgkins took this step in view of Siebarth's response and in order to resolve the grievance. It probably is more accurate to say that Hodgkins created an excuse in order to pacify the Union by resolving the grievance in Siebarth's favor.

On September 12, 1991, Hodgkins told Friar of her replacement by Siebarth. That evening they again talked about it. He told her that Siebarth would win a grievance because he had more seniority and, therefore, he may as well give him the job right then. When she protested and threatened to take some action on the matter, he asked her to wait because he did not think Siebarth could successfully complete the 30 days' training, and she would therefore regain the job. This statement of lack of faith in Siebarth's ability and the emphasis on seniority further illuminates the fact the reinterview was held solely to provide an excuse for a decision already made.

At this juncture it is appropriate to explain that what really happened here was a tug-of-war between the Employer and

the Union over differing interpretations of the clause in the collective-bargaining agreement reading as follows:

Promotions shall be based on seniority provided that demonstrated skill and ability are approximately equal.

Friar was originally granted the bid on a skill and ability basis. The Union takes the stance seniority should have prevailed, and also clearly opposes use of the skill and ability standard and intends to vigorously contest its application.

On September 23, 1991, Friar called Adams and asked why he was pulling her off the job and giving it to Siebarth. Adams cited Siebarth's seniority as the reason. She told him she was filing a grievance. Adams not surprisingly said there was no reason for a grievance. The next day Friar presented Hodgkins with a handwritten grievance protesting her removal from the ACSM position. Then she called Adams and told him of the grievance she had given to Hodgkins. He again said there was no basis for the grievance, but added he would pick it up in about a week. The same day, September 24, Friar called Ruth Davis, the executive assistant to the president of the Union, explained the situation, and told her Adams was not acting like he was going to do anything. Davis said she would look into it.

Friar again called Davis on September 26. She credibly relates that Davis told her that she (Davis) had talked to Adams and knew what was going on. Davis added the Union did not like the skill and ability language in the contract, preferred the application of seniority, did not have to honor the skill and ability language, and, moreover, it was the union members who had voted for that language, not the union committee which opposed it. Asked if she had bid on jobs outside the office, Friar explained she had not because she had none of the experience called for in the bid postings. This drew the response from Davis that the Union was not guided by the requirements the Employer listed on the bid sheets. Davis said Adams would pick up the grievance on September 27. He did not. Friar therefore mailed it to him that day.

On September 28, Friar called Adams and asked if he had received the grievance. He merely replied that he was busy and would see what he could do in a couple of weeks. This moved her to call a representative of the International union on September 30 and report what was happening vis-a-vis her grievance. Friar was advised to exhaust the grievance procedure and call back if the Union failed to act within 60 days. That same day Friar wrote a letter to Ronald Brown, the president of Local 876, setting out the basis of her grievance and complaining of Adams' conduct.

On October 4, 1991, Bradford gave Friar an official grievance form which she completed and mailed to Adams on October 7. Nothing happened so she telephoned Gerald Omstead, the Union's senior vice president, and related what had happened concerning her grievance. As a result Bradford, Adams, and Davis met with Friar at the Monroe store on October 28. Davis presented Friar with a letter explaining that Friar's grievance was without merit because Siebart's had merit. This did not satisfy Friar. Davis therefore advised Friar that if she wished to proceed further she would have to request a hearing from the Union's executive board. Friar said she would proceed further and started to leave. As she did, Bradford said that her weekly relief ACSM work in the

office, which ranged from 15 to 30 hours, was contrary to the collective-bargaining agreement and she should not be allowed to so work. This upset Friar who accurately pointed out that Bradford had long known she regularly worked in the office, as Adams had known since March 1991 when the issue of rotation with Benier was raised, and, when Davis said the union contract did not permit Friar to work in the office every week, Friar pointed out correctly that Davis had known since Friar told her about it on September 24. She then asked why this issue of her continuing work in the office was now being raised. Bradford said it was apparent she was not happy with being in the office. Friar protested that she had never said she wanted to leave the office work. Friar then left the meeting. As she left Davis asked her to send Hodgkins to meet with the union representative. Friar did so.

Hodgkins then met with the union representatives. Friar was not present. Hodgkins was told he was misusing the relief ACSMs and thereby violating the collective-bargaining agreement, which Hodgkins denied he was doing. Hodgkins first testified he knew the union people were talking about the way he assigned relief ACSMs but when asked if he did not understand they were talking about the assignment of Friar he answered, "Ms. Friar and Mr. Benier." Here Hodgkins was being evasive because he knew, as he testified, that Benier was then back in college and only working weekends. The Union knew, Hodgkins knew, and I conclude that the Union's complaints were directed at the assignment of Friar. Hodgkins promised the union representatives that he would only use a relief ACSM in the office for vacations, personal days off, or illness.

After meeting with the Union, Hodgkins immediately told Friar the Union had said he had to remove her from the office. Three days later he further told Friar he had discussed the matter with Employer officials and had to either establish another full-time ACSM position or wait until contract time to try to construct a relief position on a part-time basis. He concluded by telling her he would have to remove her from the office. She was not thereafter regularly assigned to relief work in the office as she had been in the past.

After Hodgkins advised her that there would be much less relief work for her, Friar called the Union's senior vice president, Omstead, and asked why the Union was now pulling her out of the office. He referred to a contractual requirement the job had to be bid if an employee was used on it over 30 days. Friar charged the Union was retaliating because she was pursuing her grievance. He denied that charge and told her to file with the executive board but, as far as he was concerned, nothing else could be done. She did file with the executive board on November 6, 1991. It decided not to proceed to arbitration on her grievance. She then wrote to the International executive board on December 18, 1991, appealing the action of the local executive board. The International president referred the appeal back to Local 876 on January 14, 1992, for investigation and, on March 4, 1992, advised Friar the handling of her grievance had been proper and the matter was closed.

In the meantime, Friar had filed the original charge in Case 7-CB-9027 with the Board on December 24, 1991, and followed up with an amended charge on February 27, 1992, which resulted in the present complaint about the Union's conduct which issued on February 28, 1992. On or shortly before February 3, 1992, the Union was advised by the

Board's Region 7 that a complaint would issue in Case 7-CB-9027. The Union, by Davis, then wrote a letter to the Employer on February 3, 1992, advising that the complaint was imminent, characterizing the Board's allegations as ridiculous, and advising that pending litigation on the matter "the Union has no objection to your assigning Ms. Friar to the backup assistant customer service manager position as you were previously doing." Davis went on to explain, "We are taking this position at the present time to avoid further possible financial liability. Do not consider this letter as a waiver of our right to enforce all contract provisions." The Employer had been provided with copies of the charges and complaint in Case 7-CB-9027 as they were filed or issued.

Friar took a vacation in February 1992. Before she went on vacation she bid and was interviewed for an ACSM job at another of the Employer's locations. When she returned from vacation she found that she had not been successful in her bid. She further discovered that Hodgkins had been training Pietscher to work in the office. On February 27 she asked him why. He assured her this training had taken place because he assumed her bid would be successful, but now she would still be his backup.³ Notwithstanding this assurance on February 27, Hodgkins told Friar on February 28 he was not going to so use her in the future and would use Terry Waterson, who had been an ACSM in the past, because it cost the Company less. Later that day, Friar met with Hodgkins in his office and asked why he was doing this to her. He then told her that he had told her in September not to start anything, she had since caused nothing but trouble, and he did not have to use her in the office. Friar responded by referring to the Union's February 3 letter stating the Union had no objection to her working in the office. Hodgkins heatedly replied he did not care what the Union or the Board said because he could assign anyone he wanted to that work and he was not going to so assign her. Friar did not let up and continued to argue by reminding him of his March 1991 decision to use only her and Benier for the relief work. Hodgkins repeated his lack of concern for what the Union or the Board said. Friar relentlessly pushed on by arguing she had a right to file a grievance and do what she was doing and her grievance against the Union⁴ had nothing to do with her being in the office so far as Hodgkins was concerned. At this Hodgkins flatly told her the Union had wanted her out of that work and therefore he had no choice and she was staying out of the office. This recitation of what occurred between Friar and Hodgkins on that occasion is based on the credited testimony of Friar which is not rebutted by Hodgkins whose very general and fragmentary testimony concerning what then was said is punctuated with failures of recollection and simply does not meet the specificity of Friar's testimony. Although I note, as does the Employer in its posttrial brief, Hodgkins' statement that he had no choice but to keep Friar out of the office because the Union wanted her out seems inconsistent with his earlier statement of independence from Union or Board pressure, I conclude that Hodgkins' statement of independence was pure bravado and his reference to union pressure to keep Friar out of the

office was an admission against the Employer's interest entitled to great probative weight even though inconsistent with his earlier claim of independence. The witnesses were not sequestered and Friar testified before Hodgkins did. He therefore had ample opportunity to credibly controvert her testimony if he could or explain why he told her what she says he did. His testimony does neither. Here, as he had previously done in the Siebarth situation, Hodgkins bowed to union pressure to remove relief ACSM work from Friar.

Conclusions in Case 7-CB-9027

Friar had been working from 15 to 30 hours each week as a relief ACSM for more than a year prior to October 1991, with the exception of the summer of 1991 when she and Benier rotated weeks. Even then she worked the same hours during the weeks she was scheduled as she had before. I do not believe that Rodney Bradford, the union steward at the Monroe store who has known Friar since she was first employed, or Richard Hodgkins, the store manager for 4 years at the time of the hearing, were not aware of the hours Friar had been working. Apart from the fact that to conclude otherwise would imply that both of them were derelict in their duty to know what was happening with the work force, a supermarket is not General Motors employing thousands in a single factory and requiring dozens of overseers to keep track of what is going on in the shop and, as previously noted, Bradford and Hodgkins were not particularly impressive witnesses. Jack Adams, the Union's business agent, had known that Friar was working a considerable number of hours as a relief ACSM at least as early as March 1991. His threat then to pull her out of the office fairly implies he well knew where and when she was spending much of her worktime. The testimony of Ruth Davis, the executive assistant to the president of the Union, and her October 25, 1991 letter replying to Friar's grievance shows that Davis was aware Friar had regularly served as a relief ACSM for quite some time, and it is most unlikely that the other union agents involved did not advise her of Friar's work history, an obvious topic of consideration inasmuch as Friar's experience in that position was the evidence Friar advanced in support of her claim of supervisor skill and ability. In Friar's September 30, 1991 letter to Ronald Brown, the Union's president, she expressly advised she had worked in the office every week as a relief ACSM since March 2, 1990. Friar repeated this information in her grievance dated October 4, 1991. Notwithstanding all this available information about Friar's work history as a relief ACSM, Davis testified she did not know of the extent of Friar's relief work before October 28, 1991. I do not believe this testimony. I further note that none of the union representatives claim that prior to October 28, 1991, they even considered an investigation to see if Friar's relief work in the office was either relevant to her claim of skill and ability or permissible under the terms of the collective-bargaining agreement. For the foregoing reasons, I conclude and find the Union, as well as the Employer, long before October 28, 1991, knew that Friar had worked a considerable number of hours weekly in the office for many months as a relief ACSM and had not been particularly concerned about it.

When Friar met with Davis, Bradford, and Adams on October 28, 1991, she was dealing with a group two-thirds of whose members had demonstrated both an unwillingness to

³Relief employees are sometimes erroneously referred to as backups.

⁴Here I believe Friar was referring to her charge filed with the Board.

assist her and personal ill will toward her. Adams had accused Friar of lying to him, threatened to pull her out of the office in March 1991, and displayed a studied lack of concern regarding when he might get around to attending to her September 1991 grievance. Bradford was unhappy with Friar because she had bypassed him to deal with his superiors in the union hierarchy, and he had flatly told her in September 1991 that he would not help her with a grievance. It is therefore no surprise that when Friar refused to accept Davis' explanation in satisfaction of her grievance that it was Bradford who, for the first time notwithstanding he had long known of her work history, charged that her hours of work as a relief ACSM violated the contract and she should no longer be allowed to so work. When Friar protested, Bradford's statement that it was apparent she was not happy with her work in the office fairly conveyed the message her aggressive pursuit of her grievance could mean the loss of the relief work she was now performing. Upset by Bradford's comments, Friar protested correctly that she had never said she wanted to leave the office work. Davis, agreeing with Bradford that the contract did not permit Friar to work as much as she had been doing, then told Hodgkins his use of relief ACSMs, of which Friar was then the only one, violated the contract. Hodgkins agreed to limit the use of relief ACSMs. Then he met with Friar and told her the Union said he had to remove her from the office, which I find, noting Bradford's comments to Friar and Adams' earlier threat in March, is exactly what the Union wanted and what Hodgkins understood they wanted. Accordingly, Friar was assigned only a few weeks⁵ of relief ACSM work after October 31, 1991, until the time of the hearing.

Friar had regularly worked the relief for a number of hours weekly. The Union never protested this assignment prior to October 28, 1991, and Adams condoned it in March 1991 when he directed Friar to abide by the rotation set up by Hodgkins even though this had Friar and Benier on alternate weeks working the same amount of time Friar had regularly worked for about a year prior thereto. It was only when Friar on October 28 expressed her determination to process her grievance further that Bradford, exasperated at her obduracy, raised the issue and threatened her with the loss of relief work. It was Friar's persistence, not a noble effort to enforce the contract, that moved Bradford to suggest and Davis to adopt a course of pressing Hodgkins to, as Hodgkins correctly interpreted the Union's message, remove Friar from regular relief work. Hodgkins complied. I am persuaded the Union would not have taken this action had not Friar so vigorously pursued her grievance and had not Adams and Bradford, and thus the Union, harbored ill will toward her. The Union's conduct violated Section 8(b)(2) and (1)(A) of the Act by attempting to cause and causing the Employer to curtail Friar's relief work and thereby deprive her of higher earnings⁶ because she pursued a grievance the Union did not want pursued and because union agents harbored ill will toward her. This conduct of the Union also violated Section 8(b)(1)(A) because, as the complaint alleges, it shows a breach of the Union's duty to fully and fairly represent Friar,

⁵ Friar recalls only 4 weeks after October 1991 in which she performed such work.

⁶ Friar had a substantially higher wage rate when working as a relief ACSM compared to her normal rate as a clerk/cashier.

a unit and union member, without resort to unfair, arbitrary, and invidious reasons.

Case 7-CA-33341

Hodgkins told Friar on February 28, 1992, that he was denying her any further relief ACSM work. When she asked why, he said that he had told her not to start anything, she had since caused nothing but trouble, and the Union wanted her out of the office. What she had done was press forward on a grievance and file unfair labor practice charges against the Union. Those items were the only things Friar has been shown to have started Hodgkins could have been referring to. With respect to his reference to union wishes in the matter, I find he was but speaking the truth as evidenced by the Union's unlawful efforts in October 1991.⁷ There is enough here to support an inference that Friar's grievance and charge filing activities and the Union's demands were motivating factors in the decision to eliminate or at least drastically reduce her relief ACSM work. Hodgkins' reaction to the Union's demand is consistent with his earlier easy acquiescence to the Union's demands resulting in a reinterview of Siebarth and replacement of Friar with Siebarth on the basis of a vague statement of good intentions by Siebarth. According to Hodgkins, his reason for using Waterson in the relief ACSM job instead of Friar was a saving of \$4 an hour in wages because Waterson, who had formerly been an ACSM, was already being paid a rate within a few cents of that required for the relief work and Friar's regular clerk/cashier rate was \$4 less than the relief rate. The record supports Hodgkins' description of the variance in additional cost between using Waterson and Friar, but this does not outweigh his firm declaration to Friar that the Union's demands and the trouble she had caused by her protected activities were the reasons for Hodgkins' action. The Employer has not shown by a preponderance of the credible evidence that the February 28, 1992 denial of relief ACSM work to Friar would have taken place absent her grievance and charge filing activities and the Union's demand for curtailment of Friar's relief work. The General Counsel has therefore shown by a preponderance of the credible evidence the reduction of Friar's work was designed to placate the Union and discourage her grievance activity, which is protected activity,⁸ and therefore violative of Section 8(a)(3) and (1) of the Act, and to discourage her charge filing activity in violation of Section 8(a)(4) of the Act.

CONCLUSIONS OF LAW

1. The Employer is an employer 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. By attempting to cause and causing the Employer to cease utilizing Mary Jane Friar as a relief assistant customer service manager on or about October 28, 1991, because she pursued a grievance the Union did not want her to pursue and because she went over the heads of union agents in pur-

⁷ The Employer's October acquiescence to the Union's demands is not alleged as an unfair labor practice and cannot be so alleged because it occurred more than 6 months prior to the filing and service of the charge in Case 7-CA-33341. See Sec. 10(b) of the Act.

⁸ *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

suing grievances, the Union violated Section 8(b)(2) and (1)(A) of the Act.

4. By reducing the use of Mary Jane Friar as a relief assistant customer service manager on and after February 28, 1992, because she filed and pursued grievances with the Union and because she filed and pursued charges against the Union with the National Labor Relations Board, the Employer violated Section 8(a)(1), (3), and (4) of the Act.

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

THE REMEDY

In addition to the notice-posting and cease-and-desist requirements, the Union shall be required to notify the Employer in writing, with copy to Mary Jane Friar, that it has no objection to assigning Mary Jane Friar to relief assistant

customer service manager work on the same schedule she was assigned prior to October 28, 1991, and requests that she be so assigned, and shall make Mary Jane Friar whole for wages lost as a result of its unfair labor practice, with interest thereon. The Employer shall "be required to immediately resume assigning her to such work on the same basis the Employer was assigning her up to February 28, 1992, and make her whole for wages lost as a result of the Employer's unfair labor practices, with interest thereon. All backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁹ [Recommended Order omitted from publication.]

⁹Under *New Horizons*, interest on and after January 1, 1987, is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.