

**Canned Foods, Inc., d/b/a Grass Valley Grocery Outlet and United Food and Commercial Workers Union, Local 588, United Food & Commercial Workers International Union, AFL-CIO.**

**Thomas A. Alvernaz and Deborah Alvernaz, a/k/a Deborah Johnston, A California Partnership, d/b/a Grass Valley Grocery Outlet and David G. Cubitt and Brenda Cubitt, a California Partnership, d/b/a Grass Valley Grocery Outlet and United Food & Commercial Workers 588, Northern California, United Food & Commercial Workers International Union, AFL-CIO, Petitioner.** Cases 20-CA-26685, 20-CA-26812, and 20-RC-17087

December 15, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On December 31, 1998, Administrative Law Judge Burton Litvack issued the attached decision. The General Counsel, Respondent Canned Foods, Inc., and Respondent David and Brenda Cubitt filed exceptions and supporting briefs. Respondent Canned Foods, Inc., Respondent David and Brenda Cubitt, and Respondent Thomas and Deborah Alvernaz filed answering briefs to the General Counsel's exceptions.<sup>1</sup>

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

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

1. The judge found that Respondent Canned Foods and Respondent David and Brenda Cubitt (the Cubitts) constituted a single-employer of employees who worked at a grocery outlet store in Grass Valley, California. We find merit in Canned Foods' exception to this finding.<sup>2</sup>

The judge examined the four factors that the Board has traditionally considered when deciding a single-employer

issue: interrelationship of operations, common management, centralized control of labor relations, and common ownership or financial control. The judge also noted correctly that no single criterion is controlling, but that the first three, particularly centralized control of labor relations, are more critical than common ownership or financial control. In general, single-employer status is marked by the absence of an "arm's-length" relationship between two or more unintegrated entities. *Hahn Motors*, 283 NLRB 901 (1987).

The judge found, and we agree, that evidence relevant to the factors of interrelationship of operations and common management does not indicate a single-employer relationship between Canned Foods and the Cubitts. He nevertheless based his single-employer finding on the presence of the other two factors: centralized control of labor relations, and common ownership or financial control. Contrary to the judge, we find that there is insufficient evidence of a single-employer relationship based on these factors.

As previously noted, the Board has long held that the most important factor in deciding whether a single-employer relationship exists is the control which one party may or may not exercise with respect to another's labor relations. *Gerace Construction, Inc.*, 193 NLRB 645 (1971). The relevant evidence shows that the Respondent Cubitts determined the number of employees and job classifications with which to staff the grocery outlet, decided which employees to hire, supervised and assigned their work, set their wages, bonuses, hours of work, and vacation and holiday benefits, provided employees with health insurance and a profit sharing plan, maintained workers compensation insurance on their behalf, and carried out all decisions regarding employee discipline and discharge. There is no evidence that Respondent Canned Foods involved itself in any of these matters. To the contrary, David Cubitt testified succinctly and without contradiction that "Canned Foods does not have anything to do with my employees." This evidence, as well as the absence of evidence that employees worked interchangeably at both Respondents<sup>3</sup> or that there were any management personnel common to both Respondents who could affect their labor relations,<sup>4</sup> strongly suggests that the two entities are not a single-employer.

Nevertheless, the judge concluded that "an inference" was warranted that the Respondents were a single-employer, because Canned Foods "possess[ed] and exercis[ed] a high degree of 'clout' in dealing with union-

<sup>1</sup> The General Counsel filed a motion to strike three exhibits attached to the answering brief of Respondent Canned Foods, Inc., on grounds that the exhibits are outside the record. The Respondent Canned Foods filed an opposition to the General Counsel's motion. The exhibits attached to the answering brief were not considered in deciding the issues presented here. We therefore find it unnecessary to pass on the General Counsel's motion.

<sup>2</sup> The judge found that Canned Foods and the Alvernazes, who operated the grocery outlet prior to the Cubitts, also constituted a single-employer. In light of his finding, with which we agree, that the unfair labor practice allegations against the Alvernazes are time-barred by Sec. 10(b), we find it unnecessary to pass on the judge's finding that Canned Foods and the Alvernazes were a single-employer.

<sup>3</sup> See, e.g., *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 552 (3d Cir. 1983).

<sup>4</sup> *Blumenfeld Theatres*, 240 NLRB 206 (1979).

related matters at the grocery outlets.” As support for this conclusion, the judge noted that (1) the same attorneys represented both Respondents at various stages of this proceeding, (2) grocery outlet operators were under instructions to contact Canned Foods at the first sign of union activity, and (3) Canned Foods provided outlet operators, for distribution to employees, employee orientation manuals covering many details of labor relations. We find these factors insufficient to prove common labor relations control here.

With respect to Canned Foods’ provision of employee manuals, the record shows that Canned Foods did not require labor relations at the grocery outlets to be conducted in accordance with the manual and that the Cubitts, in fact, did not abide by the manual. As to the former point, although there was testimony by Deborah Alvernaz that she and her husband used the manual during their tenure as operators of the store, she explained that she only requested copies from Canned Foods but was not obliged to use the manuals. In any event, the relationship at issue here is the one between Canned Foods and the Cubitts, not the preceding relationship between Canned Foods and the Alvernazes. The uncontradicted testimony of David Cubitt was that he did not distribute the manual to his employees or otherwise apply the policies set forth in the manuals. In light of this evidence, there is no basis for finding that, through use of its employee manuals, Canned Foods controlled or even shared responsibility for the labor relations policies of the Cubitts’ Grass Valley outlet operations.

Nor can single-employer status be inferred from the fact that Canned Foods issued instructions that it be notified in the event that union activity was observed at an outlet store. The only supporting evidence in this regard was the testimony of Gerald Davenport who, while a “trainee” operator under the tutelage of the Alvernazes, was told by a Canned Foods official that there was “union trouble” at an outlet where he was to be assigned and that “if anything were to happen” there he was to call Canned Foods and “they’d take care of it.” Consistent with this instruction, Deborah Alvernaz telephoned Canned Foods in November 1994, with news that the Union was trying to organize the Grass Valley outlet employees.

Even assuming that this evidence demonstrates a single-employer relationship, it does so only for Canned Foods and the Alvernazes. As noted, the relevant relationship here is the one between Canned Foods and the Cubitts. The record is silent as to whether the Cubitts, like the Alvernazes, had directions to transfer union-related matters to Canned Foods for resolution.

Finally, we reject the judge’s conclusion that a single-employer relationship can be inferred from the fact that Canned Foods and the Cubitts were, at times, represented by common legal counsel. Specifically, the judge pointed to the fact that Attorney Robert Tiernan represented the Cubitts during most of the instant proceeding, while simultaneously representing Canned Foods in various other unrelated labor matters, and that the same law firm represented the Cubitts during pretrial investigation in this case and Canned Foods during the hearing. Contrary to the judge, these facts do not prove centralized control of labor relations, and the cases he relied upon do not support his conclusion. In *Pathology Institute*, 320 NLRB 1050, 1061 (1996), the retention of the same law firm by a holding company and one of its subsidiaries was cited by the judge there as one of a “series” of factors showing an interrelationship of operations between the two entities. In concluding that the two entities were a single-employer, neither the judge nor the Board on review referred to the employment of common legal counsel as evidence of centralized control of labor relations. In *Blumenfeld Theatres*, 240 NLRB 206 fn. 2 (1979), the Board referred to a common attorney for two entities ultimately found to be a single-employer, but it did not rely on this fact in finding centralized control of labor relations. Rather, the Board relied on the common employment of a partner in both entities, Nathan Blumenfeld, who testified that he “handle[d] all the labor relations for [both entities].”

In sum, given that central control of labor relations is the “critical” factor in finding single-employer status,<sup>5</sup> we decline to make that finding on the basis of the unsubstantiated inferences drawn by the judge. “[C]ommon control must be actual or active, as distinguished from potential control.”<sup>6</sup> As the judge here acknowledged, there is “scant record evidence” meeting this standard.

Therefore, having found that the labor relations of the Cubitts are not centrally controlled by Canned Foods, the judge’s finding of common ownership or financial control remains as the lone factor supporting the conclusion that Canned Foods and the Cubitts are a single-employer. We need not pass on this finding. Even if we were to agree with the judge, this factor alone is not sufficient to establish that both Respondents operate as a single employing enterprise. *Dow Chemical Co.*, 326 NLRB 288 23 (1998). Consequently, we find that the Respondent Canned Foods is not a single-employer of the employees who worked at the grocery outlet operated by the Re-

<sup>5</sup> *Western Union Corp.*, 224 NLRB 274, 276 (1976).

<sup>6</sup> *Id.*

spondent Cubitts and is therefore not liable for any unfair labor practices found to have been committed.

2. The Respondent, David and Brenda Cubitt,<sup>7</sup> excepts to the judge's finding that it violated Section 8(a)(1) prior to the representation election by telling employees that it would withhold a wage increase because of the election, and that it violated Section 8(a)(3) by actually withholding the wage increase until after the election. The Respondent challenges the judge's findings that the raises had been previously announced to or were expected by employees, and that its posted notice to employees blamed the Union for the employees' failure to receive the raises.

We affirm the judge's conclusion that the Respondent acted unlawfully, but we do so on different grounds than those stated in his decision. As the judge correctly noted, Board law requires that an employer in the midst of a union organizing drive proceed with a wage increase as if no organizing campaign were in progress. "An exception to this rule, however, is that an employer may postpone such a wage or benefit adjustment so long as it '[makes] clear' to employees that the adjustment would occur whether or not they select a union and that the 'sole purpose' of the adjustment is to avoid the appearance of influencing the election's outcome."<sup>8</sup>

The record here indicates that in a meeting with several employees prior to the election, David Cubitt explained "that he had checks made with all [their] raises on it [but] that he could not give [them] the checks because it might appear to be a bribe because it was before the vote."<sup>9</sup> Shortly thereafter, Cubitt posted a notice to all employees that stated: "*I REGRET THAT I WILL NOT BE ABLE TO GIVE THE RAISES I FEEL MY CREW DESERVES!!!!!! I APOLOGIZE FOR THE MISUNDERSTANDING.*"

Contrary to the judge, Cubitt did not blame the Union for the failure to give the raises at the originally planned time. On the other hand, Cubitt failed to communicate that the planned wage increases were merely being postponed until after the election, when their implementation could no longer be viewed as a bribe. Instead, the mes-

sage sent to employees in the preelection notice posted by the Respondent was that the wage increases would not be given, i.e., they were being cancelled altogether. The *cancellation* of a planned wage increase because of a representation election is clearly unlawful and distinguishes this case from those like *Uarco*, on which the Respondent relies, where the planned wage increase was merely *postponed*. Under these circumstances, employees would reasonably tend to believe that they had lost a planned benefit as the result of protected organizational activities. We therefore find that the Respondent violated Section 8(a)(1) and (3) by its preelection announcements to employees about the wage increase and, based on the announcements, by its withholding of the increases.<sup>10</sup>

3. The judge found that the Respondent unlawfully rewarded Rebecca Vandergrift, David Mallette, and John Slaughter for their opposition to the Union by granting them higher pay raises and more overtime opportunities than other employees not known to be opposed to the Union, and by allowing Vandergrift to take unpaid vacation time while denying that privilege to others. We find merit in the Respondent's exception to this finding.

Contrary to the judge, there is an insufficient basis for inferring that the three beneficiaries of alleged discriminatory action were "opposed" to the Union and were "leaders" of others similarly opposed to the Union, or that the Respondent regarded them as such. In this regard, the judge relied on credible testimony that an employee overheard Vandergrift tell Brenda Cubitt that Vandergrift was upset that the Cubitts were not retaining an employee who was her best friend and that Vandergrift "was letting them [the Cubitts] know that she was for the Union. But . . . she didn't like the way the Union was handling things and she was very upset over the whole situation." Based on this testimony, Vandergrift's admission that she became "disillusioned" with the Union, and her testimony that similarly disillusioned co-workers Mallette and Slaughter had joined her in a gathering where the Union's campaign was discussed, the judge found that the three former prounion employees became the leaders of the opposition. He further found that the Respondent rewarded them after the election for this change of heart. We find that the evidence fails to show either that these employees turned to open opposition of the Union, or that the Respondent knew or had reason to believe that they had done so.

It is undisputed that Vandergrift was responsible for having initially contacted the Union for assistance in

<sup>7</sup> All subsequent references to "Respondent" are to the Cubitts, unless otherwise stated.

<sup>8</sup> *Atlantic Forest Products*, 282 NLRB 855, 858 (1987), citing *Uarco, Inc.*, 169 NLRB 1153, 1154 (1968). Contrary to our dissenting colleague's contention, a postponement of a wage increase during an organizing campaign is lawful only if the employer satisfies the *Uarco* conditions. Here, as explained below, the Respondent did not meet those conditions.

<sup>9</sup> The record does not show that the employees had any prior awareness or expectation that the Respondent planned to increase their wages. The Respondent clearly had such plans, however, and the vice in its conduct stems from its announcement that it was not going ahead with its plan.

<sup>10</sup> The fact that the Respondent did give wage increases after the election does not affect our finding that it unlawfully led employees to believe raises had been cancelled prior to the election.

organizing the Respondent's employees, and that she assumed the role of an in-plant organizer by soliciting employees to sign union authorization cards. Although she did later become, in her words, "disillusioned" with the Union, she never openly turned against it. She made this clear in response to several of the General Counsel's leading questions which assumed that she had "changed [her] mind . . . and went against the Union." In reply, Vandergrift recounted her earlier testimony in which she "stated [that] the last time I was here, I never said I was against the Union. I never turned against the Union. I was disillusioned. I was confused and I didn't know where we were going up until the end." It was for this reason that she kept "going to [union] meetings pretty much up until the vote . . . [because she] was still interested in what the Union had to say." Vandergrift also testified, without contradiction, that *after* her reported statement to Brenda Cubitt in response to the failure to hire Vandergrift's friend, Vandergrift refused Brenda Cubitt's unlawful entreaty to sign an informational notice disavowing employee support for preelection picketing that the Cubitts believed was Union-sponsored. Finally, although admittedly "disillusioned" with the Union, Vandergrift testified that she never "encourage[d] employees not to vote for the Union."

In light of this evidence, we find that the record falls far short of showing that Vandergrift ever opposed the union, much less that she became one of the "leaders" of an opposition faction. Furthermore, we find that the judge has misconstrued the evidence relating to a preelection gathering attended by Vandergrift, Mallette, and Slaughter. Vandergrift was the only witness to testify about this gathering, which took place at Mallette's house. She protested the General Counsel's insistent attempts to portray this gathering as a formal antiunion meeting. Only one other employee was there. Vandergrift stated that it was simply a "get-together" among the three of them, similar to past get-togethers "which we do a lot. We socialize." Furthermore, there is no evidence that the Cubitts knew anything about this "get-together."

Under these circumstances, we find that there is no basis for finding either that Vandergrift, Mallette, and Slaughter became opponents of the Union, or that the Cubitts had any reason to regard them as such. Consequently, the General Counsel has failed to make the requisite initial showing of antiunion motivation for any discriminatory postelection benefits enjoyed by these three employees. We therefore reverse the judge and dismiss the allegations of 8(a)(3) violations in this regard.

4. The judge found that the Respondent's several unfair labor practices were of a nature that precluded the

possibility of a fair rerun election. Instead, he recommended issuance of a remedial bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). We disagree and conclude that, under all the circumstances, a *Gissel* bargaining order is not warranted in this case.

We have reversed the judge and found that the Respondent did not engage in unlawful postelection discrimination favoring employees who opposed the Union. The remaining unfair labor practice findings that we affirm involve interrogating a single unit employee as to whether she supported the Union, soliciting employees to sign an informational notice to customers disavowing employee involvement in picketing that the Respondent believed to be union-sponsored, harassing picketers, telling employees that the Respondent would not be able to give a planned wage increase because of the election, and withholding that wage increase. None of these unfair labor practices are "hallmark violations" which the Board finds especially significant in evaluating the long-term effects of employer misconduct on employee free choice. See *Garvey Marine, Inc.*, 328 NLRB 991 (1999), and *General Fabricators Corp.*, 328 NLRB 1114, fn. 7 (1999).<sup>11</sup>

Based on the foregoing, we cannot conclude that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Gissel*, 395 U.S. at 614-615. We shall therefore use the Board's traditional remedies for the Respondent's unfair labor practices.<sup>12</sup> We leave the question concerning the Union's representation of the Respondent's unit employees to be resolved by the preferred method of a second Board election.<sup>13</sup>

<sup>11</sup> Although he agrees with his colleagues that a bargaining order is not warranted in this case, Member Hurtgen notes that he dissented from the issuance of bargaining orders in *Garvey Marine, Inc.*, and *General Fabricators*. In *Garvey Marine, Inc.*, he found that there were no "extraordinary circumstances" warranting a bargaining order. Rather, the traditional remedies for the 8(a)(1) and 8(a)(3) violations found in that case would have sufficed to permit a fair election to be held. In *General Fabricators Corp.*, he reserved judgment on the necessity of a bargaining order until the results of the pending representation case were determined.

<sup>12</sup> Consistent with our finding that a *Gissel* bargaining order is not warranted here, we reverse the judge's finding that the Respondent violated Sec. 8(a)(5) when it unilaterally implemented a retirement plan for unit employees on January 27, 1997, "because at that time the Respondent was not obligated to bargain with the Union." *Fiber Glass Systems*, 278 NLRB 1255, 1256 (1986). See also *Beverly California Corp.*, 326 NLRB 232 fn. 17 (1998).

<sup>13</sup> The initial tally of ballots in the election showed 6 votes for and 8 against the Union, with 13 determinative challenged ballots. In a post-

## ORDER

The National Labor Relations Board orders that the Respondent, David G. Cubitt and Brenda Cubitt, a California Partnership, d/b/a Grass Valley Grocery Outlet, Grass Valley, California, shall

## 1. Cease and desist from

(a) Harassing individuals, who are employees within the meaning of the Act and who are engaged in picketing outside the grocery outlet in Grass Valley.

(b) Interrogating employees as to their union sympathies.

(c) Soliciting its employees to sign an antiunion petition.

(d) Informing its employees that they would not be receiving a planned wage increase because a representation election was pending before the Board.

(e) Withholding a planned wage increase from its employees because a representation election was pending before the Board.

(f) 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 actions designed to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its grocery outlet in Grass Valley, California, copies of the attached notice marked "Appendix."<sup>14</sup> Copies of the notice, on forms provided by the Regional Director of Region 20, after being signed by the Respondent's au-

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election proceeding, the Regional Director sustained the challenges to seven of these ballots. The parties agreed during the hearing before the judge that the challenged ballot of voter Tim Bascom should not be counted. In light of our agreement with the judge's findings that Deborah Tahir and Marilyn Reider were not unlawfully discharged and that Sharlene Sutton voluntarily quit her employment before the election, the challenges to their ballots must also be sustained. Therefore, the two remaining challenged ballots which have not been resolved, those cast by Joan Cramer and Peggy Arnold, are no longer determinative of the election results.

Having decided that a *Gissel* bargaining order was necessary, the judge did not rule on objections or challenges in the election in Case 20-RC-17087. The Union's objections parallel certain unfair labor practice allegations with respect to events occurring during the critical preelection period. With respect to those allegations, we have affirmed the judge's findings that the Respondent violated Sec. 8(a)(1) by harassing picketers, by interrogating an employee, and by soliciting employees to sign an antiunion petition. Conduct violative of Sec. 8(a)(1) is *a fortiori* conduct which interferes with employee free choice in an election. See *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). We therefore sustain the Union's objections to this misconduct, and we shall set aside the election on that basis.

<sup>14</sup> 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."

thorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 6, 1995.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

It is further ordered that the amended consolidated complaint is dismissed as to alleged violations of the Act not found in this decision.

IT IS FURTHER ORDERED that the proceeding in Case 20-RC-17087 be severed and remanded to the Regional Director for Region 20 for further action consistent with this decision.

MEMBER HURTGEN, dissenting in part.

I agree with my colleagues that the Respondent's announcement regarding wage increases violated the Act. The Respondent explained to employees that a wage increase could be perceived as a bribe related to the election. The announcement was unlawful because it led employees to believe that the planned wage increase was being *cancelled* (rather than postponed) because of the pending election. However, it does not follow that the failure to grant the increase was itself unlawful. In this regard, my colleagues say that the failure to give the wage increase was unlawful because it was "based on the announcement." This is a classic nonsequitur. The announcement was unlawful because it was perceived as a cancellation rather than a postponement. But, the action that was taken was in fact a postponement (the wage increases were given after the election). Thus, it does not follow that the illegality of the announcement leads inexorably to illegality of the action.

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United 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 the terms of this notice.

WE WILL NOT harass individuals, who are employees within the meaning of the Act and who are engaged in picketing outside its grocery outlet in Grass Valley.

WE WILL NOT interrogate our employees with regard to their support for United Food & Commercial Workers Union, Local 588, United Food & Commercial Workers International Union, AFL-CIO.

WE WILL NOT solicit our employees to sign an anti-union petition.

WE WILL NOT inform our employees that they will not receive a planned wage increase because a representation election is pending before the National Labor Relations Board.

WE WILL NOT withhold a planned wage increase from our employees because a representation election is pending before the National Labor Relations Board.

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

DAVID G. CUBITT AND BRENDA CUBITT,  
A CALIFORNIA PARTNERSHIP, D/B/A GV  
GROCERY OUTLET

*Marilyn O'Rourke, Esq.*, for the Acting General Counsel.

*Carolyn King, Esq.* and *Dannie B. Fogleman, Esq.* (Ford & Harrison), of Atlanta, Georgia, for Respondent, Canned Foods, Inc.

*Kevin R. Iams, Esq.* (Weintraub, Genshlea & Sproul), of Sacramento, California, for Respondent, Thomas A. Alvernaz and Deb Johnston.

*Robert Tiernan, Esq.* (Tiernan & Associates), of Lake Oswego, Oregon, for Respondent, David G. Cubitt and Brenda Cubitt.

*Mike Moore*, of Roseville, California, for Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Original, first amended, second amended, and third amended unfair labor practice charges in Case 20-CA-26685 were filed by United Food & Commercial Workers Union, Local 588, United Food & Commercial Workers International Union, AFL-CIO (the Union), on April 20 and May 1, 1995, November 18, 1996, and March 10, 1997, respectively, and original, first amended, and second amended unfair labor practice charges in Case 20-CA-26812 were filed by the Union on June 26, 1995, November 18, 1996, and March 10, 1997, respectively. Based upon said unfair labor practice charges, on March 17, 1997, the Regional Director of Region 20 of the National Labor Relations Board, herein called the Board, issued an amended consolidated complaint, alleging that Canned Foods, Inc. d/b/a Grass Valley Grocery Outlet, herein called Respondent Canned Foods, engaged in, and is engaging in,

acts and conduct violative of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).<sup>1</sup> In addition, on January 30, 1997, the Regional Director of Region 20 of the Board issued a supplemental decision concerning objections and challenges in Case 20-RC-17087, consolidating certain of the challenges and objections for hearing with the aforementioned unfair labor practice allegations. Pursuant to a notice of hearing, the above consolidated matters came to trial before me in San Francisco and Sacramento, California, on April 7, September 23, November 3 through 6, 12, and 13, and 17 through 19, and December 1, 2, 9, and 10, 1997. At the hearing, all parties, including counsel for the Acting General Counsel, the representative of the Union, counsel for Respondent Canned Foods, counsel for Thomas A. Alvernaz and Deborah Johnston-Kindel (Respondent Alvernazes), and counsel for David G. and Brenda Cubitt (Respondent Cubitts), were afforded the opportunity to examine and to cross-examine witnesses, to offer into the record all relevant evidence, to argue their legal positions orally, and to file posthearing briefs. Said documents were filed by counsel for the Acting General

Counsel, the Union's representative, counsel for Respondent Canned Foods, counsel for Respondent Alvernazes,<sup>2</sup> and counsel for Respondent Cubitts. Accordingly, based upon the entire record herein, including the posthearing briefs and my observation of the demeanor, while testifying, of each of the several witnesses, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all times material herein, Respondent Canned Foods, a corporation with an office and place of business in Berkeley, California, has been engaged in the business of purchasing, warehousing, consigning, and selling, at retail, of grocery-related products through various entities, known as grocery outlets, located in the western United States, including a grocery outlet located in Grass Valley, California (the Grass Valley outlet). Further, at all times material herein until on or about April 17, 1995, the Grass Valley outlet was operated by Respondent Alvernazes, and, at all times material herein since on or about April 18, 1995, the Grass Valley outlet has been operated by Respondent Cubitts. Annually, retail sales of Respondent Canned Foods' grocery-related products at the Grass Valley grocery outlet have been in excess of \$2 million, and Respondent Canned Foods purchases and receives goods and products, valued in excess of \$1500, which originated outside the state of California and which are sold, at retail, through the Grass Valley grocery outlet. Respondent Alvernazes and Respondent Cubitts each admit that, at all times material herein, they have been an employer within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>1</sup> During the course of the hearing, counsel for the Acting General Counsel moved to amend the amended consolidated complaint in several respects—to add the filing dates of amended unfair labor practice charges and to add alternative majority status and refusals of recognition dates. Said motions were granted.

<sup>2</sup> At some point, prior to April 1995, Thomas and Deborah became divorced.

## II. LABOR ORGANIZATION

Respondent Alvernazes and Respondent Cubitts each admit that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE MOTION TO DISMISS

These matters came to trial before the below-named administrative law judge in Sacramento, California, on April 7, 1997. Shortly after the commencement of the hearing, counsel for Respondent Canned Foods, counsel for the Respondent Alvernazes, and counsel for the Respondent Cubitts jointly moved that various paragraphs of the amended consolidated complaint in Cases 20-CA-26685 and 20-CA-26812 be dismissed inasmuch as said paragraphs were based upon amended unfair labor practice charges, in each case, which allege, as unfair labor practices, acts and conduct which occurred beyond the 6-month statute of limitations period, set forth in Section 10(b) of the Act, and as said amended unfair labor practice allegations were not sufficiently closely related to the allegations of timely filed original unfair labor practice charges, in each case, so as to toll the aforementioned statute of limitations. Counsel for the Acting General Counsel argued that the decisions of the Board, upon which each Respondent relied for support, were inapposite and that, in any event, the amended unfair labor practice charges were, in fact, closely related to the allegations of the original charges and, therefore, not time-barred under Section 10(b) of the Act. On May 18, 1997, the undersigned administrative law judge issued an order, granting the joint motion to dismiss paragraphs 9(a) through (f), 10, 11, 17(b), and 17(c) of the amended consolidated complaint but denying the joint motion to dismiss paragraphs 12, 13(a), 13(d), 13(e), 14, and 17(a) of the amended consolidated complaint. Thereafter, on August 28, 1997, the Board granted an appeal by counsel for the Acting General Counsel, reversing the undersigned administrative law judge and directing that I “. . . permit the parties to present evidence at the hearing regarding the merits of [the above] allegations and whether they are closely related to the original timely charge allegations . . . .”<sup>3</sup> Subsequently, on the last day of the hearing in the above-captioned matters and after the parties had each presented evidence on the allegations of paragraphs 9(a) through (f), 10, and 11 of the amended consolidated complaint, counsel for the Respondents jointly reiterated their motion to dismiss the above paragraphs and, also, jointly moved to dismiss those portions of paragraphs 7 and 16(a) and 16(b), which concern Respondent Alvernazes.

### A. The Facts

On February 28, 1995, the Union, filed a representation petition in Case 20-RC-17087, seeking to represent certain employees of Grass Valley Grocery Outlet,<sup>4</sup> a grocery store located in Grass Valley, California. Thereafter, during the subsequent representa-

<sup>3</sup> The Board denied counsel for the Acting General Counsel's appeal of the undersigned administrative law judge's dismissal of pars. 17(b) and 17(c).

<sup>4</sup> There is no dispute that the appropriate unit herein consists of all full-time and regular part-time employees, employed at the grocery outlet in Grass Valley; excluding guards and supervisors as defined in the Act.

tion case hearing, Thomas A. Alvernaz testified that Grass Valley Grocery Outlet sells closeout groceries and nonfood items, that the business was a partnership in which he and his ex-wife Deborah, who, since their divorce, has assumed her maiden name Johnston, each owned a 50 percent interest, that their interest in the business consisted of ownership of the store's fixtures and equipment, that the store's inventory is owned by Respondent Canned Foods, that he and his wife had contracted to sell the business to David G. and Brenda Cubitt, and that the sale was scheduled to be consummated on April 17. On April 14, the Acting Regional Director of Region 20 of the Board issued a decision and direction of election, concluding that, inasmuch as the sales price of the business, a critical term of the sales transaction, had not yet been determined and as there was no record evidence that Deborah Alvernaz had consented to the sale, the sale of the business, at that time, was speculative in nature.

Six days later, on April 20, the Union filed the original unfair labor practice charge in Case 20-CA-26685, alleging that the employer (the Respondent Alvernazes, the Respondent Cubitts, and Respondent Canned Foods) had engaged in conduct violative of Section 8(a)(1) and (3) of the Act. The unfair labor practice charge states, “On or about April 14, 1995, the above-named Employers terminated the employees of Grass Valley Grocery Outlet. Since on or about April 15, 1995, the above-named Employers have refused to hire Marilyn Reider and Deborah Tahir because of their support of [the Union].” On May 1, the Union filed a first amended unfair labor practice charge in Case 20-CA-26685, amending the alleged violation of Section 8(a)(1) and (3) of the Act as follows— “On or about April 14, 1995 the above-named Employers terminated the employees of Grass Valley Grocery Outlet because of [the Union]. Since on or about April 15, 1995 the above-named Employers have refused to hire Marilyn Reider, Deborah Tahir, Jerry Young, and Jonathan Wooldridge because of their support of [the Union].”

While the investigation of the Union's original and first amended unfair labor practice charges in Case 20-CA-26685 continued,<sup>5</sup> on May 5, the aforementioned Acting Regional Director issued an order to show cause in the above-captioned representation matter in which he noted that the labor relations representative of “both the predecessor and successor” had provided him with a copy of the sales agreement, in which the purchase price was set forth, and stated:

Thereafter, the Regional Director caused an administrative investigation to be conducted which revealed that all of the employees who were employed by [Alvernaz and Johnston] were terminated as of midnight, April 18, 1995. On April 19, 1995, Grass Valley Grocery Outlet opened with [the Cubitts] as the new owners, doing the same business, the retail sale of closeout groceries and nonfood items with inventory owned by . . . Canned Foods, Inc., at the same location . . . as prior to the sale. The Cubitts, having previously met with the employees of the predecessor owners to discuss their purchase of

<sup>5</sup> Apparently, in addition to evidence pertaining to acts specified in the charges, the investigation also uncovered evidence of alleged violations of Sec. 8(a)(1) of the Act during November 1994, and at other times during the fall of that year.

the business, received applications for employment from these employees, conducted interviews with them, and offered employment to 20 of the 26 predecessor employees. The majority of these employees accepted the employment offers.

Based upon the foregoing, the Acting Regional Director concluded that the Cubitts were a successor employer to the Alvernazes and that the unit of employees, employed by the Cubitts, was the same unit of employees as was described in his decision and direction of election. There was no response to the order to show cause, and, on June 12, the Regional Director conducted the representation election in the above-captioned matter, with the tally of ballots showing that six votes were cast in favor of the Union and eight votes were cast against the Union.<sup>6</sup>

On June 26, the Union filed the unfair labor practice charge in Case 20-CA-26812, alleging that the employer (the Respondent Cubitts and Respondent Canned Foods) engaged in conduct violative of Section 8(a)(1) of the Act. The Union contended that “on or about May 6, 1995, the above-named Employers, through their agent Robert Tiernan, violated Section 8(a)(1) of the Act by assaulting union representative Michael Moore in the presence of employees who were engaging in protected, concerted and union activities.” While the investigation of this second unfair labor practice charge was in progress, the Acting Regional Director dismissed the original and amended unfair labor practice charges in Case 20-CA-26685. Thus, in a letter, dated July 27, he wrote:

Contrary to the allegations of the charge the evidence did not establish that Canned Foods, Inc. is a joint Employer with Grass Valley Grocery Outlet. While the evidence discloses that Canned Foods, Inc. sells food products to the Grass Valley Grocery Outlet on a consignment basis, there is no evidence that the two businesses have common officers, ownership, directors, management, or supervision. There is no evidence to support a finding that Canned Foods, Inc. is involved in the day-to-day operations of Grass Valley Grocery Outlet or in the hiring, discipline, termination, and/or direction of work of its employees. In addition, the evidence reflects that the Grass Valley Grocery Outlet purchases its own equipment and fixtures, pays the freight costs for the foodstuffs it purchases from Canned Foods, Inc., and separately leases the building housing the market operations from a third party. I am, therefore, refusing to issue complaint as to this allegation. With respect to the allegation that the purchasers of Grass Valley Grocery Outlet, the Cubitts, violated Section 8(a)(3) of the Act by refusing to employ. . . . Deborah Tahir and Marilyn Reider, there is no evidence that either employer knew of their union activities or harbored any animus towards them because of a belief that they had done so. Finally, while there is reason to believe that the predecessor employer and/or its agents had committed numerous violations of Section 8(a)(1) of the Act, there is no evidence that the successor had notice of these violations. Indeed, the evidence demonstrates that the sale of the business was consummated prior to the filing of the instant unfair labor practice charges. In these circumstances it is

<sup>6</sup> On June 19, the Union timely filed objections to the conduct of the election.

concluded that it would not effectuate the purposes of the Act to issue a complaint against the predecessor, who no longer operates the business. I am, therefore, refusing to issue a complaint in this matter.<sup>7</sup>

Subsequently, the Union appealed the Acting Regional Director’s dismissal of Case 20-CA-26685 to the General Counsel’s office of appeals.

Thereafter, on November 18, 1996, a second amended unfair labor practice charge was filed in Case 20-CA-26685 and an amended unfair labor practice charge was filed in Case 20-CA-26812.<sup>8</sup> Each case was amended in the same manner. Thus, in each, the name of the employer was amended to read, “Thomas A. Alvernaz and Debra Alvernaz (aka Debra Johnston), d/b/a Grass Valley Grocery Outlet, David Cubitt and Brenda E. Cubitt, d/b/a Grass Valley Grocery Outlet, and Canned Foods, Inc., A SINGLE-EMPLOYER.” In addition, each alleged that said employer engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act. Finally, each asserted that the employer engaged in several more unfair labor practices:

The Employers have also unlawfully interrogated employees, had the police apprehend union officials in the presence of employees, threatened employees, asked employees to spy on other employees, told employees it would be futile to vote for the Union, solicited grievances from employees, harassed and threatened pickets, withheld employees’ paychecks and raises, promised and granted wage increases and/or other benefits to some employees if they opposed the Union, solicited employees to sign petitions disavowing support for union activities, and changed Sharlene Sutton’s work hours, gave her more onerous duties, and constructively discharged her because of her union activities. The Employers have refused the Union’s request to recognize and bargain with it. The Union requests a *Gissel* bargaining order. By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.<sup>9</sup>

Eight days later, on November 26, 1996, with regard to Case 20-CA-26685, the Regional Director for Region 20 informed each Respondent that it had engaged in a “follow-up” investigation of the charges and that “with the exception of the allegations concerning Young and Wooldridge, I have reconsidered these matters, and I am hereby revoking the dismissal . . . in all

<sup>7</sup> Likewise, the allegations, pertaining to employees Young and Wooldridge, were dismissed.

<sup>8</sup> The record evidence is that, during the period between July 27, 1985 and November 18, 1996, Region 20 was continuing its investigation of both the unfair labor practice allegations in the above-captioned matters and what, if any, relationship existed between Respondent Canned Foods, the Respondent Alvernazes, and the Respondent Cubitts. In particular, I note that, on August 30, 1995, an investigatory subpoena was issued to Respondent Canned Foods, seeking documents concerning the relationship, if any, between the three respondents. Moreover, Robert Tiernan, counsel for the Respondent Cubitts was asked to respond to various questions concerning his work on behalf of the Alvernazes and the Cubitts during 1994 and 1995.

<sup>9</sup> Neither amendment sets forth dates for any of the new alleged unfair labor practices.

other respects.” The Regional Director did not state any reasons for his revocation of the Region’s prior dismissal of the charges.

Based upon the above-described original and amended unfair labor practice charges, on January 13, 1997, the Regional Director issued a consolidated complaint, alleging that Respondent Canned Foods and Grass Valley Grocery Outlet, acting as a single-employer, had engaged in, and were engaging in, acts and conduct violative of Section 8(a)(1), (3), and (5) of the Act. Subsequently, on March 10, 1997, the Union filed a third amended charge in Case 20–CA–26685 and a second amended charge in Case 20–CA–26812, identically amending each by adding “and have made unilateral changes” after the word “it” in the next to the last sentence of the second paragraph. Thereafter, on March 17, 1996, based upon said amendments, the Regional Director issued the instant amended consolidated complaint.<sup>6</sup> The amended consolidated complaint allegations, which, the Respondents jointly contend, are time-barred, pursuant to Section 10(b) of the Act and none of which are based upon conduct specified in the original unfair labor practice charges in the above-captioned matters, include the majority status allegations of paragraph 7, which pertains to the period in which the Respondent Alvernazes operated the grocery outlet in Grass Valley, the allegations of paragraph 9 (8(a)(1) violative acts and conduct, attributed to an unnamed agent, on November 21, 1994, and at other times in the fall of 1994), the allegations of paragraph 10 (8(a)(1) conduct, attributed to the Respondent Alvernazes, on Nov. 12, 1994), the allegations of paragraph 11 (8(a)(1) violative conduct, attributed to Deborah Alvernaz, on Dec. 7, 1994), and the recognition request and refusal to recognize provisions of paragraphs 16(a) and 16(b) as each pertains to the time period during which the Respondent Alvernazes operated the grocery outlet in Grass Valley.

#### B. Legal Analysis

There is no dispute as to the applicable legal principles involved herein. The three Respondents contend that the second amended unfair labor practice charges in Case 20–CA–26685 and the first amended unfair labor practice charges in Case 20–CA–26812, upon which the challenged amended consolidated complaint allegations are based, are time-barred by the 6-month statute of limitations in Section 10(b) of the Act and, therefore, can not serve as the basis for the said allegations. In this regard, Section 10(b) of the Act provides, in pertinent part, “that no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.”<sup>7</sup> Further, in *NLRB v. Fant Milling Co.*, 360 U.S.

<sup>6</sup> The amended consolidated complaint alleges single-employer status between Respondent Canned Foods and an entity, Grass Valley Grocery Outlet. The Respondent Alvernazes are alleged as being the operators of the entity until April 17, 1995, and the Respondent Cubitts are alleged as being the operators since April 18, 1995. No ownership interest is alleged for either, and there is no allegation that the Alvernazes had anything to do with the operation of the entity since April 18.

<sup>7</sup> Sec. 10(b) appears to have been intended to deter litigation over matters about which evidence may have been destroyed, witnesses may be unavailable, and recollections may have become unreliable. *NLRB v. MacMillan Ring-Free Oil Co.*, 394 F.2d 26, 32 (9th Cir. 1968).

301 (1959), the Supreme Court held that, rather than being measured by the standards applicable to a pleading in a private lawsuit, an unfair labor practice charge is merely the initiatory document, necessary to activate the Board’s investigatory processes.<sup>8</sup> The responsibility for making the investigation and for framing the allegations of a subsequent complaint is that of the General Counsel, and, once an unfair labor practice charge has been filed, he is permitted to undertake a complete and unfettered inquiry, one which is not limited to the specific matters alleged in the charge. *Id.* at 307. In particular, the Court held that “the Board is not precluded from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.” *Id.* at 309.

With regard to the issues at hand, both the courts and the Board have reconciled the Act’s statute of limitations with the dictates of *Fant Milling Co.* in determining the timeliness of amendments to unfair labor practice charges. Thus, the courts have found amended unfair labor practices, which involve the same course of conduct as alleged in the original charge and are within the same timeframe, to be timely filed. *Rock Hill Telephone Co. v. NLRB*, 605 F.2d 140, 142 (4th Cir. 1979); *Central Power & Light Co. v. NLRB*, 425 F.2d 1318, 1321 (5th Cir. 1970). Likewise, in *Pankratz Forest Industries*, 269 NLRB 33 (1984), in which it concluded that an amended unfair labor practice charge, which had been filed more than 6 months after the incident at issue, could properly allege a violation of Section 8(a)(1) and (3) of the Act although the original charge had alleged only a violation of Section 8(a)(1) and (5) of the Act, the Board held:

It is well settled that the timely filing of a charge tolls the time limitations of Section 10(b) as to matters subsequently alleged in an amended charge which are similar to, and arise out of the same course of conduct as those alleged in the timely filed charge. Amended charges containing such allegations, if filed outside the 6-month 10(b) period, are deemed, for 10(b) purposes, to relate back to the original charge. This practice is wholly consistent with the statutory scheme, which establishes the charge merely as a vehicle for setting in motion the Board’s investigatory machinery and, additionally, affords the Board leeway to issue a complaint on grounds other than those specifically set forth in the charge.

*Id.* at 36–37. Subsequently, in *Rocky Mountain Hospital*, 289 NLRB 1347, 1359 fn. 22 (1988), the Board utilized the same rationale in finding that an allegation of an otherwise time-barred amended unfair labor practice charge (an overly broad no solicitation-no distribution rule) did not arise out of the same course of conduct (bad-faith bargaining) alleged in the original charge so as to relate to it and toll the statute of limitations.

In *Redd-I, Inc.*, supra, the Board determined that amendments to a complaint were not time-barred under Section 10(b) of the

<sup>8</sup> In *Redd-I, Inc.*, 290 NLRB 1115, 1117 fn. 2 (1988), the Board noted, “It is well settled that it is the complaint, not the charge, that is supposed to give notice to a respondent of the specific claims made against it. . . . The ‘charge’ has a lesser function. It is not designed to give notice to the person complained of or to limit the hearing or to limit the scope of the final order. It serves in the function of drawing the Board’s attention to a cause for economic disturbance.”

Act as the allegations appeared to be “closely related” to the allegations of the unfair labor practice charge, upon which they were based. In reaching its conclusion, the Board set forth the following test:

First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act. . . . Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object. . . . Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

Id. at 1118. While *Redd-I* involved an amendment to a complaint, which, as stated above, may be more legally significant than an unfair labor practice charge, in subsequent decisions, the Board has made it clear that the identical test should be utilized in determining whether an otherwise time-barred amended unfair labor practice charge relates back, or is sufficiently closely related, to the allegations of a timely original charge so as to toll the Act’s 6-month statute of limitations and to support a complaint allegation. *Citywide Service Corp.*, 317 NLRB 861, 862 (1995); *Kaumagraph Corp.*, 316 NLRB 793, 795 (1995); *W. H. Froh, Inc.*, 310 NLRB 384, 387 (1993); *Nephi Rubber Products Corp.*, 303 NLRB 151, 155–156 (1991).

Turning to paragraphs 9(a) through (f), 10, and 11 of the instant amended consolidated complaint, which pertain to incidents, allegedly occurring in November and December 1994, at the outset, as the original unfair labor practice charge in Case 20–CA–26812 was not filed until June 26, 1995, only the unfair labor practice charge in Case 20–CA–26685 was timely filed as to alleged unfair labor practices committed during the previous fall, and only it or an amendment can be the underlying basis for said allegations. Utilizing the three factors of the above-described *Redd-I* test, counsel for the Respondent Alvernazes argues that the alleged 8(a)(1) violations of the second amended unfair labor practice charge, in Case 20–CA–26685, are not, in any way, closely related to the section 8(a)(1) and (3) allegations of the original unfair labor practice charge and, thus, can not be a basis for the above amended consolidated complaint allegations. In this regard, he initially argues that the focus of the original unfair labor practice charge in Case 20–CA–26685 was on the failure of the Respondent Cubitts to hire employees Tahir and Reider on April 18, 1995, a violation of Section 8(a)(1) and (3) of the Act, and that the alleged acts and conduct, occurring during the previous fall, committed by different individuals, were of a different class of alleged violations of the Act—violations of Section 8(a)(1) of the Act. Next, he argues that, as the Respondent Cubitts purchased the business from the Respondent Alvernazes and then failed and

refused to hire Tahir and Reider, the acts and conduct of the Respondent Alvernazes did not involve the same sequence of events as alleged in the original unfair labor practice charge. Further, counsel argues that different defenses are required for the amended charge allegations and that no reasonable respondent would have foreseen the need to preserve the evidence necessary to defend against the 8(a)(1) violation allegations of the amended consolidated complaint. Finally, counsel contends that, in order to demonstrate an on going campaign to defeat the Union, counsel for the Acting General Counsel must establish a single-employer relationship between the Respondent Alvernazes, the Respondent Cubitts, and Respondent Canned Foods and that such involves a different legal theory and defenses than required by the original unfair labor practice charge.<sup>9</sup> Taking a contrary view, relying, in particular, upon *Marriott Corp.*, 310 NLRB 1152 (1993), and *Southwest Distributing Co.*, 301 NLRB 954 (1991), counsel for the Acting General Counsel asserts that otherwise time-barred allegations of violations of Section 8(a)(1) of the Act have been found to be closely related to a timely unfair labor practice charge, alleging only a violation of Section 8(a)(1) and (3) of the Act, when they are part of an employer’s obvious scheme to aggressively undermine its employees’ support for a labor organization and to rid itself of supporters of the labor organization and, therefore, may be said to have arisen from the same fact matrix and sequence of events. As to this, counsel argues that the evidence offered during the hearing, regarding the incidents underlying paragraphs 9(a) through (f), 10, and 11 of the amended consolidated complaint, establish such a campaign to undermine the Union herein.

I find merit in the position of the three Respondents, as argued by counsel for the Respondent Alvernazes, that, as the second amended charge in Case 20–CA–26685 was filed more than 6 months after the alleged unlawful acts and conduct and as said allegations are not “closely related” to the allegations of the timely original charge, the allegations of these three paragraphs are time-barred pursuant to Section 10(b) of the Act. While counsel for the Acting General Counsel is, of course, correct that, in the abstract, otherwise time-barred 8(a)(1) violation allegations in an amended charge may be closely related to a timely discriminatory discharge unfair labor practice charge if the former allegations are part of a campaign to undermine or defeat a Union, my difficulty with her position herein lies not so much with the theory of the 8(a)(1) allegations themselves but when, as they must, such are considered in conjunction with the single-employer allegation of the amended unfair labor practice charge.<sup>10</sup> Thus, utilizing the *Redd-I*, supra, test, I be-

<sup>9</sup> At the hearing, counsel for the Respondent Alvernazes and counsel for the Respondent Cubitts offered evidence that the relationship between them was a predecessor/successor relationship.

<sup>10</sup> While the original unfair labor practice charge in Case 20–CA–26685 did refer to the Respondent Alvernazes, the Respondent Cubitts, and Respondent Canned Foods as “the employer,” single-employer status was not specifically alleged, and it is clear, as reflected in the Acting Regional Director’s April 14, 1995 decision and direction of election, his May 5, 1995 order to show cause in the representation case, and his July 27, 1995 dismissal letter in the unfair labor practice matter, that he viewed the Respondent Cubitts as the legal successor to the Respondent Alvernazes as the owner of the Grass Valley Grocery

lieve that entirely different legal theories, pertaining to liability, are involved in determining whether a violation of Section 8(a)(1) and (3) of the Act occurred when the Respondent Cubitts discharged and/or failed to offer employment to Tahir and to Reider in April 1995, and in establishing whether the Respondent Cubitts and Respondent Canned Foods also were responsible for any interrogations, threats, and other conduct, violative of Section 8(a)(1) of the Act, which were committed by the Respondent Alvernazes and their agent during the fall of 1994. If counsel for the Acting General Counsel establishes each of the required elements necessary to prove that the Respondent Cubitts unlawfully discharged and/or refused to hire Tahir and Reider,<sup>11</sup> the responsibility of the Respondent Cubitts, either alone or as part of a single-employer entity, is not at issue. In contrast, as stated above, merely proving the elements necessary to establish violations of Section 8(a)(1) of the Act during the fall of 1994 would be insufficient to hold Respondent Cubitts and/or Respondent Canned Foods responsible for said acts. Rather, according to the theory of the amended consolidated complaint, establishing single-employer status, including the Respondent Alvernazes, is an absolute prerequisite to finding the Respondent Cubitts and Respondent Canned Foods responsible for what allegedly occurred in November and December 1994.<sup>12</sup> Put another way, while the unfair labor

Outlet and did not believe that Respondent Canned Foods was a joint employer with the Grass Valley Grocery Outlet. Further, the Acting Regional Director noted that there was no evidence that the successor, the Respondent Cubitts, had any notice of any unfair labor practices, which may have been committed by the predecessor employer, the Respondent Alvernazes. Counsel for the Acting General Counsel is undoubtedly correct that the General Counsel may not be precluded from adopting a different legal position as herein; however, the point remains that single-employer status was formally raised for the first time in the second amended charge, and whether the Respondent Cubitts and Respondent Canned Foods may be found responsible for any violations of Sec. 8(a)(1) of the Act, committed by Respondent Alvernazes, is wholly dependent upon a finding of single-employer status between said entities.

<sup>11</sup> The manner, in which par. 13(b) has been plead, makes it clear that counsel for the Acting General Counsel was acutely aware of her difficult legal position. Thus, if the Alvernazes, the Cubitts, and Canned Food are found to constitute a single-employer, what occurred would be a discharge. However, if only the Cubitts or the Cubitts and Canned Foods are responsible, what occurred would be a refusal to hire.

<sup>12</sup> In my original ruling on the Respondents' motion to dismiss and in remarks on the last day of the hearing, I explicated my rationale for believing that the 8(a)(1) allegations of the second amended charge were not closely related to the timely filed original charge so as to toll the 10(b) statute of limitations. Specifically, I requested that counsel for the Acting General Counsel address my concerns, with case citations, in her posthearing brief. However, her only reference to my statements is her comment that "The Judge's rationale . . . [fails] to recognize the crucial fact that if single-employer status is proven, all entities of Respondent are one and the same. . . . Respondent is charged with knowledge of and responsible for all conduct which took place during the Alvernazes' operation of the store." *This is precisely my point.* Whatever my findings herein on single-employer status, at the time of the filing of the second amended charge herein, the issue had never before been raised much less proven and was, therefore, enmeshed with the unfair labor practice issues themselves.

practice and single-employer issues may involve separate and distinct legal theories, they are inextricably intertwined in the pleading. Moreover, while there is much record evidence herein regarding the alleged Section 8(a)(1) violations and the alleged unlawful discharges of and/or refusals to rehire Tahir and Reider, given the nearly 5 month interval between the last of the former and the latter and the change of operators, one may legitimately question whether the foregoing involve the same sequence of events. Finally, as I perceive that the timely filed Section 8(a)(3) discharge and/or refusals to hire issues and the amended independent Section 8(a)(1) violation allegations involve different legal issues, it follows that distinct defenses are applicable to each. Whether the Respondent Cubitts and Respondent Canned Foods can be held responsible for the latter acts and whether all of the foregoing acts and conduct were facets of a campaign to defeat the Union are dependent upon a finding of a single-employer relationship between the three Respondents, and, as an aspect of their defenses herein, the three Respondents contend that a predecessor/successor relationship existed between the Respondent Alvernazes and the Respondent Cubitts. In this regard, as noted by the Acting Regional Director, the matter of the Respondent Cubitt's knowledge of the alleged unfair labor practices, which occurred five months before they became the operators of the store, is a significant issue. Based upon the foregoing, I do not believe that the otherwise time-barred second amended charge in Case 20-CA-26685, upon which the Section 8(a)(1) of the Act violation allegations of paragraphs 9(a) through (f), 10, and 11 of the amended consolidated complaint are based, is sufficiently closely related to the timely filed original unfair labor practice charge so as to toll the Section 10(b) of the Act's statute of limitations and, therefore, shall grant the three Respondents' joint motion to dismiss said paragraphs of the amended consolidated complaint.<sup>13</sup>

With regard to the Respondents' joint motion to dismiss those portions of paragraphs 16(a) and 16(b) of the amended consolidated complaint, which pertain to the Respondent Alvernazes, I note that the Board upheld my May 19, 1997 dismissal of paragraphs 17(b) and 17(c). Therein, I stated:

paragraphs 17(b) and (c), of the amended consolidated complaint, which allege that Respondent' acts and conduct, specified in paragraph 12(e), as well as unspecified acts and conduct since November 1994, constitute unlawful unilateral changes, are facially time-barred. While counsel for the General Counsel states that these alleged unfair labor practices are merely ". . . derivative violations relating to the *Gissel* remedy sought . . .," making it is unnecessary to undertake a *Redd-I*, supra, "closely related" type analysis, clearly, the amended unfair labor practice charges in November 1996 and March 1997, in both of the instant unfair labor practice matters, upon which these amended consolidated complaint provisions are

<sup>13</sup> I also note that the alleged violations of Sec. 8(a)(1) of the Act, which were committed by the Respondent Alvernazes, were known to the Acting Regional Director of Region 20 as of July 27, 1995, the date of his dismissal letter in Case 20-CA-26685. Presumably, then, the Union was aware of such, or should have been aware of such, prior to that date.

based, were not timely filed as to these issues, and counsel cited no case in support of her argument. Therefore, paragraphs 17(b) and (c) are, indeed, time-barred unless closely related to the original unfair labor practice charge in Case 20-CA-26685,<sup>14</sup> and, in agreement with Respondents, I believe that they are not. Thus, not only are the allegations based upon different sections of the Act but also different defenses will be asserted,<sup>15</sup> utterly different legal theories are involved, and it can not be asserted that the acts and conduct, underlying the Section 8(a)(1) and (5) allegations, have anything to do with Respondents' asserted unlawful campaign to dissuade its employees from supporting the Union. While, in *Overnight Transportation Co.*, 296 NLRB 669 (1989), the Board did find that amended complaint Section 8(a)(1) allegations were closely related to 8(a)(5) allegations in a timely unfair labor practice charge, the Board viewed them as arising out of the same sequence of events in that the employer's "alleged bad faith at the bargaining table was a continuation and manifestation of its alleged coercive statements and interrogations."

The same analysis applies to those portions of paragraphs 16(a) and 16(b), which concern the Respondent Alvernazes, and I shall recommend dismissal of said paragraphs of the amended consolidated complaint.<sup>16</sup>

#### IV. THE ISSUES

Initially, of course, the amended consolidated complaint alleges that Respondent Canned Foods and the Grass Valley Grocery Outlet, whose operators were, until on or about April 17, 1995, the Respondent Alvernazes and have been, since on or about April 18, 1995, the Respondent Cubitts, constitute a single-employer. With regard to Respondent Canned Foods and the Grass Valley Grocery Outlet as a single-employer, the amended consolidated complaint alleges that, acting through the Respondent Cubitts, Respondent Canned Foods and the Grass Valley Grocery Outlet refused to hire Marilyn Reider and Deborah Tahir and assigned more onerous duties to, changed the work schedule of, and caused Sharlene Sutton to voluntarily quit in violation of Section 8(a)(1) and (3) of the Act. Further, the amended consolidated complaint alleges that, acting through the Respondent Cubitts, Respondent Canned Foods and the Grass Valley Grocery Outlet unilaterally granted to its employees, who opposed the Union, raises, additional vacation time, manager awards, cash awards, and the opportunity to work overtime in violation of Section 8(a)(1) and (3) of the Act; threatened its employees with discharge, threatened to call the police on its employees and generally harassed them, and interrogated its employees in violation of Section 8(a)(1) of the Act; forcibly shoved a Union representative in violation of Section 8(a)(1) of the Act; and solicited its employees to sign a petition

<sup>14</sup> As with the above-discussed 8(a)(1) and (3) violation allegations, the 8(a)(1) and (5) violation allegations of the amended charges in Case 20-CA-26812 are, in no way, closely related to the single, isolated incident, which is the subject of the original charge.

<sup>15</sup> Respondents contend that the Union waived its right to file an unfair labor practice charge over the alleged unlawful unilateral changes--a defense not available in the refusal to hire allegation.

<sup>16</sup> Inasmuch as this paragraph pertains to the bargaining order remedy, which is sought by counsel for the General Counsel, I shall deny the motion to dismiss portions of paragraph 7.

denouncing employees' union activities in violation of Section 8(a)(1) of the Act. The amended consolidated complaint alleges that the Union attained majority status amongst an appropriate unit of Respondent Canned Foods' and the Grass Valley Grocery Outlet's employees on or about November 1, 1994, or alternatively, on or about April 20, 1995, and counsel for the Acting General Counsel requests a bargaining order as the appropriate remedy for the above-described unlawful acts and conduct, which are attributed to Respondent Canned Foods and the Grass Valley Grocery Outlet. In accord with said request, the amended consolidated complaint asserts that, acting through the Respondent Cubitts, Respondent Canned Foods' and the Grass Valley Grocery Outlet's above-described unilateral acts and conduct and their implementation of a retirement plan for the employees were violative of Section 8(a)(1) and (5) of the Act. Respondent Canned Foods, the Respondent Alvernazes and the Respondent Cubitts deny they comprise a single-employer and deny the commission of any of the alleged unfair labor practices.<sup>17</sup>

With regard to Case 20-RC-17087, besides the merits of objections to the conduct of a representation election, which was held on June 12, 1995, and which closely parallel the allegations of the amended consolidated complaint, challenges to the ballots of two individuals, Joan Cramer and Peggy Arnold, were contested during the instant hearing. Concerning Cramer, the Union contends that she was not an eligible voter inasmuch as she voluntarily terminated her employment prior to the day of the election; while the Respondent Cubitts contends that she was an employee as of the date of the election but was on a medical leave of absence. As to Peggy Arnold, the Union contends that she was not an eligible voter as she was, and remains, a supervisor within the meaning of the Act. The Respondent Cubitts deny that she was a statutory supervisor.

#### V. THE SINGLE-EMPLOYER ISSUE

##### A. Overview

The consolidated amended complaint alleges that Respondent Canned Foods and the Grass Valley Grocery Outlet constitute a single-employer. Under the Board's rulings, a single-employer relationship exists whenever "nominally separate entities are actually part of a single-integrated enterprise so that, for all purposes . . . there is, in fact, only a 'single-employer.'" *Geo V. Hamilton, Inc.*, 289 NLRB 1335, fn. 2 (1988). In other words, there is the absence of the "arms length relationship found among unintegrated companies." *Operating Engineers Local 627 v. NLRB*, 518 F.2d 1040, 1045-1046 (D.C. Cir. 1975), *affd.* on this issue sub nom. *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976). In assessing whether or not a single-employer relationship exists, the Board's normal inquiry focuses on four aspects of the relationship between ostensibly separate entities: interrelationship of their operations, common management, centralized control of their labor relations, and

<sup>17</sup> As I have dismissed the allegations of the amended consolidated complaint, which specifically pertain to them, the liability of the Respondent Cubitts for any unfair labor practices, which may have been committed by the Respondent Cubitts herein, depends upon the existence of a single-employer relationship between Respondent Canned Foods, the Respondent Cubitts, and the Respondent Alvernazes.

whether there is common ownership or financial control. *Television Artists AFTRA Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255, 256–257 (1965); *Cal Spas*, 322 NLRB 41, 45 fn. 5 (1996); *Pathology Institute*, 320 NLRB 1050, 1054 (1996). “None of these factors, alone, is controlling, nor need all of them be present, as single-employer status ultimately depends on all the circumstances of the case.” *Richmond Convalescent Hospital*, 313 NLRB 1247, 1249 (1994); *Hydrolines, Inc.*, 305 NLRB 416, 417 (1991). Nevertheless, “the Board has determined that the first three factors are of particular importance, especially the centralized control of labor relations, which factor is “considered critical to a single-employer finding.” *Richmond Convalescent Hospital*, supra; *Alabama Metal Products*, 280 NLRB 1090 fn. 1 (1986); *Western Union Corp.*, 224 NLRB 274, 277 (1976), affd. sub nom. *Telegraph Workers v. NLRB*, 571 F.2d 665 (D.C. Cir. 1978), cert. denied 439 U.S. 827 (1978).<sup>18</sup> Finally, the fundamental purpose for the inquiry is to determine “whether there exists overall control of critical matters at the policy level.” *Good Life Beverage Co.*, 312 NLRB 1060, 1072 (1993).

At the outset, the record establishes that Respondent Canned Foods, which was founded by James Read, is a family-owned corporation operated by Read’s sons, Peter and Steven; that its corporate offices are located in Berkeley, California; that it is engaged in the business of providing consignment services to national suppliers of canned foods and other grocery-related products by purchasing and selling the manufacturers’ off quality products, close-outs, aged products, discontinued merchandise, and products which “for one reason or another do not meet the quality or packaging specifications of the manufacturer;”<sup>19</sup> that these products are sold at reduced prices,<sup>20</sup> to the public through a network of retail consignment stores, known as grocery outlets,<sup>21</sup> and that Respondent Canned Foods currently has approximately 109 grocery outlets located in the western United States. The record further establishes that an entity, known as the Grass Valley Grocery Outlet, does not

<sup>18</sup> With regard to centralized control of labor relations, in *Speedee 7-Eleven*, 170 NLRB 1332, 1334 (1968), the Board noted that “it is immaterial whether this control be actually exercised so long as it may potentially be exercised by virtue of the agreement under which the parties operate.” Further, on this point, quoting from *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1043 (8th Cir. 1976), in *Pathology Institute*, supra at 1063, the administrative law judge, whose decision, as to single-employer status, was adopted by the Board, wrote, “In assessing the appropriateness of single-employer treatment, the fact that day-to-day labor matters are handled at the local level is not controlling, because the more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries.”

<sup>19</sup> These products include canned foods, frozen foods, deli and produce items, household items, and health and beauty aides.

<sup>20</sup> David Cubitt explained that, as “the manufacturer wants to get rid of it,” Respondent Canned Foods obtains its grocery items at a reduced cost from manufacturers. The products are further discounted by Respondent Canned Foods and sold at 25 to 40 percent below their normal cost. The products and prices are not advertised except within the individual grocery outlets.

<sup>21</sup> The Respondent Canned Foods’ distinctive logo sign, a multi-hued rainbow and the words, grocery outlet, is prominently displayed at the front of each grocery outlet, including the facility in Grass Valley.

exist. Thus, the name, Grass Valley Grocery Outlet, is the fictitious name, under which the Respondent Alvernazes did business while they operated the grocery outlet in Grass Valley, and, when the Cubitts became the operators of the business, they also registered a fictitious name with the State of California, under which they have done business—GV Grocery Outlet. The building itself is an old Safeway building, which Respondent Canned Foods leases from the building’s owner and which bears a multi colored rainbow sign, which is common to other of Respondent Canned Foods’ grocery outlet stores and which reads “Grocery Outlet.” Almost all of Respondent Canned Foods’ grocery outlets, including the grocery outlet in Grass Valley, are managed by persons, known as operators,<sup>22</sup> and there is no dispute that these individuals invariably are married couples or have some other familial relationship<sup>23</sup> and that, upon accepting Respondent Canned Foods’ offer to become operators of a grocery outlet, the new operators enter into a lengthy store operator agreement with the former.<sup>24</sup>

As to the operators herein involved, Deborah and Thomas Alvernaz were married while both worked for the former’s parents, who were the operators of a Respondent Canned Foods grocery outlet in Chula Vista, California. In 1986, Deborah’s

<sup>22</sup> Apparently Respondent Canned Foods itself owns and manages the three facilities at which its employees are represented by a labor organization.

<sup>23</sup> This seems to be a Respondent Canned Foods requirement for grocery outlet operators. Thus, when questioned on the subject, Rita Jeannie Calkins, a director for Respondent Canned Foods responsible for personnel development, admitted that, if not married, operators have some family relationship.

<sup>24</sup> The respective store operator agreements, into which the Respondent Alvernazes and the Respondent Cubitts entered into with Respondent Canned Foods for operation of the latter’s grocery outlet in Grass Valley, are virtually identical. Said agreements obligate the Respondent Alvernazes and the Respondent Cubitts to devote their “full time to operating” the grocery outlet in Grass Valley. Further, each agreed “not to transfer, assign, sell, mortgage, or convey Operator’s rights hereunder without the written consent of [Respondent Canned Foods],” and neither agreement gives the Respondent Alvernazes or the Respondent Cubitts ownership of a grocery outlet or the right to sell the Canned Foods’ products. Rather, according to Deborah Johnston-Kindel and David Cubitt, what ownership interest an operator possesses is in the grocery outlet’s fixtures, including refrigeration units, and equipment, including shopping carts, cash registers, and the like, materials which the operator must purchase to operate a grocery market. These items are purchased by the new operator either from the predecessor operator or outside vendors, with the new operator bearing the cost of the said items out of its own funds or through financing by Respondent Canned Foods and Wells Fargo Bank, which financing is arranged by Respondent Canned Foods in a manner discussed infra. Moreover, as will also be fully discussed infra, the store operator agreements mandate that “the employees at the Store shall be the Operator’s employees and not those of [Respondent Canned Foods].” Significantly, the Respondent Alvernazes’ and the Respondent Cubitts’ respective store operator agreements give Respondent Canned Foods the right to terminate, with or without fault, with 60 days’ notice or immediately, without notice, in the case of the operator’s default. For both the Respondent Alvernazes and the Respondent Cubitts, an aspect of default is defined as vaguely as “circumstances within Operator’s control . . . which in [Respondent Canned Foods’] judgment create antagonism between [the former] and Operator.”

parents became the operators of the Respondent Canned Foods grocery outlet in San Pablo, California, and the Respondent Alvernazes followed her parents and continued working for them. Then, in 1990, Respondent Canned Foods gave the Respondent Alvernazes the opportunity to become operators of a new grocery outlet in Grass Valley, and they accepted,<sup>25</sup> eventually doing business under the fictitious name, Grass Valley Grocery Outlet. The Respondent Cubitts, a married couple, were residents of Yuca Valley, California, where David Cubitt owned a clothing store and worked as the assistant manager at Respondent Canned Foods' grocery outlet in that city. Aware that the grocery outlet's operators, a married couple, desired to move and to operate a grocery outlet elsewhere, Cubitt informed Respondent Canned Foods that his and his wife were interested in having their own store. Thereafter, they were solicited by Respondent Canned Foods regarding becoming the operators of the Yuca Valley grocery outlet; the Respondent Cubitts agreed and eventually purchased the facility's fixtures and equipment from the former owners for in excess of \$160,000, using their own funds and loans from Wells Fargo Bank and from Respondent Canned Foods. According to Deborah Johnston-Kindel, her marriage to Thomas Alvernaz ended in divorce, and they informed Respondent Canned Foods that "we were selling the store and [the former] took care of it."<sup>26</sup> Respondent Canned Foods did so by soliciting the Respondent Cubitts to move to Grass Valley and be the operators of its grocery outlet in that city. After visiting Grass Valley and inspecting the facility, the Cubitts accepted, negotiated the purchase price of the grocery outlet's fixtures and equipment with the Respondent Alvernazes, and entered into a store operator agreement, becoming the operators of Respondent Canned Foods' grocery outlet in Grass Valley. Since April 18, 1995, as did the Respondent Alvernazes, the Respondent Cubitts have operated the business under a fictitious name—GV Grocery Outlet.<sup>27</sup>

<sup>25</sup> According to Deborah Johnston-Kindel, in order to finance the purchase of the fixtures and equipment, which are necessary for the operation of a grocery outlet, she and her husband made a down payment of \$10,000 and secured loans for the remainder of the fixtures and equipment cost from Respondent Canned Foods and Wells Fargo Bank.

<sup>26</sup> Whether the Respondent Alvernazes voluntarily sold their operator's interest in the Grass Valley grocery outlet or were forced to do so by Respondent Canned Foods is a matter of dispute. While such was denied by Deborah Johnston-Kindel, Marilyn Reider testified that, with tears in her eyes, Johnston-Kindel informed employees that it was "a big surprise to her" that she and her husband had to move. Further, former employee, Carma Lawson, testified that Johnston-Kindel informed her that Respondent Canned Foods had placed the Respondent Alvernazes on probation due to their divorce and that Robert Tiernan, who was the Respondent Alvernaz' attorney during 1994, told her that, while the Respondent Alvernaz' probation had ended, Respondent Canned Foods had decided "to bring in new operators to the store." Neither Tiernan nor Johnston-Kindel denied Lawson's testimony.

<sup>27</sup> David Cubitt conceded that, if Respondent Canned Foods terminated the operator agreement and withdrew its product, he would no longer be able to do business at the grocery outlet location. However, he testified that, inasmuch as he and his wife own the interior fixtures and equipment, they rightfully could open another grocery market, utilizing the fictitious business name, GV Grocery Outlet.

Counsel for the Acting General Counsel argues that a single-employer relationship exists herein and that such encompasses Respondent Canned Foods and the Grass Valley Grocery Outlet. In so arguing, counsel dismisses any such relationship between Respondent Canned Foods and the Respondent Alvernazes or the Respondent Cubitts as "there is in actuality no true ownership of the store by the operators." However, contrary to counsel, there is no record evidence that an entity, known as the Grass Valley Grocery Outlet, actually exists; rather, as stated above, such was the fictitious name under which the Respondent Alvernazes did business in Grass Valley, California, while working as the operators of the grocery outlet store in that city. Moreover, in my view, rather than ownership,<sup>28</sup> the central issue, regarding the Respondent Alvernazes and the Respondent Cubitts, is whether, as operators, they fall within the definition of an employer within the meaning of Section 2(2) of the Act. Further, counsel for the Acting General Counsel failed to posit an alternate theory—that, notwithstanding the terms of their respective store operator agreements, the successive operators of the grocery outlet in Grass Valley, the Alvernazes and the Cubitts, are agents or employees of Respondent Canned Foods, and, therefore, the latter is the true employing entity of the bargaining unit employees, who are working at the grocery outlet. Accordingly, my legal analysis shall be confined to what is alleged in the amended consolidated complaint and argued by counsel for the Acting General Counsel—the existence of single-employer status comprising Respondent Canned Foods and some other employing entity. In my view, given their store operator agreements, as the respective relationships between the Respondent Alvernazes and the Respondent Cubitts and Respondent Canned Foods appear to be identical, if single-employers exist in these factual circumstances, they must encompass Respondent Canned Foods and the Respondent Alvernazes on one hand and Respondent Canned Foods and Respondent Cubitts on the other.<sup>29</sup> In arguing against a finding of single-employer status, counsel for Respondent Canned Foods likewise concentrates upon these relationships and argues that the Respondent Alvernazes and Respondent Canned Foods and the Respondent Cubitts and Respondent Canned Foods always acted independent of each other and not

<sup>28</sup> I do not believe that the Respondent Alvernazes or the Respondent Cubitts are sole proprietors of a business. The fourth edition of *Black's Law Dictionary* defines a proprietor as "one who has the legal right or exclusive title to anything. In many instances it is synonymous with ownership." Herein, other than ownership interest in the store fixtures and equipment, neither the Respondent Alvernazes nor the Respondent Cubitts own the grocery outlet store, the right to sell Respondent Canned Foods' consigned merchandise, or the merchandise itself, and neither may convey its rights as the operators of the grocery outlet to any other entity without the written assent of Respondent Canned Foods. In these circumstances, it can not be said that either the Respondent Alvernazes or the Respondent Cubitts actually owned the business performed at the grocery outlet in Grass Valley.

<sup>29</sup> I do not believe, nor is there any record evidence supporting such a contention, that Respondent Canned Foods, the Respondent Alvernazes, and the Respondent Cubitts together constitute a single-employer.

in an integrated manner suggestive of a single-employer relationship.<sup>30</sup>

As previously stated, it seems clear to the undersigned that a prerequisite to finding a single-employer relationship is a finding that each nominally separate entity is an employer within the meaning of the Act. While the term “employer” is among those set forth in the “Definitions” subsection of the Act, Section 2(2) contains no test or specifications for determining whether an entity falls within the above section’s provisions. As noted by the Supreme Court, in *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403 (1947), this omission was a deliberate choice of Congress “so the Board, in performing its delegated functions of defining and applying . . . terms . . . [might] bring to its task an appreciation of economic realities as well as a recognition of the aims which Congress sought to achieve by [the Act].” The Board has performed this delegated function, and, in *Roane-Anderson Co.*, 95 NLRB 1501, 1503 (1951), set forth the following test for an employing entity under the Act:

The decisive elements in establishing an employer-employee relationship are complete control over the hire, discharge, discipline, and promotion of employees, rates of pay, supervision, and determination of policy matters.

Indeed, the control need not even be absolute nor exclusive, for control over significant aspects of the employment relationship, sufficient to enable the possessor to bargain effectively concerning these matters, suffices to establish an employment relationship and, therefore, employer status under Section 2(2) of the Act. *Sun Maid Growers of California*, 239 NLRB 346 (1978). Put another way, an entity is an employer, within the meaning of Section 2(2), if it possesses or “retains sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as the representative of its employees.” *Open Taxi Lot Operation*, 240 NLRB 808, 809 (1979). Herein, inasmuch as it engages in collective-bargaining with another affiliated local union of the United Food & Commercial Workers International Union for agreements, covering employees at three grocery outlets, which it operates, Respondent Canned Foods clearly is an employer within the meaning of Section 2(2) of the Act. Moreover, based upon the language of their respective store operator agreements, as the Respondent Alvernazes were and the Respondent Cubitts are responsible for the hiring, training, supervision, direction, discipline, compensation (wages and benefits), and termination of the bargaining unit employees at the grocery outlet in Grass Valley, both operators clearly were, and

<sup>30</sup> Counsel for Respondent Canned Foods argues that “the critical—and undeniable—fact is that the [Respondent Cubitts] have their own business.” While, as discussed below, they do pay all the operating expenses, property taxes on the fixtures, liability insurance and insurance covering the fixtures and while they certainly operate a business, the Respondent Cubitts actually own nothing but the fixtures and the equipment. They do not own the grocery outlet in Grass Valley nor do they own the right to act as operators. As David Cubitt admitted, if Respondent Canned Foods terminated the store operator agreement and withheld any more product, he and his wife would have to remove the fixtures and equipment from the grocery outlet building and would have no business to operate.

are, able to engage in collective bargaining with a labor organization, which represents said employees.<sup>31</sup> In these circumstances, both operators must be considered employers within the meaning of Section 2(2). Therefore, my analysis of the factors, determinative of a single-employer, shall concentrate upon the relationships between Respondent Canned Foods and the Respondent Alvernazes and between Respondent Canned Foods and the Respondent Cubitts.

#### *B. The Interrelationship of Operations*

The record reveals, and there is no dispute that Respondent Canned Foods owns the grocery-related products, which are consigned for sale through its grocery outlets, including the Grass Valley outlet. More particularly, at said facility, the Respondent Cubitts, as did the Respondent Alvernazes prior to them, must obtain all of their merchandise from Respondent Canned Foods and can only sell items supplied by the latter.<sup>32</sup> In this regard, according to the respective store operator agreements, which the Respondent Alvernazes and the Respondent Cubitts executed before becoming operators of the grocery outlet in Grass Valley, the Respondent Alvernazes were and the Respondent Cubitts are obligated to adhere to “the required sales methods and distribution procedures used in [Respondent Canned Foods’] stores.” Further, “the character, quantity, storage, display, price, and merchandising of Merchandise shall be as determined by [Respondent Canned Foods] . . .” and operators are expected to adhere to Respondent Canned Foods’ marketing programs. Additionally, operators, including the Respondent Alvernazes and the Respondent Cubitts, are required to transmit daily sales reports to Respondent Canned Foods in a format, which is required by the latter, and on a daily basis, are required to transmit 87.5 percent of the nonalcohol and 85 percent of the alcohol sales proceeds to Respondent Canned Foods in the manner established by the latter. These sales proceeds transmittals are made on a daily basis from the operators’ business bank accounts, and each operator must arrange for the means of a daily dispersal of funds to Respondent Canned Foods. Finally, according to David Cubitt, Respondent Canned Foods’ products come to the grocery outlets “on consignment and I pay [the latter] when I sell it.”

Cubitt testified that he orders grocery-related items from a Respondent Canned Foods order guide approximately three times a week, with deliveries made to the grocery outlet in Grass Valley twice a week. On this point, Deborah Johnston-Kindel testified that Respondent Canned Foods establishes a maximum amount of each item. Also, while it appears that operators are able to order products in any mix and that the product mix is determined by consumer demand, Cubitt and

<sup>31</sup> I note, in this regard, that, inasmuch as the Union demanded that the Respondent Alvernazes and, later, the Respondent Cubitts recognize and bargain with it on behalf of the grocery outlet’s employees, the former obviously believed that the Respondent Alvernazes and the Respondent Cubitts employed said employees and were able to engage in collective bargaining.

<sup>32</sup> David Cubitt and Deborah Johnston-Kindel each testified that they can obtain items, such as ice, bread, chips, and crackers, from outside vendors. However, it is Respondent Canned Foods, which contracts for the products of the outside vendor, not the store operators, and which pays for the product and then bills the operators.

Johnston-Kindel each testified that items, which had not been ordered, appear on delivery trucks and that Respondent Canned Foods forces the operators to accept these items and expects the operators to sell them. With regard to the pricing the merchandise for sale at the grocery outlet, Johnston-Kindel and David Cubitt contradicted each other as to adhering to Respondent Canned Foods' pricing requirements. The latter stated that all prices were "suggested" prices by Respondent Canned Foods; while Johnston-Kindel testified that operators were required to adhere to the former's prices and could only change prices with the permission of Respondent Canned Foods. Further, Respondent Canned Foods allocates some products among its grocery outlets. According to David Cubitt, an allocated product "... is a product that everybody wants and there is not enough to go around. So, they allocate it so you can only get a certain amount of it." Also, while merchandise may be transferred from one grocery outlet to another with such product transfers initiated by the outlet operators, they are required to complete transfer forms in order to enable Respondent Canned Foods to maintain control of its product inventory. Further, according to the respective store operator agreements of the Respondent Alvernazes and the Respondent Cubitts, operators are required to "... maintain controls and keep timely and accurate records of all sales, returns, inventories, and other information required by [Respondent Canned Foods]," and Respondent Canned Foods retains "... the right to review, inspect, audit and copy Operator's records at any reasonable time." Inventories may be conducted at any time, but usually are done on a quarterly basis, with Respondent Canned Foods bearing the cost. Besides inspections and audits, Respondent Canned Foods requires that its outlet operators keep track of inventory, utilizing systems designed by it. Thus, operators are required to maintain forms, such as "pinks" and "yellows." The former are used by operators to report unsalable merchandise and to advise Respondent Canned Foods what the operator has done with the product; while the latter are used by Respondent Canned Foods to advise operators when products require special handling or need inspection.

Finally, with regard to interrelation of operations, I note that Respondent operates separate training programs for potential operators, called operator enhancement, and managerial personnel, called key person development, which are collectively known as Canned Foods University (CFU). The record establishes that, during the training sessions, those, who attend, are given training manuals, filled with various documents relating to position requirements, inventory management and control, merchandising, store operations, employee relations, and other matters, and that the manual documents are used as teaching tools. There is no question that, as Calkins testified, the enclosed documents, which relate to inventory tracking procedures, such as copies of the so-called "pinks" and "yellows," are utilized by grocery outlet operators in the day-to-day operation of their outlets; however, David Cubitt was uncontroverted that he and his wife treated other CFU handouts "just like a booklet that I got in high school. I read it. I did it. I took the exam and did the class, and I put it away. It was

no more than an educational tool."<sup>33</sup> Specifically, he denied that he and his wife utilize CFU manual forms, pertaining to cash registers and money handling ("We have our own policies and procedures [regarding cash registers]"); follow CFU manual recommendations on security ("I put in my own security system. . . . I did not go over this at all") or using the CFU manual employee relations documents or CFU manual employee application or exit interview forms; or adhere to the Respondent Canned Foods drug screening program. Other than the foregoing, there is no record evidence, and no contention, that Respondent Canned Foods and its grocery outlet operators, including the Respondent Alvernazes and the Respondent Cubitts, share employees, offices, equipment, or facilities or have centralized payrolls.

In agreement with counsel for the Acting General Counsel, analysis of the foregoing discloses a high degree of operational integration between Respondent Canned Foods and the grocery outlet's operators with regard to the quantities, transport, care, merchandising, control, display, pricing, and sale of the Respondent Canned Foods' products, which are consigned for sale at the grocery outlet in Grass Valley. However, most, if not all, of the above-described operational integration results from the facts that Respondent Canned Foods owns the products, which are consigned for sale at the grocery outlet in Grass Valley, and that the Respondent Alvernazes and the Respondent Cubitts must sell only items supplied by Respondent Canned Foods. While, of course, as witnesses testified, the relationship between Respondent Canned Foods and the grocery outlet operators is not that of a franchisor-franchisee, I agree with counsel for Respondent Canned Foods that the latter model, such as described by the Board in *Teamsters Local 456 (Carvel Corp.)*, 273 NLRB 516 (1984), *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 91-94 (1979), and *Speedee 7-Eleven*, supra, is the closest in degree to the relationship herein.<sup>34</sup> In this regard, I note that the Board holds "that franchisees who purchase their stock in trade . . . from their franchisor's suppliers will not, merely by virtue of their commitments in that connection, be considered functionally integrated with their franchisor." *Parklane Hosiery Co.*, 203 NLRB 597, 613 (1973).<sup>35</sup> Moreover, assuming arguendo, that the func-

<sup>33</sup> Rita Jeannie Calkins echoed Cubitt on this point, saying the manual forms "are in the manual for teaching purposes as samples or examples. This is a template, this is a start. And then, you go from there. . . . [The operators] can use them or not."

<sup>34</sup> I recognize that in the franchisor-franchisee relationship, which the Board does not consider to be a single-employer relationship when the franchisor has and exercises no control over the franchisee's labor relations practices, the franchisee normally pays a fee to the franchisor and, arguably, owns his franchise. While such is not present herein and the operator can not be said to "own" the grocery outlet, which he operates, in numerous other respects, including source of products, financial arrangements, and compliance with practices and policies, there do not appear to be many operational differences between the relationships.

<sup>35</sup> In *Teamsters Local 456 (Carvel Corp.)*, supra, which involved a labor dispute between a labor organization and a licensor and an alleged violation of Sec. 8(b)(4)(ii)(B) of the Act, the issue before the Board was whether the licensor's various licensees were neutral parties to the labor dispute. In its analysis the Board noted that the licensee was "heavily dependent" upon the licensor, placing total reliance upon the latter, which was the exclusive supplier, for its product. The Board

tional integration herein exceeds what might be expected from “truly separate enterprises,” this factor<sup>36</sup> “is but one of four aspects scrutinized to ascertain if a single-employer relationship exists,” and “it will not alone confer single-employer status absent overlap in at least some of the other aspects analyzed.” *Pathology Institute*, supra at 1061.

### C. Common Management

With regard to management of the grocery outlet, while Respondent Canned Foods requires that the grocery outlets be open for business 7 days a week and a minimum number of hours per day and the operator agreements specify the holidays on which the Grass Valley grocery outlet may be closed, it is left to the operators to determine the daily opening and closing hours for an outlet. Further, David Cubitt testified that he and his wife are responsible for paying the freight charges on all of Respondent Canned Foods’ deliveries to the grocery outlet and that, inasmuch as manufacturer labeling requirements come with the various grocery items, he and his wife are required to display and sign the product in accord with the manufacturers’ wishes and not those of Respondent Canned Foods. Cubitt added that, while the store operator agreement mandates that he and his wife “maintain the Store in a fashion which is satisfactory to [Respondent Canned Foods],” they determine the “set up” of the outlet;<sup>37</sup> that he and his wife are responsible for withholding taxes from their employees’ wages, maintaining unemployment compensation insurance for their employees, and paying sales taxes, on all the consigned goods sold at the grocery outlet, and property taxes, on all their personal property within the store, out of their own funds; that he and his wife utilize an accounting firm, which they selected, to perform all accounting functions, including the payroll, and pay for its services out of their own funds; that he and his wife are responsible for paying the cost of all utilities, including water, electric, and trash removal; and that he and his wife select and pay for the uniforms, which are worn by their employees. In fact, according to Cubitt, “there is

stated, in this regard, that “it is in the area of integration of operations and economic interdependence where the licensee is linked most closely to the [licensor]. Such mutual interdependence, necessary for the economic survival of both parties is characteristic of franchise operations. However, the level of . . . functional integration here does not lead to the conclusion that the licensee has . . . lost its neutral status . . .” Id. at 519–520.

<sup>36</sup> I note that the payment procedures, described by the Board in *Speedee 7-Eleven*, supra, are not dissimilar to that which exist herein. Thus, in *Speedee 7-Eleven*, on a daily basis, the franchisee was required to deposit all cash proceeds into the franchisor’s bank account, and the franchisor received 55 percent of the adjusted gross profits of the franchisee. Id. at 1332. Moreover, as herein, in *Carvel Corp.*, supra, there were restrictions upon the licensee’s right to sell his business.

<sup>37</sup> Cubitt further testified, “If you go into a Grocery Outlet store anywhere, none of them are set up the same because . . . merchandising is up to the person. As far as Canned Foods saying how you display it on the shelves . . . that is mostly up to the operator.” He added that, while Respondent Canned Foods does have “minimum” requirements for merchandising, “it depends on the person, it depends on the store, how high you put the store. Some stores don’t have shelving. Some stores are on the floor.”

not one thing that [Respondent Canned Foods] pay[s] for” in the operation of the business.<sup>38</sup>

On this latter point, Deborah Johnston-Kindel echoed Cubitt, testifying that she and her former husband paid all their operating expenses from their business bank account and were never reimbursed for any losses. Also, Cubitt noted that representatives of Respondent Canned Foods have visited the grocery outlet “no more than six times in the entire two years and nine months” he and his wife have operated their outlet.<sup>39</sup> As to insurance, while Respondent Canned Foods pays for the cost of property insurance over the building, fire and damage insurance coverage for the merchandise and property insurance coverage on any frozen food equipment, which is jointly owned with an operator,<sup>40</sup> in a grocery outlet, David Cubitt testified that, in accord with their operator agreement, he and his wife pay for insurance coverage on the facility’s fixtures and for property liability insurance. Further, the Respondent Cubitts have their own Federal tax identification number and their own unemployment compensation insurance account.

There is no record evidence that Respondent Canned Foods’ representatives have any role in day-to-day operation of the grocery outlet store in Grass Valley, California. However, there is substantial record evidence that Respondent Canned Foods plays the dominant role in the selection of operators for its grocery outlet stores, including the Grass Valley facility. Initially, it is clear that Respondent Canned Foods prefers, and normally selects, only married couples as its operators. Thus, Jeannie Calkins conceded that, “for the most part,” the grocery outlet operators are married couples, and, according to Jonathan Wooldridge, who worked for the Respondent Alvernazes as a manager during their tenure as the operators of the grocery outlet in Grass Valley, while attending CFU, he was informed by Calkins “that [Respondent Canned Foods] preferred . . . married couples” as managers. Next, the record evidence is that Respondent Canned Foods maintains a training program for prospective operators, what it terms “cross pollination,” and monitors their progress. Cross pollination is defined as the “temporary exchange of store personnel for the purpose of in-

<sup>38</sup> In particular, Cubitt testified that, upon becoming the operators of the grocery outlet in Grass Valley, he and his wife inspected the light fixtures inside the facility and “contracted with a lighting company and changed out all [the] neon tubes . . . at a cost of \$21,000,” which sum was paid out of their personal funds.

<sup>39</sup> Johnston-Kindel testified that Respondent Canned Foods representatives would visit the grocery outlet in Grass Valley “about once a month . . . to make sure the place looked like a Canned Foods store, in their image.”

avid Cubitt testified that these visits to the grocery outlet in Grass Valley are by Respondent Canned Foods’ district operations managers, who travel to the outlets and discuss “the way the product is handled and how it is displayed and how it is stacked.” Cubitt added that, if the grocery outlet is not being operated in compliance with Respondent Canned Foods’ “minimum standards,” the district manager and the operator “discuss why you do it this way and he would discuss why he did it that way, or why he suggest you do it that way. And you would come to an agreement. . . . But, as far as a cut and dry, no.”

<sup>40</sup> There is no dispute that Respondent Canned Foods and the Respondent Cubitts jointly own some of the refrigeration equipment in the grocery outlet in Grass Valley.

dividual training and exposure to new ideas.” In practice, what the term means, what the training program for prospective operators entails, and what Respondent Canned Foods requires, is the movement of married couples from grocery outlet to grocery outlet in order to gain experience in various positions before consideration of them for operator positions. Thus, Gerald Davenport was an employee at the grocery outlet in Grass Valley for the Respondent Alvernazes, and, after he expressed interest in becoming an operator, the Alvernazes hired his wife. According to Davenport, Thomas Alvernaz kept them informed about Respondent Canned Foods’ interest in their progress; they were required to complete various forms for Canned Foods; after a while, Jeannie Calkins informed them that they would have to accept transfer to the Vacaville, California grocery outlet in order to continue their training; and, after transferring to Vacaville, he and his wife were required to complete an evaluation questionnaire. Jeannie Calkins described Respondent Canned Foods’ continued monitoring of operator candidates—“It is monitoring their training that they understand every aspect of running the grocery outlet and our relationship. . . . I monitor their training, but I don’t advance them.” She added, “I talk to the operators about their evaluations of these people.”

The record reveals that the operators themselves play virtually no role in the operator selection process. Thus, Deborah Johnston-Kindel testified that, in 1990, representatives of Respondent Canned Foods informed her former husband and her that the company was opening a grocery outlet in Grass Valley and asked if they wanted to become the operators of that facility. Johnston-Kindel further testified that, five years later and after she and her former husband became divorced, although not required by Respondent Canned Foods, they decided to resign as operators of the grocery outlet and that Respondent Canned Foods ultimately “took care of it.”<sup>41</sup> In this regard, according to Jonathan Wooldridge, Thomas Alvernaz told him

<sup>41</sup> Counsel for the Acting General Counsel asserts that the Respondent Alvernaz’ departure from the facility was “initiated and orchestrated” by Respondent Canned Foods. In support, alleged discriminatee, Marilyn Reider, testified that, in January 1995, the Alvernazes spoke to small groups of employees, informing them that new “owners” would be coming but that they did not know who and that it was “a big surprise . . . they were having to move so soon.” Carma Lawson, who worked at the grocery outlet from November 1993 through June 1996, testified that, in early 1995, the Alvernazes told her and other employees that they were becoming divorced and that, as Respondent Canned Foods wanted the operators to be married, they were “on a probation period.” She further testified that attorney Robert Tiernan subsequently told her that the Alvernaz’ probation period had ended but that Respondent Canned Foods had decided “to bring in new operators to the store.” That Respondent Canned Foods had forced the Respondent Alvernazes to leave the grocery outlet in Grass Valley was specifically denied by Deborah Johnston-Kindel, and she also denied telling any employee either that their leaving was unexpected or that they had been placed on probation by Respondent Canned Foods. Her testimony was corroborated by Jonathan Wooldridge, who worked at the store during the Respondent Alvernaz’ entire tenure as operators and was a manager in April 1995. He testified that Thomas Alvernaz told him that he and his wife were leaving “because [they] were going to divorce.” For reasons discussed *infra*, I place no reliance upon Lawson’s testimony on this point.

that “. . . he was waiting for another couple to be chosen by Canned Foods to take over the store,” and Johnston-Kindel admitted that she was not aware that the Respondent Cubitts would be the new operators of the grocery outlet until informed of such by Respondent Canned Foods. David Cubitt testified that he and his wife were happy in Yuca Valley and not interested in moving but that, in February, Mike Huppert, the head of the operations department for Respondent Canned Foods, telephoned and asked if the Cubitts would be interested in moving to Grass Valley and becoming operators of the grocery outlet there. They had never heard of Grass Valley, and Huppert invited them to go to Grass Valley and inspect the outlet and the area. Huppert added that he was considering two other married couples for the Grass Valley grocery outlet. After visiting Grass Valley, the Cubitts telephoned Huppert and expressed interest in moving to Grass Valley. A week or two later, Huppert called back, said, after speaking to the two other candidates, he was offering the Grass Valley location to the Cubitts, and gave them just 2 days to decide. As with the Respondent Alvernazes, the Respondent Cubitts played no role in selecting the married couple, who became the new operators in Yuca Valley. Thus, David Cubitt admitted that Respondent Canned Foods located the new operators of the Yuca Valley grocery outlet without any assistance from the Respondent Cubitts.<sup>42</sup>

In summation, as is not the case in most of the single-employer cases, upon which counsel for the Acting General Counsel relies, there is no record evidence of any stockholder, director, or managerial overlap in the operation of Respondent Canned Foods and of its grocery outlets, including the grocery outlet in Grass Valley. Simply stated, the Respondent Alvernazes were and the Respondent Cubitts are the highest level of management at the grocery outlet in Grass Valley. Moreover, while it is true that single-employer determinations focus upon “control of critical matters at the policy level” and that operators must manage their grocery outlets in a manner, which is satisfactory to Respondent Canned Foods, the record evidence herein is that the Respondent Cubitts, as were the Respondent Alvernazes before them, on a daily basis, are allowed to operate the grocery outlet in Grass Valley with significant autonomy and that there is no active or actual control by Respondent Canned Foods over the daily management of the business. Thus, the Respondent Alvernazes and the Respondent Cubitts determine what products to order from Respondent Canned Foods and the merchandising of the product, set up the store as they wish, establish the hours during which the grocery outlet is open each day, pay property taxes on the grocery outlet’s fixtures, pay the cost of utilities, liability insurance, and insurance on the fixtures, have Federal and state tax identification numbers, and decide on staffing levels and job classifications. Finally, while the record evidence is clear that Respondent Canned Foods

<sup>42</sup> Counsel for the Acting General Counsel asserts that common management of the Respondent Canned Foods’ grocery outlets is directed by Mike Huppert and the company’s operations department. Indeed, while there is, of course, considerable evidence that Respondent Canned Foods controls the selection process for operators, there is no record evidence to establish that the Respondent Canned Foods operations department controls the day-to-day management of the grocery outlets.

does, in fact, determine the types of individuals who become the operators of the grocery outlets, establish and supervise the training program for prospective operators, and effectively control the selection of operators for new grocery outlets or for existing stores at which operators have terminated their store operator agreements, I do not believe that such negates the relative autonomy, with which the operators manage their grocery outlets on a daily basis.

#### *D. Centralized Control of Labor Relations*

Two identical provisions of the respective store operator agreements, entered into by the Respondent Alvernazes and the Respondent Cubitts, are pertinent to this aspect of an alleged single-employer relationship. Section 5(b) of the agreements provides that the "Operator shall maintain a properly trained sales force and other employee personnel sufficient in number to provide efficient, knowledgeable and friendly service to customers," and Section 6(a) of the agreements provides:

Employees at the Store shall be Operator's employees and not employees of [Respondent Canned Foods]. Operator shall have the sole, exclusive and complete responsibility for the hiring, training, supervision, direction, discipline, compensation (including wages, salaries, and employee benefits) and termination of all Store employees. Operator has the exclusive right to determine its employee policies and practices. [Respondent Canned Foods] has no authority to direct or recommend particular personnel decisions or actions to be made or taken by Operator.

In these regards, David Cubitt testified, without contradiction, that, without input from or reporting to Respondent Canned Foods, he and his wife hire and fire employees; that the former does not require his wife and him to employ a specific number of employees or to have particular job classifications for employees; that Respondent Canned Foods does not mandate what employment benefits for the grocery outlet's employees, and he and his wife decide what benefits, including bonus programs, to provide without informing the former;<sup>43</sup> that he and his wife assign work to the store employees without reporting to Respondent Canned Foods; and that he and his wife determine the wage rates of their employees and pay all withholding and payroll taxes on their employees and maintain their own workers' compensation insurance policy. With regard to health insurance, Brenda Cubitt testified that the Respondent Cubitts' decision to implement the same health insurance plan, which had previously been offered by the Respondent Alvernazes, was made after consultation with their own insurance agent and was based upon the lack of a cutoff of benefits.

Conceding the foregoing, counsel for the Acting General Counsel nevertheless argues that Respondent Canned Foods and its grocery outlets share both a common labor relations policy and officials. As to the latter, the record evidence is that Robert Tiernan acts as a labor relations attorney for Respondent Canned Foods, representing it in collective bargaining and arbitrations, and that, independent of his relationship with Respondent Canned

Foods, Tiernan also acts as the labor relations attorney for the operators of approximately 50 grocery outlets "... just to answer day to day problems or questions . . . ." <sup>44</sup> For the latter, Tiernan asks the operators to execute retainers, hiring him for a fee of \$500 per year. Among the grocery outlet operators, who retained Tiernan over the years, were the Respondent Alvernazes. Deborah Johnston-Kindel testified that she had been acquainted with Tiernan for a "few years," first becoming aware of him "through one of the other operators, and there is no dispute that he represented the Respondent Alvernazes during the Union's activities at the grocery outlet in Grass Valley during 1994."<sup>45</sup> In addition to the Respondent Alvernazes, Tiernan had been retained by the Respondent Cubitts for a number of years in Yuca Valley and, of course, is their attorney in the instant matters. According to David Cubitt, "I paid him a retainer in Yuca Valley of \$500. I also picked up his retainer when I took over the Grass Valley store," paying the remainder of his contract for 1995. Finally, with regard to legal representation, there is no dispute that the law firm, Ford & Harrison, which represents Respondent Canned Foods in these proceedings, also represented the Respondent Cubitts during the Board's initial investigation in Case 20-CA-26685, for which services David Cubitt did not pay the law firm's fee and does not know who did, and the operators of the grocery outlet in Indio, California.

Counsel for the Acting General Counsel's assertions, regarding a common labor relations policy, concern immediate telephone calls to Respondent Canned Foods at the first sign of union activity at a grocery outlet and the operators' response to such. As to this, Gerald Davenport testified that, prior to transferring to the grocery outlet in Vacaville, he and his wife spoke to Jeannie Calkins, who told him "that they were having a bit of a union trouble there, and if anything were to happen, she gave us a number to call and they'd take care of it." Calkins added, "So keep your eye out and if I . . . see anything to give her a call . . . and they'll handle it." Davenport added that Calkins then gave him a business card with a telephone number. While Calkins specifically denied Davenport's testimony, she admitted giving business cards to prospective operators,<sup>46</sup> and Deborah Johnston-Kindel admitted telephoning Respondent Canned Foods' operations department after Union officials visited the grocery outlet in Grass Valley in November 1994 and demanded recognition. However, there is no record evidence as to any advice or instructions given to Johnston-Kindel by representatives of Respondent Canned Foods.<sup>47</sup>

<sup>44</sup> Tiernan testified that he represented his first grocery outlet in 1989 and that, by 1995, the number had risen to approximately 50. His representation of the operators of grocery outlets was accomplished by means of solicitation letters. According to Tiernan, independent of and subsequent to his representation of the operators, he met Mike Huppert of Respondent Canned Foods at a "seminar" and, as a result, was hired to represent the latter in labor relations matters.

<sup>45</sup> Tiernan charged the Respondent Alvernazes an additional \$7500 to represent them during the Union's organizing campaign.

<sup>46</sup> Calkins denied having anything to do with union-related matters.

<sup>47</sup> According to David Cubitt, at the time he was informed of the open operator position at the grocery outlet in Grass Valley, he was informed by Mike Huppert of the existence of a Union organizing campaign.

<sup>43</sup> Cubitt testified that he and his wife provide four paid holidays, paid vacations, a bonus profit sharing plan, and dental and medical insurance for the grocery outlet's employees.

As proof of a common labor relations policy, counsel for the Acting General Counsel asserts that the operators of the grocery outlets seem to respond to the presence of organizers for the Union, who enter a store, in the same manner. Thus, Thomas Pate, who was an organizer for the Union in 1994 and 1995 and is currently a business representative, testified that, on two occasions during November 1994, he and another Union organizer, John Heise, were inside the grocery outlet in Grass Valley; that, on each occasion, Deborah Alvernaz approached and, while yelling, demanded that they leave the facility; and that, during the second incident, Johnston-Kindel threatened that she would call the police if they did not leave. Pate further testified that, also in 1994, he entered grocery outlet stores in two other California cities, Rancho Cordova and North Lake Tahoe, and that, on each occasion after making his presence known to the operator, he was met with the identical response—the operator demanded that he leave the store. However, it does not appear that such is the universal response to the presence of Union agents inside a grocery outlet. Thus, prior to their two confrontations with Deborah Alvernaz, Pate and Heise had visited the grocery outlet in Grass Valley, came to the office, and, during a seemingly cordial conversation with Thomas Alvernaz, delivered a recognition demand letter to him. Likewise, Pate and Michael Moore, a special representative for the Union, visited the facility after the Respondent Cubitts became the operators and presented a recognition demand letter to David Cubitt; there is no record evidence that Cubitt was anything but cordial to the Union agents. Further, while Pate testified that, besides the California grocery outlets in Rancho Cordova and North Lake Tahoe, he visited Respondent Canned Foods facilities in Woodland and North Highlands, he made no assertion of being ordered to leave the store. Finally, there is no specific record evidence that the grocery outlet operators' response to the presence of Union agents inside the facilities has been orchestrated by Respondent Canned Foods; rather such may well have resulted from consultations amongst the operators. In this regard, David Cubitt testified that, when agents of the Union visit, grocery outlet operators inform other operators in the area.<sup>48</sup>

<sup>48</sup> In her posthearing brief, counsel for the Acting General Counsel refers to an amendment to their store operator agreement, which the Respondent Cubitts executed on April 18, 1995. One of the provisions of said amendment reads as follows:

Operator shall maintain physical control of the store and be responsible for its safe and efficient operation during the term of this Agreement. Operator shall have the right and the duty to exclude from the Store trespassers, solicitors, vagrants and other unauthorized persons or objects. Operator shall follow all applicable legal requirements and procedures in excluding persons or objects from the Store.

In this regard, Union Agent, Moore, testified that he observed a sign, which prohibited soliciting and trespassing, posted outside of the grocery outlet in Grass Valley during and after the time of the organizing campaign. Counsel contends that such was "clearly intended to require the ejection of union representatives." While I agree that the vague language of the amendment might apply to agents of the Union, it is also true that the language would prohibit soliciting by any other group, including charitable organizations, and there is no record evidence that the amendment language and the posted sign were only applied to agents of the Union.

As further evidence of a common labor relations policy, covering Respondent Canned Foods and its grocery outlets, counsel for the Acting General Counsel points to the testimony of Jonathan Wooldridge, who attended a key person development class at CFU, that among the topics discussed were past union problems. However, beyond stating that the topic was mentioned, he could not recall any details. Counsel also points to record evidence that, among the topics discussed at the key person development and operator training sessions at CFU is one involving "union awareness;" however, there is no record evidence as to what is discussed. Also, Respondent Canned Foods publishes an employee orientation manual, which deals with all aspects of the grocery outlet employees' terms and conditions of employment. While the document apparently is made available to grocery outlet operators and while the Respondent Alvernazes distributed it to Grass Valley grocery outlet employees, there is no requirement that such be done, and the record evidence is that the Respondent Cubitts did not adhere to it.

In drawing conclusions with regard to centralized control of labor relations, there is no question that, on a day-to-day basis, pursuant to their respective store operator agreements, the Respondent Cubitts, as did the Respondent Alvernazes before them, effectively are in charge of the hiring, firing, discipline, supervision, and direction of the bargaining unit employees, employed at the grocery outlet in Grass Valley. Moreover, the Respondent Cubitts, as were the Respondent Alvernazes before them, are responsible for establishing rates of pay and monetary benefits, granting vacations and time off, and determining job classifications and staffing levels for the employees at the grocery outlet. Nevertheless, as the Board pointed out in *Pathology Institute*, supra, at 1064, the existence of centralized control over labor relations does not require "micromanagement of each entity's labor relations by the same individual . . . it is only necessary to conclude that there had been an ability by one entity to exercise 'clout' over labor relations of others." In agreement with counsel for the Acting General Counsel, I believe that, while there is scant record evidence of conversations with or instructions from representatives of Respondent Canned Foods regarding labor relations or unions, the record warrants an inference that the managers of Respondent Canned Foods' operations department not only possess and exercise a high degree of "clout" in dealing with union-related matters at the grocery outlets but also that the extent of such influence may well predominate over a grocery outlet operator's nominal contractual authority over labor relations. In this regard, I note that the same attorneys, Robert Tiernan and the Ford & Harrison law firm, represent both Respondent Canned Foods and store operators in labor relations matters and that such is a significant indicia of interrelationship of operations and of centralized control of labor relations. *Pathology Institute*, supra at 1061; *Blumenfeld Theaters Circuit*, 240 NLRB 206 fn. 2 (1979). While, as Tiernan's representation of numerous grocery outlet operators and of Respondent Canned Foods for labor relations matters may be coincidental, when considered in conjunction with Ford & Harrison's representation of the operators of the Indio grocery outlet, of the Respondent Cubitts during the pretrial investigation and of Respondent Canned Foods during the trial, it strains credulity to believe that the corporate entity, Respondent Canned Foods played no role in both Tiernan's and the law firm's representation

of its grocery outlet operators for union-related matters. In this regard, I note that David Cubitt claimed ignorance as to the source of the payment for legal expenses, owed to Ford & Harrison, and I doubt the latter represented the Respondent Cubitts on a pro bono basis. Further, Respondent Canned Foods does not utilize store operators to manage the three grocery outlets in the San Francisco Bay area, at which an affiliate of the Food & Commercial Workers International Union represents the three facilities' employees; rather Respondent Canned Foods retains responsibility for managing those grocery outlets and for bargaining with the labor organization involved. Moreover, I credit and rely upon the testimony of Gerald Davenport, who impressed me as being an honest and forthright witness, that, while he and his wife were in training for to become operators of a grocery outlet, Jeannie Calkins<sup>49</sup> instructed him to telephone at the first indication of union-related problems. As to this, I note that the Respondent Alvernazes telephoned representatives of Respondent Canned Foods immediately after the Union demanded recognition from them. Finally, on this point, there is no dispute that Respondent Canned Foods itself publishes and makes available for its operators for distribution to new employees, an employee orientation manual, which deals with all aspects of labor relations. While the Respondent Cubitts did not distribute the document to new employees, the Respondent Alvernazes did. Based upon the foregoing and the record as a whole, I believe that Respondent Canned Foods clearly possesses the "ability" to exercise "clout" over the Respondent Cubitts' and the Respondent Alvernazes' labor relations policies and practices, relating to union-related problems, and that, therefore, counsel for the Acting General Counsel has established the prerequisite common labor relations policy, required for the existence of a single-employer relationship.

#### *E. Common Ownership or Financial Control*

Counsel for the Acting General Counsel argues that the grocery outlet in Grass Valley is under the complete financial control of Respondent Canned Foods, and there appears to be significant record evidence in support of this assertion. At the outset, I note that both the Respondent Alvernazes and the Respondent Cubitts entered into virtually identical store operator agreements and that the Respondent Cubitts have never sought to modify their store operator agreement. Further, pursuant to its terms, Respondent Canned Foods may terminate the Respondent Cubitts' store operator agreement, by providing written notice within 60 days, with or without cause or immediately if "circumstances," within the control of the Respondent Cubitts, "create antagonism" between them and it, and their store operator agreement prohibits anyone but the Respondent Cubitts from owning any "interest" in the operator position.

There is no dispute that Respondent Canned Foods owns the grocery-related products, which are sold at the grocery outlets, including the store in Grass Valley, and that said products are shipped to the grocery outlets on a consignment basis. Review of the store operator agreements, into which the Respondent Alvernazes and the Respondent Cubitts entered, discloses that neither

possesses an ownership interest in a Canned Foods' grocery outlet or a right to sell Canned Foods' consigned grocery and non-grocery products. Rather, as stated above, when becoming the operators of a new grocery outlet or an existing facility, what the new operators, usually a married couple, purchase are the fixtures and equipment, necessary to operate the store, and such is the extent of their ownership interest in the business of operating a grocery outlet store. According to David Cubitt, in paying for these items, the new operators pay "only what you can afford at that time" and finance the remainder of the purchase prices through loans from Respondent Canned Foods and from Wells Fargo Bank, the latter of which is arranged by Respondent Canned Foods. In this regard, the Respondent Alvernazes spent approximately \$10,000 of their own funds to purchase a percentage of the consigned store grocery and nongrocery inventory from Respondent Canned Foods and financed the cost of the equipment and fixtures, which were necessary for the operation of the grocery outlet in Grass Valley, with loans from Wells Fargo Bank and Respondent Canned Foods.<sup>50</sup> Also, the Respondent Cubitts paid approximately \$224,000 to the Respondent Alvernazes for the grocery outlet's fixtures and equipment, paying \$50,000 out-of-pocket<sup>51</sup> and financing the remainder with a loan from Respondent Canned Foods and an existing loan from Wells Fargo Bank. While the Respondent Alvernazes and the Respondent Cubitts utilized their own funds to help purchase the Grass Valley grocery outlet "business," it is clear that prospective new operators need to expend little, if any, of their own funds to pay for their grocery outlet's equipment and fixtures and, in fact, may borrow virtually the entire purchase price from Respondent Canned Foods and Wells Fargo Bank. Thus, Gerald Davenport testified that Jeannie Calkins told him that "there was . . . no cash involved . . .," and David and Brenda Cubitt's daughter and son-in-law, Lori and Tim Bascom, who worked for the Respondent Cubitts in Yuca Valley and Grass Valley, became the operators of a new grocery outlet in Lodi, California, and borrowed almost the entire cost of their store fixtures and equipment from Respondent Canned Foods. With regard to the amount borrowed from the latter, the record evidence is that the operators are required to sign an interest-bearing promissory note but are not required to have any collateral for the loan. On this point, David Cubitt stated, "I think the collateral for my loan was my signature," and the terms of the Respondent Cubitts' promissory note disclose no collateral requirement. Also, regarding the loan from Respondent Canned Foods, Cubitt stated that the first year is "non-interest bearing."

The significant extent of Respondent Canned Foods involvement in the financial affairs of the operators is best illustrated by the so-called sale of a grocery outlet from one operator to another. In this regard, I note that, at the time the Respondent Cubitts became operators of the grocery outlet in Grass Valley, Respondent Canned Foods apparently represented the former and the Respondent Alvernazes, prepared all

<sup>50</sup> The loan from Respondent Canned Foods was to pay for the refrigeration equipment.

<sup>51</sup> It is unclear whether the amount paid out-of-pocket by the Respondent Cubitts represented payment to Respondent Canned Foods for a percentage of the grocery outlet's merchandise inventory, partial payment to the Respondent Alvernazes for the store equipment and fixtures, or both.

<sup>49</sup> Comparing them as witnesses, I found Davenport to have been more credible than Calkins and do not credit her denial of not being involved in union-related matters. Moreover, she corroborated Davenport as to giving him a business card.

of the documents<sup>52</sup> for the transaction between the Alvernazes and the Cubitts, and set the depreciation percentage applied to the price of the business equipment and store fixtures. As to the prices established for the said equipment and fixtures, while Deborah Johnston-Kindel testified that she, her former husband, and their accountant determined the worth of the foregoing and that they did not negotiate the prices with the Respondent Cubitts, David Cubitt again contradicted her, stating that there were negotiations between himself and Thomas Alvernaz, that “if Tom said he wanted x amount of dollars for that, we would discuss how much he was going to get for it,” and that he did persuade Thomas Alvernaz to change the price of some items. In any event, what is certain is that the Respondent Alvernazes did not realize a profit from the transaction. Thus, Deborah Johnston-Kindel admitted that the amount of money she and her husband received represented the difference between what they owed to Respondent Canned Foods and to Wells Fargo Bank and the worth of the equipment and fixtures at the time of the transaction.

With regard to the compensation received by the Respondent Alvernazes and the Respondent Cubitts as the operators of the grocery outlet in Grass Valley, their respective store operator agreements provide that, on a daily basis, the operators retain 12.5 percent of the alcohol and 15 percent of the nonalcohol net sales proceeds as “commission.” Apparently, the operators must meet their operating expenses out of their retained daily net sales proceeds, and the percentages are not affected by labor costs. Moreover, while the daily percentages are fixed by Respondent Canned Foods and are “invariable,” the amount of possible commission for the operator is directly related to the grocery outlet’s sales; therefore, it is apparent that the harder operators work to increase sales, the greater their resulting daily net sales commissions. In addition to the proceeds retained from sales, the operators receive “a bonus commission,” based upon calculations involving a quarterly inventory of the grocery outlet’s merchandise and the grocery outlet’s net sales proceeds for nonalcohol-related merchandise for the relevant time period, from Respondent Canned Foods. Deborah Johnston-Kindel testified that the quarterly bonus represented “a check for selling—if . . . you were not missing product through the inventories, you got a part of an amount back . . . there was a percentage based on the calculation of the amount of money we got. It was a . . . percentage of sales.” She added that bonus payments for her husband and her ranged from \$10,000 to \$50,000. Likewise, David Cubitt testified that these quarterly bonus payments to his wife and him represent the “profit from my store;” that the “bonus fluctuates on the amount of sales only and whatever the gross might be for that time period, whether I lost inventory or whether my inventory came out right;” and that the quarterly bonus payments to his wife and him have ranged from \$12,000 to \$60,000. Finally, Respondent filed Form 1099 documents with the Internal Revenue Service in 1995 and 1996, show-

<sup>52</sup> The main sale document is not even labeled a contract for the sale of materials. Rather, it is termed bears the strange title, “operator change.”

ing “miscellaneous income” payments to the Respondent Cubitts for those years.<sup>53</sup>

Counsel for the Acting General Counsel points to the mandated bank accounts and security deposit as further indicative of Respondent Canned Foods’ financial control over the grocery outlet operators. Thus, there is no dispute that operators, including the Respondent Alvernazes and the Respondent Cubitts, are required to maintain business bank accounts into which they must deposit their grocery outlet’s daily nonalcohol and alcohol-related sales proceeds and from which Respondent Canned Foods withdraws its mandated percentage amounts. Further, pursuant to their respective store operator agreements, Respondent Alvernazes and Respondent Cubitts granted Respondent Canned Foods security interests in the fixtures and equipment, which each owned and used in the grocery outlet in Grass Valley, and in savings accounts at a Wells Fargo Bank branch, located in San Francisco, California, which each was required to open and maintain. The Respondent Alvernazes and the Respondent Cubitts each was required to deposit \$5000 into its Wells Fargo Bank savings accounts upon entering into its store operator agreement and to make additional deposits into said account from time to time until the amount on deposit equals 25 percent of the retail value of the grocery outlet’s merchandise inventory. However, notwithstanding the wording of the respective store operator agreements, asked when he must deposit enough money to reach the 25 percent security deposit amount, David Cubitt responded, “as soon as I have [Respondent Canned Foods] paid off, I pay on Wells Fargo and my security deposit at the same time.” Finally, with regard to the Wells Fargo Bank savings accounts, an operator is not permitted to withdraw from said savings account without the prior written authorization of an officer of Respondent Canned Foods.

Neither Respondent Canned Foods, the Respondent Alvernazes, nor the Respondent Cubitts possesses any ownership interest in the building in which the grocery outlet in Grass Valley is located. The record establishes that the building is owned by Safeway, which leases the building to Respondent Canned Foods. Further, while the Respondent Alvernazes were not and the Respondent Cubitts are not sublessees to Respondent Canned Foods, the latter charges them for the cost of its leasehold. Thus, according to Deborah Johnston-Kindel, a “percentage lease” is paid to Respondent Canned Foods, with the latter withdrawing 2.5 percent of gross sales receipts from the operator’s business account to cover the cost of the lease.

The Board has held that a clear indication of common ownership or financial control is operation of the two nominally separate entities on less than an ordinary “arm’s-length” basis. *Gold Coast Produce*, 319 NLRB 202, 206 (1995); *AAA Fire Sprinkler, Inc.*, 322 NLRB 69, 86 (1996). Herein, the record establishes that, upon entering into their store operator agreements, grocery outlet operators need expend little or none of their own funds to purchase the requisite equipment and fixtures to operate their grocery outlet. Thus, I credit Gerald Davenport, who testified that Jeannie Calkins told him a new operator need not put down any money in order to become an operator, and, apparently, Tim and Lori Bascom, the daughter and son-in-law of the Cubitts, used little of their

<sup>53</sup> There is no record evidence that Respondent Canned Foods withholds taxes from these bonus payments.

own funds upon becoming operators of the Lodi, California grocery outlet. No outlay of funds upon the establishment of the second entity is an indicia of a single-employer relationship. *AAA Fire Sprinkler*, supra at 85. Moreover, while the cost of a grocery outlet's fixtures and equipment seems to be almost entirely financed by loans from Respondent Canned Foods and Wells Fargo Bank, the former loan need not be secured by any collateral. Not only did David Cubitt admit that the collateral for his loan from Respondent Canned Foods for the grocery outlet in Grass Valley was his signature but also there is no collateral requirement stated in the promissory note. Such is a significant factor in finding a less than arm's-length business transaction. *Pathology Institute*, supra, at 1060; *Gold Coast Produce*, supra at 206. In addition, while Respondent Canned Foods is the lessee of the building, which houses the grocery outlet in Grass Valley, and while the Respondent Alvernazes and the Respondent Cubitts are required to pay the former for the use of the building,<sup>54</sup> there is no written sublease agreement and the cost to the operators is a nonvariable 2.5 percent of gross sales. The lack of a written lease agreement and making the cost of rental payments dependent upon the gross volume of sales have been held to be indicia of less than an arm's-length transaction. *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 551 (3d Cir. 1983); *Pathology Institute*, supra at 1061; *G. Zaffino & Sons*, 289 NLRB 571, 577 (1988). Further, the sale of the business transaction between the Respondent Alvernazes and the Respondent Cubitts is indicative of the less than an arm's-length relationship between Respondent Canned Foods and the operators of the grocery outlet in Grass Valley. In this regard, not only did the Respondent Alvernazes realize no profit from the transaction but also Respondent Canned Food apparently was the representative for each party, drafted all the paperwork, and established the depreciation percentage for all of the equipment and fixtures. Finally, with regard to the extent of Respondent Canned Foods' financial control over the Respondent Alvernazes and the Respondent Cubitts, I note that the latter's respective store operator agreements permit the former to terminate the said agreements and take over operation of the grocery outlet in Grass Valley, with written notice, "with or without cause" and immediately, without notice, if "circumstances," within the control of the operator, create "antagonism" between the operator and Respondent Canned Foods. I agree with counsel for the General Counsel that, in light of the foregoing, these latter provisions demonstrate the extent of financial control held over the Respondent Alvernazes and the Respondent Cubitts by Respondent Canned Foods so as to exemplify single-employer relationships.

Based upon the foregoing, especially considering the "clout" held over the operators' ability to effectuate labor relations policy, complicated by union-related matters, by Respondent Canned Foods and the extent of the financial control exercised over the operators by the former, I find that, at all times material herein, while, nominally separate entities, Respondent Canned Foods and the Respondent Alvernazes were and Respondent Canned Foods and the Respondent Cubitts are integrated business enterprises to

<sup>54</sup> There is no record evidence of the terms of Respondent Canned Foods' lease agreement with the owner of the building, and, of course, there is no record evidence that what the operators pay to Respondent Canned Foods equals or exceeds the lease payment.

such an extent that the former entities constituted and the latter entities constitute a single-employer relationship. With regard to my conclusions, I have closely examined those cases, cited by counsel for Respondent Canned Foods, and find each to be inapposite. Thus, not one concerns an entity, which has the apparent ability to dictate union-related labor relations matters to the extent held by Respondent Canned Foods, and none involve the extent of financial control over the second entity as held and exercised by Respondent Canned Foods. However, inasmuch as each appears to have been part of a single-integrated enterprise with Respondent Canned Foods and as there is no evidence of such a relationship between them, I further find that no such single-employer relationship existed between the Respondent Alvernazes and the Respondent Cubitts. Further, there is no record evidence or allegation of any joint employer or alter ego relationship between the two entities.<sup>55</sup> Accordingly, I shall recommend dismissal of all allegations of the amended consolidated complaint as to the Respondent Alvernazes.<sup>56</sup>

## VI. THE ALLEGED UNFAIR LABOR PRACTICES

### A. The Facts

The record establishes that Respondent Canned Foods opened its grocery outlet in Grass Valley<sup>57</sup> in or about 1990 with the Respondent Alvernazes as the operators and that, in the fall of 1994, there were approximately 28 employees, performing work as department managers, checkers, courtesy clerks, and other typical grocery market job classifications. The Union's organizing campaign amongst the employees, who worked at the grocery outlet, commenced in October 1994, when an employee, Rebecca Vandergrift, approached alleged discriminatee, Deborah Tahir, regarding the employees' perceived need for union representation.<sup>58</sup> Vandergrift had a business card of a representative of the Union, John Heise, and the women telephoned and arranged a meeting with him. Heise met Vandergrift and Tahir at a pizza restaurant in Grass Valley, and Heise gave them authorization cards, which were to be distributed to other employees. After this initial meeting, Vandergrift and Tahir distributed and collected signed authorization cards from employees, including one from alleged discriminatee, Marilyn Reider,<sup>59</sup> usually "before and after work" in the facility's parking lot,<sup>60</sup> and Heise and an organizer, Tom

<sup>55</sup> Whether, in fact, the transfer of the materials and fixtures, used in the grocery outlet in Grass Valley, to the Respondent Cubitts from the Respondent Alvernazes constituted an actual sale is not at issue herein.

<sup>56</sup> Hereinafter, I shall treat Respondent Canned Foods and the Respondent Cubitts as a single entity and refer to such as Respondent.

<sup>57</sup> The store is located in a shopping center, with a public parking lot in front of it and a sidewalk between the entrance to the store and the parking lot. The store has three doorway entrances from the sidewalk and large windows between the doors. Viewing the store from the parking lot, the right hand door is for the public to enter. The middle doorway is a set of double doors, used for exiting the store. The left side door is marked with a "Do Not Enter" sign and is only supposed to be used by the employees.

<sup>58</sup> The two women were the co-managers of the health and beauty aids department of the grocery outlet.

<sup>59</sup> Reider was in charge of ordering foods for and stocking the deli foods section of the grocery outlet, and she trained checkers.

<sup>60</sup> Vandergrift distributed and collected, at least, eight authorization cards, and Tahir distributed and collected, at least, four signed cards.

Pate, held approximately 10 meetings with employees at pizza restaurants in Grass Valley and at an employee's house during which they distributed and collected more authorization cards and discussed the advantages of representation by the Union. After collecting 19 signed authorization cards from employees, on November 13, Heise and Pate went to the grocery outlet, met with Thomas Alvernaz, and gave him a letter, in which the Union demanded recognition as the employees' bargaining representative and the start of negotiations for a collective-bargaining agreement. By a letter to the Union, dated November 16, on behalf of the Respondent Alvernazes, attorney Tiernan informed the Union that his clients had "no intention of voluntarily recognizing" it. Thereafter, on February 28, 1995, the Union filed the representation petition in Case 20-RC-17087, seeking to represent the entire employee complement working at the grocery outlet, excluding the clerical employees and supervisors.

Marilyn Reider and Jonathan Wooldridge each testified that, in or about January 1995, the Alvernazes began informing the grocery outlet's employees that they would be selling the business and "new owners" would be taking it over. In fact, Respondent Canned Foods offered the operator position at the grocery outlet in Grass Valley to the Respondent Cubitts, and, in mid-March, prior to the operator change but with the consent and cooperation of the Alvernazes, David Cubitt and Lori, and Tim Bascom, his daughter and son-in-law, traveled to Grass Valley, spent two weeks at the grocery outlet, familiarized themselves with the operation of the store, and became acquainted with many of the employees. Meanwhile, in a letter, dated March 29, 1995, to Region 20, attorney Tiernan submitted a motion that the previously scheduled representation case hearing, in Case 20-RC-17087, be postponed as the Alvernazes were in the process of "selling" their store to the Respondent Cubitts. Nevertheless, the hearing was held, as scheduled, on March 31, and, notwithstanding that attorney Tiernan contended that the representation petition should be dismissed because of the imminent sale of the business, in his April 14, 1995 decision and direction of election, the Acting Regional Director concluded that the sale was then merely speculative but also that, should the sale be consummated, the petition would be subject to dismissal. Thereafter, upon the execution of all the necessary documents and the payment to the Alvernazes of \$224,000, on April 18, the Respondent Cubitts became the operators of the grocery outlet in Grass Valley. As to the ongoing activity in support of the Union and the pending election, David Cubitt testified that, "I knew nothing about an election. I knew the Union was on the scene" and that he did not learn about the election until "about a month and a half after" he and his wife began operating the grocery outlet.<sup>61</sup>

On a Sunday evening in mid-April, approximately a week before the Respondent Cubitts succeeded the Alvernazes as the operators of the grocery outlet, David and Brenda Cubitt and the

<sup>61</sup> On April 26, attorney Tiernan wrote to Region 20 that he had been retained by the Respondent Cubitts and that the sale had been consummated, and he requested dismissal of the representation case petition. On May 5, the Acting Regional Director issued an order to show cause why the correct name of the Employer in the representation matter should not be the Respondent Cubitts as the successor to the Alvernazes.

Bascoms met with the entire employee complement at a pizza restaurant in Grass Valley. According to alleged discriminatee Tahir, the Cubitts asked each employee to identify himself or herself and to state his or her current job, and "they handed out applications and told everybody there was a paper stating when [employment interviews were scheduled]." Tahir recalled both Cubitts stating, "that there was nothing going to be happening to the jobs. Everyone was going to get their old position they were in" and recalled David Cubitt saying "he had an excellent crew in Yuca Valley and if he could, he would bring them all up here." With regard to the employment applications, alleged discriminatee Reider, who, besides signing an authorization card, attended several Union meetings with other employees, stated that both Cubitts said "it was because [the Alvernazes] were taking all their papers. They needed it for their personnel file." Finally, alleged discriminatee, Sharlene Sutton, who worked at the grocery outlet as a "bagger, trasher" and assertedly as the "freezer person" for the Respondent Cubitts, testified that she attended an employees meeting with the Cubitts at a pizza restaurant and recalled that David Cubitt said, "that nobody would be fired and none of us had anything to worry about."

As was their stated intention, the Respondent Cubitts held interview meetings with all of the employees, who worked at the grocery outlet, during the time period between the above pizza restaurant meeting and April 18. Tahir testified that she met with the Cubitts and Lori Bascom in the health and beauty aids room on April 14, and "Lori did a lot of the talking. I handed my application along with my resume and letter of recommendation. . . . There were a lot of questions asked like are you happy here, are you wanting better wages, better benefits, vacation pay. . . . I said of course." Also, according to Tahir, "there were no indications that I didn't have a job," and the Cubitts said "that the schedule would be posted by the time clock" and that "they would let you know within a week or something" about a job when they take over the store. Alleged discriminatee Reider testified that she met with the Cubitts and the Bascoms in the health and beauty aids room on April 15 in the morning. "I was asked various questions about the safety and the policy of the store, and what I thought that I deserved a raise for all the responsibilities I had." Reider replied that she was only earning \$5.25 an hour as the head of the deli and training checkers, and "I told them I was happy with the safety procedures. [David Cubitt] said is there anything else you would like to happen. I said I think we are all deserving raises because none of us have had a raise." Alleged discriminatee, Sharlene Sutton, testified that her interview was also in the health and beauty aids room and that she was interviewed by the Cubitts and their daughter. "They asked me if I liked my hours, my days off. They asked me what my job was. . . . I brought up that the Alvernazes had offered to train me to be cashier and they never got around to doing that. They said I would be the next cashier."<sup>62</sup> Also, according to Sutton, they discussed her work schedule; "[the Cubitts] just asked if I liked it and I said I would like to keep it that way. . . . They said it was fine." Another employee, Carma Lawson, who worked at the grocery outlet from November 1993

<sup>62</sup> Brenda Cubitt conceded that Sutton did mention her desire to become a cashier but denied that she or her husband said they would move her to that position— "We did not promise her anything."

until June 1996, as the person in charge of the “hard line” department, the area of the store in which products such as clothing and hardware items are sold, testified that she was interviewed by the Cubitts and their daughter and that David Cubitt told her “that [Respondent Canned Foods] was bringing them in as the new operators and they wanted their employees to be happy. . . . They were there to change things and make them better.” David Cubitt’s version of the employment interviews was corroborative of the foregoing accounts. He recalled that his wife, his daughter, and him sat at a table, had the grocery outlet employees fill out job application forms, and “we asked them what their experience was. You know, what duties they had at the time and what they did for the Alvernazes.” He added that he and his wife used a written list of questions in speaking to the grocery outlet employees.

There is no dispute that the last day of work for both Deborah Tahir and Marilyn Reider at the grocery outlet was April 18, the day on which the Respondent Cubitts assumed operation of the facility.<sup>63</sup> Each was on the assignment schedule for that day and reported for work in the morning.<sup>64</sup> Reider, whose activities in support of the Union included signing an authorization card and attending two or three meetings with Union representatives, testified that, at approximately 1 p.m. shortly after her lunchbreak, David Cubitt called her to report to the office. She did and found Cubitt and his daughter Lori waiting for her. “They asked me to sit down and Mr. Cubitt said they made a decision. That they were going to let four people go because there were four of them coming in and I was one of them. I was really startled. I said is there any reason . . . he said that [Tim Bascom] was going to be taking my position in the deli. I said was there any reason why I couldn’t go back to checking. He said you don’t seem to understand we don’t want you here. You can get up and leave now. . . . He said Tom and him would not fight any unemployment.”<sup>65</sup> Thereupon, Reider gathered her belongings and left the facility. Tahir, who, as stated above, along with Rebecca Vandergrift, was one of the initiators of the organizing campaign for the Union and one of the leading union adherents,<sup>66</sup> testified that she performed her job duties until approximately 1:30 p.m. when “I [was]

called into the office by David Cubitt where he and Lori were waiting.” According to Tahir, “I told Dave I was next because I knew there were two other employees that had been terminated. He proceeded to tell me that there was no longer a position for me. . . . that Lori could do my job. . . . I said what do you mean there was not a position for me. I had been there three and a half years.” Cubitt had no response other than “he would have to let me go” and “that Tim would escort me out.”<sup>67</sup> As had Reider, Tahir then left the store.<sup>68</sup> While not denying the testimony of either Tahir and Reider, David Cubitt did state that “I did not terminate them. I told them that they were not employed by the Cubitts. . . . I told them that they would not have a job tomorrow when I took over the store.”<sup>69</sup> Asked why the two alleged discriminatees were told to leave in the middle of the day, he replied, “because Tom and I did not want to have a scene in the store.”

The amended consolidated complaint and counsel for the Acting General Counsel argue that the refusals to hire both Reider and Tahir were violative of Section 8(a)(1) and (3) of the Act. An essential element of the General Counsel’s burden of proof is establishing that Respondent possessed knowledge of, or suspected, each alleged discriminatee’s involvement in the Union organizing drive, and, in this regard, counsel for the Acting General Counsel’s focus, at the hearing, was upon the activities and knowledge of attorney Robert Tiernan, who represented both the Alvernazes and the Respondent Cubitts, without interruption, during the Union’s organizing campaign. She offered the testimony of 7-year grocery outlet employee, Ysidra Hundevadt, who testified that, one day in the fall of 1994 after a visit to the store by representatives of the Union, she had a conversation in the office with Tiernan and the Alvernazes. “We talked about a piece of paper [Tiernan] had that had all the employees’ names on it. That it said yes, no, or maybe. And if I would mark off who I thought was for or against or maybe for the Union.” Hundevadt asked if she was supposed to fill in the entire paper, and Tiernan told her she did not have to do so in front of the Alvernazes<sup>70</sup> and him and suggested she return it before a scheduled safety meeting that night.<sup>71</sup> Further, counsel points out that, while there is no record

<sup>63</sup> As there was no such allegation in the amended consolidated complaint, I shall make no findings as to whether David and Brenda Cubitt were successors to the Alvernazes as operators of the grocery outlet in Grass Valley. Nevertheless, in its investigation of the instant representation matter and in its July 1995 dismissal of the unfair labor practice charge in Case 20–CA–26685, the Acting Regional Director of Region 21 believed such to be the case, and the record evidence herein would probably warrant the drawing of such a conclusion. In this regard, I note that there was no hiatus between the Alvernazes’ and the Respondent Cubitts’ operation of the grocery outlet, that approximately 24 of the Alvernazes’ employees were hired by the Respondent Cubitts, and that the employees worked in the same job classifications and performed the same jobs for the Respondent Cubitts as they did for the Alvernazes.

<sup>64</sup> Apparently, the Respondent Cubitts were utilizing the Alvernazes’ work schedule for that week, and both women were scheduled for work on April 18.

<sup>65</sup> Reider conceded that, in her pre-trial affidavit version of the conversation, she failed to mention Cubitt saying “we don’t want you here.”

<sup>66</sup> Asked if anyone from the grocery outlet was aware of her Union activities, Tahir replied, “No, not to my knowledge.”

<sup>67</sup> During cross-examination, Tahir admitted that her pre-trial affidavit version of the conversation was correct— “David Cubitt said there was too much management and no longer a position for me . . . . He said he looked over my application and . . . he thought Lori Cubitt could do my job.”

<sup>68</sup> Gerald Young and Jonathan Wooldridge had also not been hired by the Respondent Cubitts.

<sup>69</sup> As such is consistent with her single-employer theory, counsel for the Acting General Counsel argues that Tahir and Reider were terminated. However, inasmuch as I believe that Respondent Canned Foods and the Respondent Alvernazes and the Respondent Cubitts constitute separate single-employer entities and as the Respondent Cubitts were probably successors to the Respondent Alvernazes, it is reasonable to conclude that the alleged unlawful acts of discrimination against the alleged discriminatees were refusals to hire, and I shall characterize them as such herein.

<sup>70</sup> Hundevadt admitted that neither of the Alvernazes ever indicated to her that they were aware of the identities of any of the union adherents amongst the employees at the grocery outlet.

<sup>71</sup> Hundevadt added that she completed the paper, placing a check mark in the maybe box by each name.

evidence that Tiernan actually discovered the identities of the leading Union adherents or the Union sympathies of any employees, there appears to have been capacious opportunity for the Respondent Cubitts to have discussed their employment decisions with Tiernan at the time they became the operators of the grocery outlet, and Tiernan's retainer was for advice on matters such as hiring and firing employees. As to this, Brenda Cubitt admitted that Tiernan was present, on the Cubitt's behalf, in the store on April 17, 18, and 19, and David Cubitt admitted that, when he decided not to employ Reider and Tahir, "I talked to [Tiernan] every day at that time." Although Tiernan himself failed to deny Hundevadt's testimony, David Cubitt generally denied any knowledge of the grocery outlet's employees' activities in support of the Union while working for the Alvernazes<sup>72</sup> and specifically denied any knowledge of Tahir's status as an initiator of the Union's organizing efforts.<sup>73</sup>

With regard to Respondent's defenses to the allegations that the Respondent Cubitts discharged or refused to hire both Tahir and Reider in violation of Section 8(a)(1) and (3) of the Act, David Cubitt testified that, when Respondent Canned Foods offered his wife and him the opportunity to operate the grocery outlet in Grass Valley, they invited their daughter and son-in-law to work with them, and "I had specific jobs in mind for us. . . . My son-in-law had trained in Yuca Valley to be my deli manager. My daughter was going to be my store manager. . . . My wife . . . did all my books and record keeping. I, in Yuca Valley, was in charge of the wine department. . . . I made myself the wine man."<sup>74</sup> Then, Cu-

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It is alleged that the Alvernazes themselves attempted to ascertain the identities of the Union adherents amongst their employees. Carma Lawson testified that, in November 1994, "they called me into the office to . . . speak with them . . ." and "Deborah asked me if I knew anyone who was passing around cards for the employees to sign to join the Union . . . I told her I did not. She asked me to keep my ears open and get back with her. . . . I told her I would." Likewise, Jonathan Wooldridge testified that, on one occasion, Thomas Alvernaz called him into the office, "and he asked me if I had heard anything from anyone" about the Union." Wooldridge said, no. Thomas Alvernaz did not testify and, thus, failed to deny Wooldridge's testimony; Deborah Johnston-Kindel failed to deny any such interrogation of Lawson. There is no evidence that the Alvernazes ever ascertained who, amongst their employee complement, were Union adherents, and, as mentioned above, according to Ysidra Hundevadt, they never indicated possessing such knowledge to her. Further, there is no record evidence that, if they had such knowledge or suspicions, the Alvernazes confided such to Tiernan.

<sup>72</sup> Cubitt testified, without contradiction, that he never discussed the employees' union activities with the Alvernazes and that he was not permitted to view the Alvernazes' personnel files. Employee Hundevadt testified that the Alvernazes took all their personnel files when they left the store.

<sup>73</sup> While counsel for the Respondent Cubitts asserts in his posthearing brief that Ysidra Hundevadt testified that the Cubitts never indicated that they had knowledge of the identities of the Union adherents, review of the record indicates that Hundevadt never so testified. What did occur is that, during his cross-examination of the witness, counsel mentioned such a statement in her pre-trial affidavit but then, in the same question, asked about another subject; Hundevadt's affirmative response was to the latter question.

<sup>74</sup> Counsel for the Acting General Counsel points out that six grocery outlet employees quit in April and May, and among them were Jeff and Janice Kimerling, who were second in command while the Alvernazes

bitt testified, after ". . . [spending] two weeks in the [grocery outlet] checking out the things in the store and [observing] the help" and after interviewing all of the Alvernaz' employees, he and his wife were able to reach some conclusions about the facility and about which of the Alvernaz' employees they would not hire. David Cubitt testified that, based upon his observations, the deli department, in which Reider was the manager, was the "poorest" of the grocery outlet's departments,<sup>75</sup> and the wine department, in which Jonathan Wooldridge was the manager, was "the next poorest." Therefore, as the Cubitts' intent had been to make Tim Bascom the deli manager and David Cubitt the wine manager, they decided not to offer employment to either Reider and or Wooldridge.<sup>76</sup> Cubitt also believed that "there was no need for two managers in [health and beauty aids]," adding that no other department had such an arrangement and that he did not have "the foggiest idea" why the Alvernazes had comanagers over health and beauty aids. Further, observing for 2 weeks convinced Cubitt "that I could do with one less person," and he decided to keep Vandergrift as "in my opinion, Rebecca interviewed a lot better and she did a little better job." Finally, asked why he and his wife did not consider either alleged discriminatee for another position in the facility, Cubitt responded that such was not considered "because if you take [people] and demote them and cut their pay and change their title, it is not good for business."<sup>77</sup>

Also, on April 18, two other incidents allegedly occurred shortly after Tahir and Reider each left the grocery outlet. First, according to Ysidra Hundevadt, she overheard part of a conversation between Brenda Cubitt, Lori Bascom, and Rebecca Vandergrift in the office. "Rebecca was very upset because her best friend had just been let go and . . . she was letting them know that she was for the Union. But . . . she didn't like the way the Union was handling things and she was very upset over the whole situa-

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were the operators of the grocery outlet in Grass Valley. She argues that, rather than anyone else, the Bascoms were at the store to replace the Kimerlings. However, as counsel for the Respondent Cubitt points out, the Kimerlings did not cease their employment at the grocery outlet until on or about May 6. David Brake, who had been the store manager for the Respondent Cubitts in Yuca Valley requested that the Cubitts hire him at the grocery outlet in Grass Valley. They agreed, and he began working for the Respondent Cubitts in Grass Valley on May 3, being paid a management salary of \$900 per pay period. It is reasonable to believe that he was to be the replacement for the Kimerlings.

<sup>75</sup> Cubitt testified that "the variety . . . was poor, the merchandising was poor, how it was displayed in the case was poor." He added that, in April, deli sales comprised only 3.5 percent of gross sales; while, in Yuca Valley, said department had accounted for 10 percent of gross sales.

<sup>76</sup> David Cubitt testified that, when he informed Reider that Bascom was going to be the manager of the deli department, she became "very unhappy."

<sup>77</sup> In her posthearing brief, counsel for the Acting General Counsel spends considerable time pointing out that Tahir and Reider had been good employees each with an excellent employment record and that others, who were employed by the Cubitts, had worse employment records. At the hearing, I expressed doubt as to the relevancy of such evidence. I have considered the record evidence, and, inasmuch as Respondent contends only that it would not have been efficacious for business purposes to employ demoted managers and not that either alleged discriminatee was a bad employee, I find evidence as to the other grocery outlet employees' employment records to be irrelevant.

tion.”<sup>78</sup> Vandergrift, who, along with Tahir, initiated the Union organizing campaign but who admitted having become “disillusioned” with the Union prior to Tahir’s dismissal,<sup>79</sup> confirmed that she “got upset” over what occurred to the former and that she immediately went to the office. “Dave and Brenda were in there. They said they did not need two managers in one department. The way Debbie and I were running it, we had split the responsibilities.” Vandergrift specifically denied telling the Cubitts that she was for the Union but would give them a chance. The second alleged incident that day, the subject of paragraph 9(g) of the amended consolidated complaint, involved Carma Lawson. She testified that Robert Tiernan, who was in the grocery outlet that day, approached her, and “he asked me if I understood what happened today. I said . . . people got fired. He asked me if I understood why” and “said that he was going around talking to the employees to let them know everything was going to be okay. The reason they were let go was because there were too many chiefs and [not] enough Indians.” Tiernan added that “there were other reasons but the could not discuss them.” Tiernan failed to deny the foregoing testimony.

On April 20, 2 days after Respondent’s refusals to hire Reider and Tahir, the Union held a meeting for the employees, who were working for Respondent at the grocery outlet in Grass Valley, at a pizza restaurant in that city. The Union’s agents, Thomas Pate and Mike Moore, conducted the meeting, and approximately 14 employees attended.<sup>80</sup> According to Pate, he informed the employees that, because “there had been an ownership change” and the Union wanted recognition “from the new owner,” new signed authorization cards would have to be collected. Thereupon he and Moore collected an executed authorization card from each of the employees.<sup>81</sup> Later that week, on or about April 24, Pate and Moore went to the grocery outlet, approached David Cubitt, and handed him a letter, in which the Union demanded recognition as the majority representative of the Respondent Cubitt’s employees and bargaining. The conversation was polite, with Cubitt saying he would not recognize or bargain with the Union.

The record reveals that, within 2 weeks of the Respondent Cubitts’ refusal to hire alleged discriminatees Tahir and Reider and Gerald Young and Jonathan Wooldridge, the four former employees and their friends and relatives began picketing on the sidewalk

<sup>78</sup> Hundevadt described Vandergrift as crying while speaking to the Cubitts.

<sup>79</sup> Vandergrift stated that this began in January 1995 when phone calls from Tahir and her to the Union were not being returned. “We did not feel they were looking out for us. . . . We both felt the same way. We wanted to distance ourselves from the Union. The Union was involved with [a] strike. When that was resolved, we started hearing from them again. My feeling was already completely changed. Debbie was not sure.”

<sup>80</sup> Rebecca Vandergrift, who professed disenchantment with the Union, attended the meeting.

<sup>81</sup> The employees, who signed authorization cards were Sharlene Sutton, Scott Ashley, Diane Bartlett, Ysidra Hundevadt, Carma Lawson, Margaret Leatherman, David Mallette, Tim Mercado, Eric Paul, John Slaughter, Cheryl Sullivan, Sandra Tate, Rebecca Vandergrift, and Dorothy Van Buskirk. Brenda Cubitt admitted that the employee complement, at the time, numbered 24.

in front of the grocery outlet.<sup>82</sup> They carried placards, protesting what happened to the former employees as unfair<sup>83</sup> and their replacement by workers from outside Grass Valley, and distributed leaflets, stating that the new operators of the grocery outlet were unfair, to patrons of the grocery outlet and bypassers. The record further establishes that the Cubitts themselves protested the picketing by distributing leaflets, explaining their reasons for refusing to hire the former employees, to customers as they entered the store. In addition, according to Darla Hernandez, Tahir’s sister, on the second day of the picketing, the Cubitts approached her, and “they asked me why I was there. I told them I was there on my sister’s behalf, and she told me to get a real job. He also asked me where I worked.”

Paragraph 9(h) of the amended consolidated complaint alleges that attorney Robert Tiernan, while acting on behalf of Respondent, engaged in conduct, violative of Section 8(a)(1) of the Act, by harassing the picketers. Apparently, the crux of this allegation concerns alleged incidents, which occurred on May 6. Union agent, Mike Moore, testified that, on said date in the early afternoon, he received a telephone call from one of the picketers at the grocery outlet, who told him “that they needed a Union representative up there immediately” because the company attorney “would not leave them alone.” Thereupon, according to Moore, he drove to Grass Valley, parked in the parking lot in front of the grocery outlet “shortly before 2:00 p.m.” and sat in the car in order to observe what, if anything, occurred. Moore further testified that he sat in his car for 10 to 15 minutes and observed attorney Tiernan, whom he recognized, continually “going up to the picketers, who were walking on the sidewalk between the grocery outlet and the parking lot. I could not hear what was being said. There would seem to be an argument. They would move, he’d follow them. And it was basically what I was told. . . . he kept following them around and hassling them.” Eventually, Moore testified, he left his car, approached Tiernan, and confronted him “in front of the store” by some pallets. Moore asked Tiernan to identify himself, but the attorney refused. Tiernan then asked Moore to identify himself, and Moore said he was a representative of the Union. Tiernan uttered a snide remark and walked back over to the picketers. Hearing a picketer say she did not want to speak to Tiernan, Moore asked the pickets if Tiernan was “harassing” them. Another picketer said the man’s name was Bob Tiernan, and Moore twice requested that Tiernan leave the picketers alone and said he could not legally do what he was doing. Tiernan ignored Moore and continued attempting to start conversation with the picketers. Once, according to Moore, Tiernan said to a picketer, “if you keep picketing bad things will happen here.”<sup>84</sup> At this point, Moore, who felt “frustrated” because Tiernan was

<sup>82</sup> There is no record evidence that the Union instigated the picketing or that the picketing was undertaken on behalf of the Union. However, as will be discussed infra, there is no question that the Union supported the picketing.

<sup>83</sup> One such placard was hand printed and read, “PLEASE DON’T SHOP HERE THIS NEW OWNER IS UNFAIR.”

<sup>84</sup> Moore’s account of what occurred before he went into the store was corroborated by alleged discriminatee Tahir, who testified that Tiernan “was following some of the picketers around” that day. She added that Tiernan was “harassing people, telling people to leave, following my daughter around.”

ignoring his concerns and would not discontinue following the picketers, decided go inside the grocery outlet and speak to David Cubitt, who was in charge of the store and presumably could control Cubitt, and left the picketers and walked inside the store. An alleged shoving incident, which occurred inside the store, is the subject of a separate alleged unfair labor practice allegation and shall be discussed infra. There is no record evidence that any of the Respondent Cubitts' employees were outside observing Tiernan's conduct or that what occurred at the scene of the picketing was observed by any employees inside the store.

Union Agent Moore testified that, after the alleged shoving incident, he "deployed" the picketers on the sidewalk area and that, after a few minutes, Tiernan came back outside and resumed engaging in the same behavior as before the alleged shoving incident. According to Moore, he attempted to move the picketers away from Tiernan, but the latter continued to harass the picketers. Shortly thereafter, Moore testified, David Cubitt walked outside and "was following Bob around." At some point, Moore went to his car, returned with a video camera and commenced taping Tiernan's activities; upon observing Moore, Tiernan "ceased his activities and left the picketline." During his testimony, while denying that Tiernan was acting pursuant to his instructions, David Cubitt<sup>85</sup> admitted that Tiernan had been outside prior to the alleged shoving incident but insisted that the Respondent Cubitt's attorney "was out there trying to be friendly. . . . He was out there trying to make conversation." Also, Cubitt admitted going outside after the alleged shoving incident and following Tiernan as the latter was attempting to speak to the picketers. For his part, Tiernan conceded that he spoke to the picketers on occasion but that "the only thing I would ever say to [them] is hello, how are you . . . I never talked about what they were doing."<sup>86</sup> However, notwithstanding the testimony of Cubitt and Tiernan, Moore's videotape of the incident shows Tiernan following a picketer, Vikie Young, and the women attempting to move away from him. Further, Moore can be heard on the tape, asking Young if she wants to speak to Moore. She replied, "No, I don't want to talk to him." Also, Tiernan can be heard telling Young to "picket in the right area." Finally, with regard to what allegedly occurred during the above portion of the harassment incident, while there is no record evidence that any employees observed what occurred,<sup>87</sup> I note that Union agents, Moore and Pate met with the individuals, who worked at the grocery outlet, on the following Monday and that, according to Rebecca Vandergrift, what occurred on Saturday was discussed.

Paragraph 9(i) of the amended consolidated complaint concerns the alleged shoving incident, which occurred in the midst of attorney Bob Tiernan's alleged harassment of the picketers on May 6. In this regard, as stated above, Union Agent Mike Moore became "frustrated" over not being able to convince Attorney Tiernan to

<sup>85</sup> Cubitt asserted he always treated the picketers "with kindness," taking them water on occasion.

<sup>86</sup> Deborah Tahir testified that there was "no reason" for Tiernan to be speaking to the picketers at all, let alone to say hello to people with whom he was not acquainted.

<sup>87</sup> I shall grant counsel for the Acting General Counsel's motion to withdraw that portion of the relevant amended consolidated complaint paragraph, alleging that Respondent threatened to call the police on the picketers.

cease harassing the picketers and, at, by his own estimate, "about 2:30 in the afternoon, walked from the parking lot into the grocery outlet store to speak to David Cubitt about controlling his attorney. There is no dispute that, at the time, many customers were waiting at the checkout stands and that the cashiers were busy helping them. According to Moore, who entered the grocery outlet through the door, marked "Do Not Enter,"<sup>88</sup> he walked to the area in front of the last checkstand, noticed Cubitt working "in one of the center check stands. . . . And I [shouted] . . . 'Can I have your attention, David?' . . . I pointed outside through the windows at Tiernan who was still [next to the picketers], harassing them. And I said 'Alls I want to know is that man working? Do you have any control over that individual?' And Dave kind of froze and looked at me. And some of the checkers . . . turned around . . . . There was a lot of customers." With Cubitt now staring at him, Moore repeated his questions and threatened "to call the police if he does not stop." At this point, according to Moore, Tiernan, who must have noticed through the windows that Moore was inside the store (Moore was standing between the middle exit doors and the left-side door), hurried into the store through the right-side entrance door. "He came running in at me, very angry look upon his face. And he had both hands out and struck me in the chest . . . . I lost my balance. I went back on one of my legs . . . made my balance, and then at that time he did the exact same thing and struck me again in the chest . . . it felt like a fist. And at that point, I was back near the door I'd come in." Moore added, "I was going backwards out the door. I was walking backwards and . . . under the momentum of the last hit." Moore quickly recovered his balance and walked back to the picketers. He recalled being inside the grocery outlet for no more than "just a couple of minutes."

Three witnesses offered testimony, ostensibly corroborating Union agent Moore's version of the alleged shoving incident. Picketeer Darla Hernandez testified that she was no more than six feet away while Moore was standing "outside" the left-side door of the grocery outlet and speaking to a man inside the store, who, "everyone" said, was named "Bob" and was the lawyer for the grocery outlet. The man asked Moore to identify himself. Moore identified himself as a Union representative and asked Bob to identify himself. Moore repeated his demand "several times." Bob said nothing other than to demand that Moore "remove himself from the store." When Moore repeated his request for the man to identify himself, Bob "pushed him, shoved him on his shoulders, and told him to leave the store or he was going to call the cops." Moore "stumbled back. He didn't fall." Picketeer, Vikie Young, testified that, when Mike Moore arrived where the picketers were standing, he was informed that the grocery outlet's lawyer had been outside talking to them. Thereupon, Moore walked away the picketers toward the store and went into the store through "the right door."<sup>89</sup> According to Young, the picketers were not far from the right-side door<sup>90</sup> and could overhear Moore,

<sup>88</sup> Moore specifically denied that any sign, denying entry, was posted on the left-side door and averred that "people go in and out of all doors, all three of those doors in both directions. I've see that." Also, he stated that the door was open—"Its normally an entrance door."

<sup>89</sup> Young described the door as "one of those doors that stay open as you walk through."

<sup>90</sup> Young placed herself to the left of the double exit doors.

who was inside the store, “ask[ing] who the lawyer was. Bob would not identify himself.” Then, Young testified, Moore turned left and walked past the checkout stands to the other door—“the door on the far left.”<sup>91</sup> As he did so, Moore encountered the lawyer “by the windows” and “they moved and proceeded to go in front of the windows.” At this point, according to Young, “You could see them talking, but you couldn’t hear . . . what they were saying.” She continued, “Then when they got to the door on the far left . . . you could see . . . them talking. . . . And then you saw Bob push Mike out the door.” Elaborating, Young observed the lawyer place his hands “on Mike’s chest,” and “Mike came out the door . . . backwards.” However, “he regained his balance” and did not fall down.<sup>92</sup> As to the push itself, Young saw one push—“both hands on the chest.” During cross-examination, after denying that Moore informed the picketers that he had been shoved, Young was confronted with her pretrial affidavit in which she stated that Moore told the picketers he had been pushed by the attorney. Finally, as to whether Young’s view of what occurred inside the store may have been impeded, analysis of Mike Moore’s videotape of the picketing that day establishes that the front windows of the grocery outlet were partially covered with holiday decorations.

The most controversial of those witnesses, who ostensibly corroborated Moore’s version of the alleged shoving incident, was Dorothy Van Buskirk, who worked at the grocery outlet as a cashier until August 18, 1997. She testified, on May 6, “I was at the register taking care of customers. . . . At first, I didn’t see anything. I heard voices asking if he would like to leave the store. I turned around and Mike was being pushed out the door and asked to leave the premises, that he wasn’t wanted.” According to Van Buskirk, when she turned around, she observed attorney Tiernan and Moore standing “in front of the double doors going out,” the middle doorway and Tiernan’s hands on Moore’s chest; “[Tiernan] asked him to leave and . . . pushed him out the door.” Continuing, she denied that Moore fell over backwards; “he shook a little bit—kind of wobbled to keep his balance, and he walked out.” Respondent sought to undermine the reliability of Van Buskirk’s testimony. Thus, David Cubitt testified that, after the incident, he asked every employee, who worked that day if he or she had witnessed the incident; Van Buskirk replied “that she never saw a thing.”<sup>93</sup> Brenda Cubitt testified that, on May 6, Van Buskirk was scheduled to work in the freezer area from 6 a.m. until 2:30 p.m., and the employees’ work schedule for the week of April 30 through May 6 establishes that, rather than working as a cashier, Van Buskirk was scheduled to work her entire eight hour shift in the freezer on May 6. Testifying in rebuttal, Van Buskirk stated that she “. . . just worked part of the day” at a checkstand—“long enough for breaks or lunch,” perhaps a half an hour. On this point, Brenda Cubitt conceded “Dottie could have been called” to work at a checkstand. Further, Rebecca Vandergrift testified that

<sup>91</sup> Young stated that the left side door was “usually” kept locked but “because there was a protest going on out front, they had both doors going for in and out.” She was not sure whether the left-side door automatically opens or must be manually opened.

<sup>92</sup> Young recalled that, as the lawyer pushed Moore back toward the door, “the door opened.” She was unsure if Moore’s back hit the door or it opened automatically.

<sup>93</sup> Van Buskirk did not deny this testimony.

she attended a meeting, scheduled by the Union, on May 8—2 days after the alleged shoving incident.<sup>94</sup> At the meeting, according to the witness, “I asked [Van Buskirk] what had happened. . . . She said I don’t know. . . . Dottie said she was working freezer at the time and she was filling her cart . . . . By the time she got up, she heard the commotion, and the commotion had already happened.”<sup>95</sup> Testifying in rebuttal, Van Buskirk originally denied having spoken to Vandergrift about the events of May 6; however, after being informed of what Vandergrift testified Van Buskirk told her, the latter changed her testimony, stating that she could not recall speaking to Vandergrift about the alleged shoving incident.

Respondent concedes that an incident, involving Mike Moore, did occur inside the grocery outlet on May 6, but denies that what happened included attorney Tiernan shoving Moore. Robert Tiernan testified that, early in the afternoon, he was inside the store in the candy section, which is located to the left of the left-side entrance, when “I heard shouting, identify yourself, identify yourself. . . . I turned my head. I saw Mr. Moore coming in the employee door . . . . I was probably about 10–15 feet away from him, where the coffee pot is. I immediately turned and went over to him. I was walking towards him. . . . My hands were up. I was saying just one thing, out, out, out. . . . My arms were going straight up and my fingers were pointing out, and motioning out the door.” According to Tiernan, Moore noticed him approaching and asked “Who are you? I did not engage in any conversation with Mr. Moore. I just continued to say out, out, out. Where I met him, his feet were just about a [foot] on the rubber mat. . . . I was about 18 inches apart from him, telling him to get out. . . . Mr. Moore started to walk backwards. I walked with him backwards. And about a foot or two inside the door, he turned around and went out the door.” David Cubitt testified that, at the moment Moore came inside the store on May 6, he was working at checkstand 2, attorney Tiernan was in the candy section,<sup>96</sup> and his wife was upstairs in the office. According to Cubitt, Moore walked into the store through the employee entrance,<sup>97</sup> turned toward Tiernan, and began shouting identify yourself, identify yourself. He added that he first noticed Moore when the latter was 10 or 12

<sup>94</sup> Vandergrift testified that she had not been scheduled for work on May 6, but that, on said date, Tahir telephoned her and said something had happened that day and Moore would tell them about it at the Union meeting.

<sup>95</sup> The freezer is located in the back of the facility.

<sup>96</sup> Counsel for the Acting General Counsel argues that Cubitt admitted “I am positive Bob Tiernan came in the store when [Moore] came in the store” and that, therefore, this corroborates Moore that Tiernan followed him into the grocery outlet. However, I am not as sanguine as counsel as to the proper interpretation of Cubitt’s comment and believe her view is questionable. Thus, in the transcript, the sentence is punctuated with a question mark, and Cubitt did not say that Tiernan *followed* Moore into the store.

<sup>97</sup> According to Cubitt, the left-side or employee entrance door may only be opened in and does not close automatically. A person must pull the door shut, and the door was closed prior to Moore entering the store. Cubitt also testified that, “on occasion,” customers have entered the store through the employees’ door.

feet inside the grocery outlet and shouting.<sup>98</sup> As soon as Moore began shouting, Cubitt and Tiernan began walking toward him, “and we all met right there. Mr. Moore started to leave because Bob was asking him to leave. Then, he said do not touch me and the two of them stepped to the threshold.” Cubitt conceded that, at one point, not getting any response from Tiernan, Moore turned to him and asked if Tiernan was an employee. Tiernan was standing “in front” of Moore, gesturing with his fingers, and Moore exited the store backwards with both feet on the ground and without losing his balance. Finally, asked if it was possible that Moore could have followed Tiernan into the store, Cubitt replied, “It would have been impossible without me seeing him. Mr. Tiernan was shopping for candy.” Brenda Cubitt testified that she was in the upstairs office at the time of the incident, and “what got my attention was Mr. Moore’s yelling identify yourself, identify yourself. And I looked down. I had a perfect view of the front of the checkstands. And I saw him yelling. Saw [Tiernan] going towards him and Dave was somewhere in that vicinity, too. . . . I saw [Tiernan] walking towards Mr. Moore and Mr. Moore backing out. . . . I couldn’t see Mr. Moore actually leave the store because he was out of my range.” Further, Brenda Cubitt stated that Moore was approximately four feet inside the store entrance when she first saw him and denied that Moore ever walked in front of the checkstands or was shoved by Tiernan in front of the checkstands. During cross-examination, Mrs. Cubitt admitted that, as Moore was backing out, she heard him yell “something like don’t touch me.”

In addition to the Cubitts and Tiernan, three employees testified with regard to the alleged shoving incident. Robin Sobecki, who followed the Respondent Cubitts to Grass Valley from Yuca Valley,<sup>99</sup> who was the head cashier for the Cubitts in May 1995, and who was stationed at checkstand 1 on May 6 between 2 and 3 p.m., testified that she was working, “and I heard a loud commotion to my left. When I turned around . . . I saw both [Bob Tiernan] and Michael . . . Moore. I saw Mr. Moore’s back facing towards the front of the store and [Tiernan’s] back was facing towards the back of our store and [Tiernan was] talking to Michael, saying out; and Michael was yelling at [Tiernan] with his finger in [Tiernan’s] face, saying identify yourself. And then . . . Michael walked backwards as you were walking forwards and he left the store.” Sobecki, who estimated she was 20 to 25 feet from Tiernan and Moore, added that “there was a definite space between” Tiernan and Moore and denied seeing the lawyer touch Moore and the latter stumble backwards—“I never physically seen [Tiernan or Moore] touch each other.” During cross-examination, Sobecki described Tiernan as having his arms “just above shoulder level with his finger pointed out.” Also, she conceded that departing customers may have hindered her view for “moments, seconds” and that Moore told Tiernan not to touch him—“he was yelling . . . don’t touch me.” Finally, Sobecki denied continuing to work during the incident and stated that she did not see David Cubitt anywhere in the vicinity of Tiernan and

<sup>98</sup> Asked how Moore could have known Tiernan was the lawyer, Cubitt testified that the attorney had been outside with the picketers 15 minutes before.

<sup>99</sup> The record reveals that the Respondent Cubitts paid part of her moving expenses.

Moore. Diane Bartlett, who is a cashier at the grocery outlet in Grass Valley and was working at checkstand 5 on May 6 between 2 and 3 p.m., testified that, while working, “I heard somebody say identify yourself. I heard that several times, and I turned and looked up, and I saw Mr. Moore with his hands up and [Tiernan and Moore] were like face to face right at the door. After that, he said it a couple more times.” Bartlett added that the two men were by the left-side door and that she saw Moore leave the store through that door. Bartlett denied seeing Tiernan touch Moore during the incident and did not see Moore stumble. As to how the Union agent left the store, “Moore had backed up and was starting to turn to go towards the parking lot. . . . He had taken a couple of steps and it looked like he was turning at the time I went back to what I was doing.” Finally, Bartlett could not be sure she would have seen Tiernan hit Moore; she did not see Dave Cubitt in the area; and the distance between Tiernan and Moore was “about a foot.” The third employee, Pamela Bennett-Heib, who was working as a cashier at checkstand 3 between 2 and 3 p.m. on May 6, testified that “. . . it caught my attention when [Tiernan] and Mr. Moore were at the door, which was the employees’ entrance, and he was yelling identify yourself and [Tiernan was] saying out.” Bennett-Heib denied that Tiernan touched Moore or that the latter stumbled backwards out the door. Rather, the incident ended “with Mr. Moore backing out of the door. [The two men] were about a foot apart.” The witness added that Tiernan held his hands “at shoulder level” with his fingers pointed out. During cross-examination, Bennett-Heib conceded she did not see the entire incident, said she did not see Dave Cubitt during the incident, and, while again saying she did not see Tiernan shove Moore, admitted signing a sworn statement in which she stated she had seen Tiernan push Moore.<sup>100</sup>

Ysidra Hundevadt testified that, as the picketing continued through May, both David and Brenda Cubitt became increasingly upset and “angry” over what was occurring on the sidewalk outside the grocery outlet. “It was a very upsetting time,” and “I

<sup>100</sup> As to her contradictory sworn statement, Bennett-Heib testified that, “after thought, in retrospective, I can’t really tell for sure.” Under further questioning, she conceded now being unsure as to what occurred. Also, with regard to the witness’s memory, she averred that she was able to recall the incident but could not recall giving a pretrial affidavit to a Board agent.

During rebuttal, alleged discriminatee, Sharlene Sutton, testified about an asserted conversation with Bennett-Heib. “I was working the back of the store at the time. She came running back there real fast and goes, you’ll never guess what just happened. . . . Bob, the attorney, just hit the little guy from the Union. I go, you mean he slugged him. She goes, no, he smacked him in the head. I go, wow. . . . She said they have recalled the other cashiers into the office and are talking to them now, and making them sign something.” According to Sutton, she spoke to an employee named “Sandra” 20 minutes later, but the latter wouldn’t comment about what occurred. Sutton conceded that, if Sandra was not working that day, she could not have said anything. Sutton then averred that she was not positive whether the second person to whom she spoke was Sandra or Van Buskirk. The latter denied saying anything to Sutton about the incident, and “Sandra” was not scheduled for work on May 6. Bennett-Heib was not called as a witness to confirm or deny Sutton’s testimony.

Finally, as will be discussed *infra*, notwithstanding Brenda Cubitt’s admission that she solicited employees to sign a petition regarding the picketing, Bennett-Heib denied that Cubitt did so.

heard [both Cubitts] say the picketing was hurting the store. A couple of times, they asked if anybody wanted to go home because the business had gone down.” Also, according to Hundevadt, “I know Dave came up very angry a couple of times into my office and would say, what’s going on, why are they doing this?”<sup>101</sup> Then, he would turn to Hundevadt and “. . . would ask me are you with us or are you against us?” Moreover, there is no dispute that, while the picketing was on-going, Respondent posted at two locations in the grocery outlet and solicited employees to sign what counsel for the Acting General Counsel characterizes as “. . . a petition denouncing the employees’ union activities,” conduct, which is alleged in the amended consolidated complaint as being violative of Section 8(a)(1) of the Act. This document, General Counsel’s Exhibit 23, states, at the top, in large, bold print, “WE ARE NOT ON STRIKE” and, at the bottom,

Thank you for your patronage. We want to be sure you know that none of the people outside picketing are Grass Valley grocery outlet employees. We are all happily employed and are receiving competitive wages and benefits from our employer. This is a family owned and operated business and we are all inside the store ready to serve you as always. Come back and see us again soon and *PLEASE BRING YOUR FRIENDS*.

Carma Lawson testified that, one day while the picketers were outside the grocery outlet, “Brenda Cubitt came around and was asking the employees to sign it.” She spoke to Lawson, and “she said they were not there to cause any problems and if we signed this, it would put everybody at ease. . . . I told her I did not want to get involved. She told me it would help, so I signed it.” Lawson added that she saw Brenda Cubitt soliciting other employees to sign the document. Likewise, Ysidra Hundevadt testified that Brenda Cubitt asked her to place her signature on the document, explaining it was “just telling the public we were not on strike.” Besides direct solicitations, David Cubitt testified that his wife Brenda “posted [the document] on the front door” and Pamela Bennett-Heib, who denied that Brenda Cubitt solicited employees to sign the document, saw it posted on a bulletin board near the timeclock. Mrs. Cubitt admitted soliciting employees to sign the document but explained that she was merely attempting to inform customers that the picketing was not as a result of a strike by the grocery outlet’s employees and that she “did it in a hurry.” Finally, she conceded not informing employees they were not required to sign the document.

The final amended consolidated complaint allegation, stemming from the picketing outside of the grocery outlet, concerns employee, Sharlene Sutton, who signed authorization cards in October 1994 and April 20, 1995, and the contention that, rather than having voluntarily quit her employment at the grocery outlet, she was constructively discharged by Respondent. As to this allegation, Sutton, whose job as a bagger/trasher involved placing customers’ groceries in bags, collecting empty food baskets, and cleaning the merchandise shelves, testified that she desired to show support for the picketers by carrying a placard and that she had been told she could do so as long as she did it on her own time

and not during working hours. On Friday, May 5, Sutton arrived at the grocery outlet a half hour before the scheduled start of her work shift, obtained a placard, and joined in the picketing. However, Brenda Cubitt noticed what she was doing, “came out and said what are you doing . . . you can’t do that. I go, I was told I could . . . She goes you can’t do that . . . it is illegal. I said I was told I could do this as long as it was on my time.” Mrs. Cubitt walked back inside the grocery outlet and, five minutes later, returned, asking “. . . are you going to continue doing this or what?” Sutton responded that she was going to picket until it was time to report for work. “She goes, why are you doing this. We liked you. I said . . . I am doing this because we need this. She goes, you are suspended for five days.” About 10 minutes later, a customer approached and asked Sutton what was happening. As Sutton was explaining her predicament, David Cubitt came out of the grocery outlet, “walked up and said don’t listen to her; she is supposed to be working and not here doing this. I said that is a lie. They just suspended me for picking up the sign on my time off of work.”<sup>102</sup> Alleged discriminatee, Marilyn Reider must have observed what occurred, for she immediately informed Union agent Pate about Sutton’s suspension. Shortly thereafter, according to Sutton, Pate came to the grocery outlet and spoke to David Cubitt about her suspension. After meeting with Cubitt, Pate instructed Sutton to go home and to telephone Cubitt. “I called and Dave said they were wrong, that they were sorry and I could come back to work and they would pay me the two hours that I didn’t work.” The next morning, May 6, Sutton reported for work and worked a normal shift, starting at 11 a.m.<sup>103</sup>

According to Sutton, for the next 5 days, her work shift “stayed the same. They were not as friendly, but they were not mean.”<sup>104</sup> However, on a Thursday, the 6th day after her suspension, “I was working on the bagging job and Dave came up and said something about doing the freezer. Dave was not very friendly. His tone wasn’t nice. The freezer guy looked at me with raised eyebrows . . . I started doing what he told me to do. Brenda comes out the back room and said I want you to get back there and clean the break room now.”<sup>105</sup> Sutton protested that David Cubitt had instructed her to fill the freezer, but Brenda insisted that she clean the break room. Sutton did as she was ordered,<sup>106</sup> working five minutes into her scheduled break when she heard a call for her to do retrieve empty grocery carts. At this point, according to Sutton, “I had a feeling that they were trying to get me. I got emo-

<sup>102</sup> Brenda Cubitt conceded that the employees, who were working at the time, must have become aware of the suspension of Sutton—we are a tightly knit store. I’m sure people were aware of what happened.”

<sup>103</sup> Sutton was paid for the 2 hours of work she missed that day.

Counsel for the Acting General Counsel does not allege the events of this day as an unfair labor practice.

<sup>104</sup> During cross-examination, Sutton characterized the Respondent Cubitts as ignoring her.

<sup>105</sup> Sutton characterized David Cubitt as being “not very friendly” and “his tone wasn’t nice.” She viewed Brenda Cubitt as not being polite to her.

<sup>106</sup> Sutton maintained that she had never been asked to clean the break room before.

Apparently, rather than protesting the cleaning work itself, Sutton’s complaint goes to the Respondent Cubitts’ attitude—they “had an attitude behind it that made me feel like they were after me.”

<sup>101</sup> Hundevadt did not perceive these comments as questions.

tionally upset and scared.<sup>107</sup> Peggy Arnold, “one of the managers,” saw her and asked if something was wrong. Sutton replied that she was not feeling well and wanted to go home sick and that “they wanted me to do this and this and I can’t do it; I don’t feel well.” Arnold replied that it was alright for her to leave work, and Sutton went home.<sup>108</sup> Continuing to believe that “they were trying to get rid of me,” Sutton telephoned a company, which had offered her a higher-paying job in March or April, which offer she had declined after speaking to Rebecca Vandergrift.

Sutton returned to work the next morning, a Friday, and noticed her work schedule had been changed—“I was taken off the freezer job which meant I didn’t have to work evenings. I was really disappointed.”<sup>109</sup> Instead, she was scheduled to work the trasher job “full-time afternoons.”<sup>110</sup> Sutton immediately went to find Peggy Arnold and asked why that had happened. She said they just want to try Diane out.” According to Sutton, no one had informed her that her work schedule would be changed, and her schedule had never been changed previously without someone telling her. Next, Sutton testified, on the following Monday, May 15,<sup>111</sup> she again telephoned the company, whose job offer she previously had declined, and said she now would accept the offer. Sutton explained, “I went for a job because I was frightened that I was not going to have one.” Then, after accepting the new job, “I called Dave up and told him that I would not be coming in that Tuesday.”

During cross-examination, as to this last conversation, Sutton conceded that, when she announced she would not be reporting for work, Cubitt asked why. She replied that she was quitting, and he acted shocked. Also, during cross-examination, Sutton conceded that, while her typical daily work schedule had extended into the evening shift, she had only worked for the Cubitts for a short time, and “they were changing the store around.” Further, Sutton stated that, during April, her job changed from that of strictly a bagger/trasher—“There were certain days that I was the freezer person,” but, when asked if she was a bagger/trasher work-

<sup>107</sup> Sutton admitted that David Cubitt ordered her to clean the bathroom the week before and that she did so without complaint—“I didn’t look at it as being bad at all.”

<sup>108</sup> Peggy Arnold, who testified on behalf of Respondent, stated that, while she could not recall, she “might have” given Sutton permission to go home “if she were very ill.”

<sup>109</sup> During counsel for the Acting General Counsel’s direct examination, Sutton testified that, “on certain days,” her schedule had been 10 a.m. until 5 p.m.; with the change, it was back to 11 a.m. to 7:30 p.m. each day. Later, during cross-examination, Sutton changed her testimony, stating that, when she first started with the Cubitts, her hours were 11 a.m. until 7:30 p.m. and that these changed to “9:00 to 5:00 on most days, on the weekend, I was still at 11:00 to 7:30.”

Examination of the Respondent Cubitts’ weekly work schedules, GC Exh. 104, reveals that Sutton’s normal workday commenced at either 9 a.m. or 11 a.m., with most days starting at 9 a.m. There do not appear to be any days on which she started work at 10 a.m.

<sup>110</sup> Sutton claimed she was the “freezer person” for the Respondent Cubitts. However, examination of GC Exh. 104, the weekly schedules for the Respondent Cubitts, reveals that Sutton is always grouped at the bottom of the schedule with the other bagger/trashers. On each schedule, the freezer person appears to be an individual named “David.”

<sup>111</sup> Sutton worked the next day, Saturday. She was off work on Sunday and Monday and quit her job on Tuesday.

ing for the Cubitts, she replied, “yes.” On these points, Sutton said that the Respondent Cubitts had a full-time person, named Dave, taking care of the freezer but that “they needed two people.” With regard to Brenda Cubitt’s assignment to clean the break room, Sutton conceded that the Respondent Cubitts did not employ a janitor during the day, that she cleaned the bathroom the week before without objection, and that no particular employee was assigned to clean the bathroom or break room.<sup>112</sup> Finally, during cross-examination, Sutton testified that, while cleaning the break room, it was the head checker who called and asked to do a grocery cart run, which was part of her job responsibilities. She conceded that the person did not know that Brenda Cubitt had asked her to clean the break room but did know it was her break time.

With regard to Sharlene Sutton, Carma Lawson testified that, prior to her picketing, Sutton “worked in the front in bagging and carry out,” and “basically she would do her work and nobody bothered her.” However, according to Lawson, after Sutton’s picketing and suspension, she observed David Cubitt ask Sutton such things as where had she been and say she wasn’t doing her job. Also, rather than strictly doing bagging and carry out work, Sutton “was doing clean-up of ‘spills, broken jars.’” With regard to cleaning the break room, Lawson further testified that, while Sutton was assigned to do this after she picketed, “everyone took turns” cleaning it voluntarily, and “we just did it. No one told us we had to do it.”<sup>113</sup> As to cleaning spills, Lawson said “We did have a janitor a few times, but not very often. It was whoever was closest or a manager.” She denied finding this onerous work. Finally, Lawson recalled seeing Sutton crying one time after speaking to Dave Cubitt.

With regard her suspension of Sutton, Brenda Cubitt testified, “It was one of those mornings with the pickets. I looked outside and I saw Sharlene carrying a picket sign. . . . I really thought that it was time for her to be on her shift. And I walked out there and I said to her, Sharlene, you have to make a choice. Are you going to picket or are you going to work. And she said these are my friends. I’m going to picket. And I walked back in. . . . I went back out and I told her that she was suspended for five days.” Later, that day, according to the witness, after her husband spoke to an “advisor,” who said they had made a “mistake” and were wrong to suspend Sutton, she and her husband telephoned Sutton, and both said they had made a mistake and apologized to her. During cross-examination, Brenda Cubitt denied being unhappy because Sutton had picketed—“I wasn’t angry. I was more hurt when I saw out there picketing with the sign.” In fact, averred Mrs. Cubitt, “I never get mad at people. . . . I don’t have that in my personality.” On this point, her husband directly contradicted Brenda Cubitt. Asked if his wife became really angry that Sutton was picketing, David Cubitt replied, “Yes, my wife was upset.”<sup>114</sup> Further, as to the precise reason she suspended Sutton, notwithstanding her earlier testimony that such was a mistake prompted

<sup>112</sup> She denied that these latter jobs were rotated amongst the employees.

<sup>113</sup> According to Lawson, “We had no set janitor to do it,” and cleaning the break room did not cause her to become upset.

<sup>114</sup> David Cubitt admitted that his wife told Sutton she was not allowed to picket and continue to work at the grocery outlet.

by her belief that Sutton should have been working, a fact which she easily could have verified by checking the daily work schedule, Brenda Cubitt later admitted to the undersigned the reason was solely that Sutton was picketing.

As to Sharlene Sutton's work assignments after being informed that her suspension had been mistaken and was rescinded, Brenda Cubitt testified that, in May 1995, the Respondent Cubitts employed "probably" five bagger/trashers, including Sutton, and that "they bag groceries, they shag carts . . . they [arrange product on the shelves]. . . . They clean spills, bathrooms, clean break rooms. They help customers." As to the cleaning work, Mrs. Cubitt stated that she and her husband have never employed a janitor to clean the building, and "when a spill happens, somebody takes care of it. Every morning, we have the bathrooms gone over. It is divided up." Further, according to Mrs. Cubitt, "different people at different times do the work;" no employees, including merchandisers and bagger/trashers, are exempted from this work; and Sutton was a bagger/trasher. Confirming Sutton's testimony, Brenda Cubitt stated that she and her husband did ask Sutton to help in the freezer "because it needed doing and she wasn't doing anything else at the time. When baggers have free time . . . they go help [elsewhere]." Mrs. Cubitt also conceded "probably" asking Sutton to clean the breakroom as "it is something I ask somebody every day." She further added that it would not have been unusual to ask someone, who is cleaning the breakroom, to shag grocery carts. "The person up front who is taking care of the front end and sees the carts are low, they automatically call somebody. The person is always doing something else. . . . that person leaves what [he or she is] doing and goes gets carts." Mrs. Cubitt specifically denied that, after the picketing incident, she treated Sutton different than any other employee and stated that she was "surprised" when the employee quit on May 15. She added that Sutton gave no reason except that she had another job, which paid more money. Finally, asked if Sutton seemed upset when she quit, Mrs. Cubitt testified, ". . . I don't remember her being upset. She was kind of a nervous person." On this point, Mrs. Cubitt was contradicted by Peggy Arnold, who testified that Brenda Cubitt informed her that Sutton had quit and was upset.

The amended consolidated complaint next alleges that Respondent engaged in conduct, violative of Section 8(a)(1) of the Act, by informing employees that they would not receive their paychecks and raises as scheduled because of the Union and would not receive their raises until all the "bullcrap" stopped with the Union, and that Respondent violated Section 8(a)(1) and (3) of the Act by withholding employees' paychecks and raises. In this regard, Carma Lawson testified that the Respondent Cubitts normally distributed the employees' paychecks "on Tuesday"<sup>115</sup> but that, on one Tuesday in April or May, David Cubitt called her, Vandergrift, and two other employees into the grocery outlet's office and holding paychecks in his hand, "told us . . . he planned to give us our checks but we would not be receiving them that day. He had planned on giving us a raise, but he had spoken to Bob Tiernan who told him that it would be considered a bribe.

<sup>115</sup> According to Ysidra Hundevadt, while paychecks normally are distributed on Tuesdays, that is not the employees' pay day. According to the witness, the pay day is Wednesday, but "paychecks come in on Tuesday and Dave is nice enough to hand them out to all of us."

[Tiernan] told him that he would have to wait until all the bullcrap with the Union was over before we could get our raises." Lawson added that the paychecks were distributed the next day with no raises included. Ysidra Hundevadt testified that she also was present in the office on that occasion<sup>116</sup> and testified that Cubitt "had checks with all our raises on it and that he could not give us the checks because it might appear to be as a bribe because it was before the vote." David Cubitt specifically denied ever withholding paychecks from the employees, who worked at the grocery outlet in Grass Valley in 1995, and in this regard, testified that, after interviewing all of the Alvernazes' employees and learning that none had received pay increases for over a year, he decided to implement an across-the-board raise in pay, which would be effective with the employees' paychecks to be distributed on May 17. Accordingly, Cubitt instructed his accountant to prepare paychecks, reflecting a raise in pay for each bargaining unit employee, and these arrived at the grocery outlet on Tuesday, May 16. However, during the day, according to Cubitt, he "was talking to [Bob Tiernan] over a different matter. I said I had given everybody a pay raise. [He] told me that I could not give everybody a raise." Thereupon, "I called my accountant and told him that I had to reissue the checks at the old pay rates. . . . They were delivered on Wednesday, the regular pay day." Cubitt further testified that, when employees requested their paychecks on Tuesday, "I told them that I made a mistake" and that he posted the following notice, regarding the delay in distributing the paychecks"

TO ALL OUR FELLOW EMPLOYEES:

AS YOU KNOW I HAD MADE A DECISION TO GIVE RAISES TO MOST EMPLOYEE'S. I HAVE JUST BEEN INFORMED BY OUR COMPANY ATTORNEY (BOB TIERNAN) THAT THE NATIONAL LABOR RELATIONS BOARD PROHIBITS RAISES WHILE AN ELECTION IS PENDING WITH THE NATIONAL LABOR RELATIONS BOARD.

I REGRET THAT I WILL NOT BE ABLE TO GIVE THE RAISES I FEEL BY CREW DESERVES!!!!!! I APOLOGIZE FOR THE MISUNDERSTANDING.

IF YOU HAVE ANY QUESTIONS PLEASE CALL THE NATIONAL LABOR RELATIONS BOARD . . .<sup>117</sup>

Paragraph 12(e) of the amended consolidated complaint alleges that, during the spring and summer of 1995, Respondent unlawfully "granted employees raises, additional vacation time, manager awards, cash awards, and/or the opportunity to work overtime because they opposed the Union." In this regard, the record establishes that, while, as set forth above, the Respondent Cubitts gave no raises in pay to their employees prior to the representation election, which was conducted by the Regional Director of Region 20 on June 12, they gave pay raises to most of said employees in the pay period immediately following June 12. Thus, analysis of the Respondent Cubitts' payroll records discloses the following

<sup>116</sup> Hundevadt testified that, in the office with Cubitt, were herself, Lawson, Peggy Arnold, and Rebecca Vandergrift.

<sup>117</sup> Given the opening sentence of the notice, I am convinced that the Respondent Cubitts previously had informed employees that they would be receiving raises in pay.

information with regard to hourly wage rates immediately before and after the election:

*hourly wage rates immediately before and after election*

	June 14, 1995	June 28, 1995
Alcano	5.25	5.75
Arnold	7.50	8.00
Bartlett	5.50	6.00
Bennett-Heib	5.50	6.00
Hundevadt	7.50	7.75
Lawson	5.75	6.25
Leatherman	5.00	5.50
Malette	6.50	7.25
Mercado	5.00	5.25
Paul	5.25	5.40
Slaughter	6.00	6.75
Tate	5.00	5.50
Van Buskirk	5.25	5.75
Vandergrift	6.50	7.50

The three employees, who received the highest hourly raises were Rebecca Vandergrift, who received a dollar per hour wage increase, and John Slaughter and David Mallette, each of whom received a 75 cents per hour wage increase. Counsel for the Acting General Counsel argues that these high raises were rewards for the three employees' opposition to the Union. In this regard, while denying that, on the day the Respondent Cubitts refused employment to her friend, Deborah Tahir, she informed the Cubitts of her support for the Union and of her willingness to give them a chance, Rebecca Vandergrift admitted that, toward the end of the Union's preelection campaign, she had become opposed to the Union, and "I told [other employees] that I was apprehensive and was not sure where it was going. I had been very disillusioned with the Union and I made that clear to everybody." She added that Mallette and Slaughter, each of whom had signed authorization cards for the Union, also became disenchanted with the Union "well before the election," that the three of them were the leaders of those employees,<sup>118</sup> who were adverse to representation by the Union, and that the three held an antiunion meeting at Mallette's house prior to the election.

Counsel for the Acting General Counsel further argues that the same pattern of reward and favoritism, by the Respondent Cubitts, is present in the amounts of overtime hours, given to Rebecca Vandergrift, David Mallette, and John Slaughter from early May through late September 1995, the pre and postelection time period, and in permitting Vandergrift to take a vacation in July. As to overtime, she points out that, as compared to the other voting unit employees, Vandergrift, Mallette, and Slaughter received significantly more overtime hours during the above time period than received by the other employees, working at the grocery outlet in Grass Valley. In fact, analysis of the overtime hours worked by the Respondent Cubitts' employees during this time period<sup>119</sup>

<sup>118</sup> Others included Diane Bartlett and Sandra Tate.

<sup>119</sup> Carma Lawson testified that "usually, we did not get overtime" but that she did ask the Cubitts in May or June about overtime work and David and Brenda said "that we could not get overtime." Nevertheless, according to Lawson, "some employees did" receive overtime.

establishes that Mallette worked in excess of 101 hours of overtime, Slaughter worked 54 hours of overtime, and Vandergrift worked 47 overtime hours, that Dorothy Van Buskirk was the only other employee to work more overtime hours than did Vandergrift, and that Mallette, Slaughter, and Vandergrift received the most overtime hours during the two pay periods immediately before and after the representation election. With regard to the Respondent Cubitts' granting permission to Vandergrift to take vacation, on April 18, the day they became the operators of the grocery outlet in Grass Valley, the Respondent Cubitts distributed a document, entitled "wages and benefits" to the employees. In said document, the Cubitts stated that they were the employees' "new employer" and announced that their vacation policy would be "after 1 year, 1 week. After 2 years, 2 weeks vacation." In this regard, Carma Lawson testified that, during her employment interview, David Cubitt told her "... that our starting date would be April, when they took over" and that "I would have to wait a year" before taking a vacation. Subsequently, Lawson further testified, she asked the Cubitts if she could possibly take a vacation that year, and "they told me it would not be possible to take my vacation until 1996." Notwithstanding their explicit policy, according to Lawson, Vandergrift, Mallette, and Slaughter were permitted to take vacations in 1995.<sup>120</sup> Lawson was certain that Vandergrift was on vacation during the first two weeks of July as "I was doing her job. Also, Dave Cubitt came up to Rebecca and handed her an envelope. He told her he wanted her to have this before she left to go on vacation. After Dave walked away, she told me that Dave gave her vacation pay and she did not expect it." While the Respondent Cubitts' payroll records for 1995 do not show any pay periods during which Mallette and Slaughter were not credited with having worked any hours, said documents do establish that, during the 2-week payroll period ending July 28, 1995, Vandergrift worked no hours and received a bonus payment of \$250 during that time period. David Cubitt testified that "all employees that had worked more than a year for the Alvernazes, after one year, I gave them credit for that time served for the previous owners." Then, asked if any employees received a paid vacation in 1995, Cubitt said, "Not from me. They received vacation checks from the Alvernazes. April 1996 would have been the first year they started getting their vacation checks." He added that no employee was entitled to paid vacation in 1995 "because we did not

During cross-examination, she denied working overtime in May and June 1995, except for a limited amount in May in order to change the products in the aisles. From her testimony, one might conclude that only a favored few employees received overtime work after the Respondent Cubitts became the operators of the grocery outlet in Grass Valley. However, Lawson's entire testimony in these regards was contradicted by the Respondent Cubitts' payroll records. Thus, these establish that almost every employee worked some overtime during every payroll period in May, June, July, August, and September 1995; that Lawson herself worked in excess of 33 hours of overtime during this time period; and that, in May and June, she earned overtime during each pay period.

<sup>120</sup> Vandergrift's alleged vacation will be discussed infra. As to Mallette and Slaughter, the Respondent Cubitts' payroll records, Respondent Cubitts' Exhibit 3, establish that Mallette worked regular hours during each payroll period of 1995 and that Slaughter worked regular hours during each payroll period through October 4, 1995. As to the latter, there is no record of his having worked beyond October 4.

have the store in operation. The rule was you had to work for the Cubitts for one year.” Asked, then, if any employee received nonpaid time off in 1995, Cubitt replied that, “Rebecca received time to go to Mexico with her husband.”<sup>121</sup> Further, while he could not recall when he gave it to Vandergrift, David Cubitt maintained that the \$250, which was given to Vandergrift in July, was a normal department manager’s quarterly bonus payment,<sup>122</sup> which policy was announced in the above-described April 18 document, which was distributed to all employees.

There is no dispute that the Respondent Cubitts refused to extend recognition to the Union as the majority representative for purposes of collective bargaining of their employees. Paragraph 17(a) of the amended consolidated complaint alleges that Respondent engaged in conduct, violative of Section 8(a)(1) and (5) of the Act, by implementing a retirement plan without affording notice to or giving the Union an opportunity to bargain. Likewise, there is no dispute as to the applicable facts underlying this allegation. Thus, on January 27, 1997, the Respondent Cubitts met with all of the employees, working at the grocery outlet in Grass Valley, and announced implementation of a retirement plan, for which some, but not all, of the employees would be immediately eligible. The record establishes that, commencing in March 1997, employees began signing the necessary documents in order to become eligible for the plan’s benefits. David Cubitt conceded that he did not offer to bargain with the Union prior to implementing the retirement plan.

#### B. Legal Analysis

Initially, I turn to the amended consolidated complaint allegation that Respondent engaged in conduct, violative of Section 8(a)(1) and (3) of the Act, by failing and refusing to hire Marilyn Reider and Deborah Tahir. In this regard, there is no dispute as to the applicable Board law. Thus, I note, at the outset, that my determination of the legality of Respondent’s conduct is governed by the traditional precepts of Board law in alleged union animus discharge cases, as modified by the Board’s decision in *Wright Line*, 251 NLRB 1083 (1990), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 453 U.S. 989 (1982), approved in *Transportation Management Corp.*, 462 U.S. 393 (1983). Thus, in order to prove a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel has the burden of establishing that the alleged discriminatees engaged in union activities; that Respondent had knowledge of such conduct; that Respondent’s actions were motivated by union animus; and that the refusals to hire had the effect of encouraging or discouraging membership in the Union. *WMRU-TV*, 253 NLRB 697, 703 (1980). Further, the General Counsel has the burden of proving the foregoing matters by a preponderance of the evidence. *Gonic Mfg. Co.*, 141 NLRB 201,

<sup>121</sup> Cubitt placed this as occurring during the pay period ending May 31, 1995. In his posthearing brief, counsel for the Respondent Cubitts conceded that Vandergrift took her two weeks off “between July 13 towards the end of July.” Further, in accord with Cubitt’s testimony, based upon the payroll records, it does not appear that she was paid for these 2 weeks.

<sup>122</sup> In her posthearing brief, counsel for the Acting General Counsel conceded that the envelope, which Lawson observed David Cubitt give to Vandergrift, may have contained her quarterly department manager’s bonus check.

209 (1963). However, while the above analysis is easily applied in cases in which a respondent’s motivation is straightforward, conceptual problems arise in cases in which the record evidence discloses the presence of both a lawful and an unlawful cause for the allegedly unlawful conduct. In order to resolve this ambiguity, in *Wright Line*, supra, the Board established a causation test in all Section 8(a)(1) and (3) cases involving employer motivation. “First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.” Id. at 1089. Three points are relevant to the foregoing analytical approach. First, in concluding that the General Counsel has established a prima facie showing of unlawful animus, the Board will not “quantitatively analyze the effect of the unlawful motive. The existence of such is sufficient to make a discharge a violation of the Act.” Id. at 1089 fn. 4. Second, once the burden has shifted to the employer, the crucial inquiry is not whether Respondent could have engaged in the discharges and layoffs herein, but, rather, whether Respondent would have done so in the absence of the alleged discriminatees’ union activities and support. *Structural Composites Industries*, 304 NLRB 729 (1991); *Filene’s Basement Store*, 299 NLRB 183 (1990). Third, pretextual discharge cases should be viewed as those in which “the defense of business justification is wholly without merit,” (*Wright Line*, supra at 1084 fn. 5) and the “burden shifting” analysis of *Wright Line* need not be utilized. *Arthur Anderson & Co.*, 291 NLRB 39 (1989). Finally, in alleged hiring discrimination cases, as involved herein, in order for counsel for the Acting General Counsel to meet her burden of proof, it is necessary that she establish the availability of jobs, which were denied to the alleged discriminatees. *Casey Electric*, 313 NLRB 774 at 774 (1984).

Having closely scrutinized the record as a whole, I do not believe that counsel for the Acting General Counsel has met her burden of proof that Respondent was unlawfully motivated in refusing to offer employment to Deborah Tahir and to Marilyn Reider. Thus, while it is undisputed that Deborah Tahir was one of the two principal employee organizers of the campaign to gain representation by the Union, meeting with union officials to plan the organizing campaign and distributing to and collecting signed authorization cards from her fellow employees in the parking lot in front of the grocery outlet, and that Marilyn Reider signed an authorization card and attended meetings, arranged and conducted by agents of the Union, there is no record evidence that the Alvernazes were aware of Tahir’s active role in organizing the Union campaign or of Reider’s limited role. Moreover, while there is record evidence that attorney Robert Tiernan actively sought to ascertain knowledge of the Union sympathies and activities of the Alvernazes’ employees<sup>123</sup> and that he was present at the grocery

<sup>123</sup> I credit Ysidra Hundevadt’s uncontroverted testimony that Tiernan asked her to mark on a piece of paper her impressions of the Union sympathies of each of the Alvernazes’ employees and note the uncontroverted testimony of Jonathan Wooldridge that Thomas Alvernaz interrogated him on the same subject. Further, for reasons stated infra, I am reluctant to credit Carma Lawson; however, given the activities of her former husband and of their attorney, I believe it likely that Deb-

outlet at the time the Respondent Cubitts refused employment to Tahir, Reider, and two others and discussed employment decisions with his clients, there is not a scintilla of record evidence, establishing that Tiernan actually gained direct knowledge of or, at least, suspected Tahir's extensive involvement in the organizing campaign for the Union or of Reider's decidedly more limited role<sup>124</sup> or that he discussed his knowledge or suspicions with the Respondent Cubitts. Acknowledging this deficiency in the record evidence, counsel for the Acting General Counsel requests that I draw inferences that "Tiernan's and the Alvernazes' repeated attempts to find out which employees were involved in the union activity eventually resulted in information being given to them" and that Tiernan "without doubt conveyed" his knowledge to the Respondent Cubitts and may have "recommended" the refusals to hire the alleged discriminatees. Perhaps, if there existed direct evidence of Tiernan's knowledge or suspicions, I might draw the inference that he shared such knowledge or suspicions with the Respondent Cubitts or, if there was direct evidence that Tiernan made recommendations or participated in the decisions not to offer employment to Tahir or Reider, I might draw the inference that he had direct knowledge of their involvement with the Union or harbored suspicions as to both alleged discriminatees. What I shall not do is pile inference upon inference, as suggested by counsel, in order to conjure the nonexistent facts of suspicion and knowledge.<sup>125</sup>

Moreover, I believe that the record as a whole does not establish that, on the day the Respondent Cubitts became the operators of the grocery outlet, the day they refused employment to Reider and to Tahir, the Respondent Cubitts harbored any unlawful animus. In support of her contention that there does exist record evidence of unlawful animus, counsel for the Acting General Counsel initially relies upon the numerous unfair labor practices, which were allegedly committed by the Alvernazes. However, I have concluded not only that litigation of said acts and conduct is time-barred pursuant to Section 10(b) of the Act but also but also that the Alvernazes and the Respondent Cubitts do not comprise a single-employer entity and, thus, the latter are not bound by the Alvernazes' conduct. Counsel next points to the Respondent Cubitts' conduct prior to the election. As to this, while, as shall be discussed *infra*, I agree that the Respondent Cubitts' response to

orah Johnston-Kindel also interrogated employees about her employees' union activities.

<sup>124</sup> Hundevadt marked the "maybe" column next to each employees' name, and there is no evidence he ascertained more knowledge from any other source. Also, if the Alvernazes gained knowledge or harbored suspicions of specific employees' involvement with the Union, there is no evidence they shared such knowledge or suspicions with Tiernan.

<sup>125</sup> While Tahir's and Reider's versions of their employment interviews were uncontroverted, I do not place the degree of importance, attributed to the questions by counsel for the Acting General Counsel. Thus, contrary to counsel, I do not believe that the questions, posed to the alleged discriminatees, were designed to enable the Respondent Cubitts to discover union activists nor that Tahir's or Reider's answers provided clues that they were union activists or adherents. Rather, the types of questions that were asked begged for affirmative responses, and I believe that, if asked, any honest employee would have replied in the same way—that he or she desired better wages, benefits, or working conditions.

the picketing, which occurred in protest of their refusals to hire Tahir, Reider, and two other former Alvernaz employees, and their egregious acts of favoritism towards employees, who were the primary opponents of Union representation, demonstrated unlawful animus towards their employees, who supported the Union, and the Union itself, I believe that such was engendered by the picketing and did not exist at the time the Respondent Cubitts decided not to hire Tahir or Reider. Finally, without regard to whatever else attorney Tiernan may have said to Carma Lawson after Tahir and Reider were denied employment by the Respondent Cubitts on April 18, notwithstanding that she was uncontroverted, inasmuch as Lawson's demeanor, while testifying, was that of an oleaginous and mendacious witness,<sup>126</sup> I do not believe that the lawyer volunteered to her that there were other reasons for the Respondent Cubitts' actions, which he could not discuss.<sup>127</sup> Accordingly, as I do not believe that counsel for the Acting General Counsel has met its *prima facie* burden of proof by establishing that Respondent was unlawfully motivated in refusing to offer employment to Tahir and to Reider,<sup>128</sup> I shall recommend dismissal of the applicable paragraphs of the amended consolidated complaint.<sup>129</sup>

Next, I turn to the allegation that, on behalf of Respondent, attorney Tiernan acted in violation of Section 8(a)(1) of the Act by harassing the individuals, who were picketing in front of the grocery outlet in protest of the Respondent Cubitts' refusals to offer employment to Tahir, Reider, and two others and note that there exists a factual dispute as to what occurred during the afternoon of May 6. Counsel for the Acting General Counsel contends that, on

<sup>126</sup> I note that Lawson's assertions that, except for one occasion, she never worked overtime during May and June 1995, and that David Mallette took a vacation in 1995 were utterly belied by the Respondent Cubitts' payroll records, which show that she regularly worked overtime each pay period during May through September of that year and that Mallette worked regular hours during each payroll period. These demonstrable falsehoods as to the only portions of her testimony capable of objective measure leads to the inescapable conclusion that the remainder of her testimony, for which the only measure of candor is demeanor, is likewise unreliable. In these circumstances, and noting her demeanor which was not that of a forthright witness, I shall only rely upon the testimony of Lawson when corroborated by other, more credible, witnesses or the record as a whole.

<sup>127</sup> This appears to be the basis for the allegation in par. 9(g) of the amended consolidated complaint. Accordingly, I shall recommend dismissal of said paragraph.

<sup>128</sup> As I believe that she was impeached on this point by her pre-trial affidavit, I shall place no reliance upon Reider's assertion that David Cubitt said "we don't want you here" after she protested the Respondent Cubitts' refusal to offer her employment.

<sup>129</sup> Assuming *arguendo* that counsel for the Acting General Counsel had established the existence of unlawful animus, I believe that Respondent was able to establish that it would have refused employment to the two alleged discriminatees notwithstanding said animus. Thus, I credit David Cubitt that, prior to becoming the operators of the grocery outlet, he and his wife had decided to make their son-in-law the deli manager instead of Tahir and that, as there were too many managers and as co-health and beauty aids managers were unnecessary, they decided to retain the more impressive individual, Vandergrift. Further, the Respondent Cubitts' decision not to retain the two alleged discriminatees in other positions were business decisions that should not be subject to second guessing.

the above date, the Respondent Cubitts' attorney followed the individuals, who were picketing on the public sidewalk in front of the grocery outlet, as they marched and harassed them. In these regards, as between Tiernan and Union agent, Mike Moore, who was corroborated by Deborah Tahir and a videotape of a portion of the incident, I credit the former that Tiernan did more than merely walk alongside and greet the picketers and that he, in fact, deliberately followed the picketers as they marched and made objectionable comments, which caused picketers to demand that he leave them alone. In short, I believe, and find, that Tiernan had no valid purpose for being in the vicinity of the picketing and that what he did was for the explicit purpose of harassing them. Regarding the legality of Tiernan's actions, there can be no doubt that the above picketing constituted conduct, privileged by Section 7 of the Act. *Indio Grocery Outlet*, 323 NLRB 1138 (1997); *United Supermarkets*, 283 NLRB 814 (1987). Moreover, notwithstanding that none of the picketers were employees of the Respondent Cubitts, each, nonetheless, was an employee within the meaning of Section 2(3) of the Act, which includes the working class in general and is not limited to the employees of a particular employer, and comments, such as Tiernan's threats to them that "bad things" would happen if they continued picketing, were patently violative of Section 8(a)(1) of the Act. *Consolidation Coal Co.*, 266 NLRB 670, 673 (1983); *Peddie Buildings*, 203 NLRB 265 (1973). Inasmuch as Union agent Moore presumably reported this incident to the bargaining unit employees at a union meeting two days later, that no employee, who was working inside the grocery outlet, may have witnessed Tiernan's acts and conduct, is not a relevant consideration. Accordingly, I find that Respondent engaged in conduct, violative of Section 8(a)(1) of the Act by harassing the picketers in front of the grocery outlet.

The most contentious of the issues, raised during the instant hearing was, of course, the alleged shoving incident, between attorney Tiernan and Union agent Moore, on May 6. At the outset, resolving this alleged violation of Section 8(a)(1) of the Act is fraught with problems, the most difficult of which is credibility. Thus, rather than testifying honestly as to the best of his recollection, Tiernan and Moore each impressed me as testifying in a manner calculated to buttress his party's legal and factual positions during the trial, and attempting to rationalize the credibility of one over the other on the basis of demeanor appears to be an exercise in futility. Moreover, in considering the ostensibly corroborative witnesses for each, one is confronted with additional credibility problems. Thus, Moore testified that he entered the store through the left-side doorway;<sup>130</sup> that he shouted in order to gain David Cubitt's attention; that Tiernan then rushed into the store and ran towards him, encountering him near the checkstand closest to the left-side entrance; and that Tiernan twice placed his hands on Moore's chest and shoved him backwards, the last time propelling him backwards out of the market through the left-side doorway. However, of the three witnesses, who, Counsel for the Acting General Counsel asserts, corroborated Moore's testimony, Vikie Young contradicted him, stating that Moore went into the

market through the right side, or customer, entrance, walked past the checkout stands toward the left-side door, and could be heard shouting for the Respondent Cubitts' lawyer to identify himself; Darla Hernandez contradicted him, testifying that the entire incident occurred "outside" the left-side door; and Dorothy Van Buskirk<sup>131</sup> contradicted Moore, stating that Tiernan pushed him out the middle doorway, the customer exit doors. Moreover, and most significantly, while the three women did agree that Tiernan pushed Moore, none corroborated the latter's testimony that Tiernan shoved him twice. Moreover, while the witnesses (David Cubitt, Diane Bartlett, Robin Sobecki, and Pamela Bennett-Heib), who testified in arguable corroboration of Tiernan, were consistent that Tiernan was inside the grocery outlet when Moore entered through the left-side door; that Tiernan approached Moore, shouting for the latter to get out of the store; that Tiernan never touched Moore; and that Moore did not stumble backwards as he left through the left-side door, I note that none of the three cashiers were able to place David Cubitt in the vicinity of the incident, that, given the facts that she followed the Respondent Cubitts from Yuca Valley to Grass Valley and was given moving expenses money by the Cubitts, Sobecki may have been biased in their behalf, that Bartlett admitted she may have observed Tiernan striking Moore, and that Bennett-Heib admitted, in an earlier sworn statement, she saw Tiernan push Moore.

However, notwithstanding any doubts I have as to their credibility, in comparison to those witnesses, who ostensibly corroborated Moore's version of the incident, I believe that the witnesses, who testified on behalf of Respondent and in support of Tiernan's version of events, exhibited the candor of more reliable witnesses. In this regard, I note that, in direct contrast to the witnesses, who testified on behalf of the General Counsel and who contradicted Moore on important points, Respondent's witnesses' accounts were consistent with that of Tiernan.<sup>132</sup> Accordingly, I find that, at approximately 2:30 in the afternoon of Saturday, May 6, Mike Moore entered the grocery outlet through the left-side door and began shouting for Tiernan to identify himself, that Tiernan, who already was inside the building, approached Moore, pointing and shouting for him to leave the store, that Tiernan eventually stood no more than a foot from Moore, continuing to point and demand that the union agent leave the store, and that Moore stepped backward and left the store through the same doorway. Finally, while I credit the corroborating witnesses and, therefore, Tiernan that the latter did not forcibly push Moore out the door and that Moore did not stumble out backwards, I also believe it likely that, as he came close to the union agent, Tiernan probably did, in fact, touch

<sup>130</sup> Moore was contradicted by photographic evidence and testimony with regard to whether the left-side door had a "Do Not Enter" sign posted on it. I reject his testimony that no such sign was posted on May 6.

<sup>131</sup> Given Brenda Cubitt's testimony, it is entirely possible that Van Buskirk did, in fact, work as a checker on Saturday, May 6. However, whether or not she was working at the time of the incident, I think it clear that either her recollection of events was in error or she dissembled while testifying. In any event, I place no reliance upon her account.

<sup>132</sup> While uncontroverted, Sharlene Sutton's implausible testimony, regarding comments allegedly made to her by Bennett-Heib shortly after the incident, is not worthy of belief. Initially, no witness, not even Moore, asserted that Tiernan "smashed [Moore] in the head." Moreover, her assertion that she spoke to either "Sandra" or Van Buskirk 20 minutes later was contradicted by the latter and "Sandra" was off work on May 6.

Moore, although inadvertently, while gesturing for him to leave the market. In this regard, I note that Respondent's witnesses, Sobbecki and Brenda Cubitt, each heard Moore say to Tiernan "don't touch me" as he backed out the door, and, in agreement with counsel for the Acting General Counsel, I do not think one would spontaneously utter such a comment unless actually the recipient of a battery to some degree. "An employer violates Section 8(a)(1) of the Act by assaulting a union representative when it does so in the presence of one or more employees under circumstances where onlookers would likely infer from the assault that the employer would also retaliate in the same fashion against any employee who supported the union." *Horton Automatics*, 289 NLRB 405, 411 (1988); *Batavia Nursing Inn*, 275 NLRB 886 (1985). Herein, whether, as alleged, Tiernan actually pushed Moore out of the grocery outlet or whether, as is more likely, he inadvertently touched the Union agent while gesturing for him to leave the store, I do not believe that any employee onlooker would have inferred that the Respondent Cubitts would have retaliated in the same manner against a supporter of the Union. Thus, by all accounts, it was a busy Saturday afternoon. Many customers were in the store; all employees were busy; and there is no dispute that Moore's actions interrupted normal business activities. In these circumstances, unlike *Horton Automatics* and *Batavia Nursing Inn*, wherein the employers themselves initiated the confrontations and left little to doubt as to their motivation, there can be no doubt that Moore deliberately provoked the May 6 incident, and that employees would have perceived Tiernan's reaction as aimed at protecting the Respondent Cubitts' business interests. Therefore, I am unable to conclude that Respondent violated Section 8(a)(1) of the Act and shall recommend dismissal of the applicable amended consolidated complaint paragraph.

With regard to the two other picketing-related incidents, based upon Ysidra Hundevadt's uncontroverted and credible testimony, I find that, while the picketing was on-going outside the grocery outlet, on, at least, two occasions, David Cubitt came upstairs to the office where Hundevadt was working and angrily asked "what's going on, why are they doing this" and "are you with us or against us." The amended consolidated complaint alleges the foregoing as interrogation, violative of Section 8(a)(1) of the Act. In defense, counsel for the Respondent Cubitts argues that there is no record evidence that Hundevadt felt compelled to respond to Cubitt's questions, that the conduct occurred in her office, and that the atmosphere was free of coercion. As to Cubitt's comments, "what's going on, why are they doing this," it appears that Cubitt was merely expressing his growing frustration over the picketing, and I see no reason not to accept Hundevadt's own observation that these comments were not really questions. However, the same can not be said for his next question ("are you with us or against us?"). Inasmuch as I believe that the Respondent Cubitts considered the picketing to be a Union-sponsored or sanctioned activity,<sup>133</sup> Cubitt's question appears to have been a calculated

<sup>133</sup> Given the Union's unfair labor practice charge over their refusal to hire four of the Alvernazes' employees, Union agent Pate's intervention after they suspended Sharlene Sutton because she joined the picketing, Union agent Moore's conduct on May 6, and their anger at the picketing, I believe the record evidence warrants the inference that the Respondent Cubitts believed the picketing in front of the grocery outlet was sponsored by the Union.

one, designed to ascertain the perceived level of Hundevadt's support for the picketing, and inferentially, for the Union. Hundevadt certainly was not an open and avowed supporter of the Union, and there simply existed to reason for Cubitt to interrogate her other than to satisfy himself as to her support for the picketing and for the Union. Accordingly, I find that, on behalf of Respondent, David Cubitts' interrogation of Hundevadt was violative of Section 8(a)(1) of the Act. *Cal Spas*, 322 NLRB 41, 55 (1996).

The remaining picketing-related incident concerns the Respondent Cubitts' alleged solicitation of employees to sign a petition, denouncing the employees' activities in support of the Union. The amended consolidated complaint alleges that said acts and conduct were violative of Section 8(a)(1) of the Act. As to this, there is no dispute that, while the picketing continued, Brenda Cubitt solicited employees to sign a statement,<sup>134</sup> which she drafted and which stated, in part, "We want to be sure you know that none of the people outside picketing are Grass Valley grocery outlet employees. We are all happily employed and are receiving competitive wages and benefits from our employer." Mrs. Cubitt admitted that she failed to inform employees that they were not required to sign the petition, and the record reveals that the said petition was also posted at two locations inside the grocery outlet. Clearly, the plain meaning and, I believe, intended message of the last quoted sentence of the document to the public and to each of the Respondent Cubitts' employees was that, by signing, an employee was indicating contentment with the status quo and was, therefore, not advocating the need for representation by the Union. Counsel for the Acting General Counsel argues that an employer's solicitations to employees to sign such petitions are, by their nature, coercive and need not be accompanied by threats, inducements, or other coercive acts. In defense, while citing no court or Board cases in support, counsel for the Respondent Cubitts contends that soliciting signatures for the petition was not unlawful as the document was not designed to, and did not, solicit employee sentiment either for or against the Union. While I am uncertain that counsel for the Acting General Counsel's sweeping generalization is an accurate statement of the law,<sup>135</sup> given what I perceive as the unmistakably antiunion message of the petition, the appearance that the Respondent Cubitts were promoting the petition, and the certainty that Brenda Cubitt would be aware of which employees agreed to sign and which ones refused to sign the document, her solicitations, on behalf of Respondent, were patently violative of Section 8(a)(1) of the Act. *Davies Medical Center*, 303 NLRB 195, 200 (1991).

Next, I consider the allegation of the amended consolidated complaint that the Respondent constructively discharged Sharlene Sutton in violation of Section 8(a)(1) and (3) of the Act. With regard to the General Counsel's burden of proof in such a matter, the seminal Board decision is *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976), wherein the Board defined the two elements,

<sup>134</sup> I rely upon the testimony of Ysidra Hundevadt, who impressed me as being an honest witness and upon the admissions of Brenda Cubitt.

<sup>135</sup> Two of the decisions of the Board, upon which she relies, do not support her legal argument. Thus, in *Frank Leta Honda*, 321 NLRB 482 (1996), the solicitation was accompanied by the promise of a wage increase, and, in *National Roof Systems*, 305 NLRB 965 (1991), the solicitation was accompanied by a threat of loss of employment.

which must be proven in any case in which a constructive discharge is alleged. “First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee’s union activities.” *Id.* at 1069. With regard to the element of proof, in *American Licorice Co.*, 299 NLRB 145, 148 (1990), the Board subsequently stated, “We do not believe . . . that the *Crystal Princeton* test can be read so narrowly as to apply only when an employer has changed an employee’s working conditions” and that “the test for intent is not limited to whether the employer specifically intended to cause the employee to quit, but includes whether, under the circumstances, the employer reasonably should have foreseen that its action would have that result.” Further, in *David Electric Wallingford Corp.*, 318 NLRB 375, 376 (1995), the Board noted that “The *Wright Line* test applies to the second element of *Crystal Princeton*.” However, a mere showing of unlawful motivation on the part of the employer is not enough. “The unlawfully motivated action on the part of the employer must create an employment condition sufficiently ‘difficult or unpleasant’ to cause a reasonable person to quit.” *Lively Electric, Inc.*, 316 NLRB 471, 473 fn. 8 (1995).

Bearing the above legal principles in mind, there is no dispute, and I find that on May 5, prior to the start of her work shift, Sutton joined the picketing by the individuals, who were refused employment by the Respondent Cubitts, their family members, and their friends; that she walked the picketline, carrying a placard in support of the picketing; and that Brenda Cubitt came outside, and after initially warning the alleged discriminatee that she would not be allowed to picket and continue working at the grocery outlet, later suspended her for 5 days. As to the suspension, after initially averring that it was a mistake based upon her presumption that Sutton should have been working at the time, Mrs. Cubitt later admitted that Sutton’s suspension was based solely on the fact that she joined the picketing. Further, given the undisputed facts that Union Agent Thomas Pate met with David Cubitt over Sutton’s suspension and that Union Agent Mike Moore was with the picketers the next day and my above findings that, faced with the picketing, Brenda Cubitt unlawfully solicited employees to place their signatures on an antiunion petition and Dave Cubitt unlawfully interrogated Ysidra Hundevadt in order to ascertain her support for the Union, the record warrants the inference that the Respondent Cubitts believed that the picketing was a union-related activity. Accordingly, based upon the above and the record as a whole, I am convinced that the Respondent Cubitts believed Sutton’s picketing demonstrated her support for the Union; that the Respondent Cubitts were, therefore, unlawfully motivated in suspending Sutton for 5 days; that, in reinstating her, the Cubitts merely acted to avoid the legal consequences of their arguably unlawful act; and that the level of their antiunion animus never dissipated, affecting work related decisions involving Sutton.

In these circumstances, the issue is a simple one—given the unlawful animus, which the Respondent Cubitts continued to harbor toward Sutton after her return to work, did they intentionally cause changes in the alleged discriminatee’s working condi-

tions “so difficult or unpleasant” so as to force her to quit, as she did little over a week after her return to work. At the outset, in this regard, I do not rely upon the testimony of Carma Lawson, who, as I stated above, impressed me as being a disingenuous witness.<sup>136</sup> Further, as demonstrated by, what I view as, her fabricated testimony regarding a purported conversation with Bennett-Heib shortly after the Tieman-Moore incident on May 6, Sutton appeared to be eminently capable of dissembling over matters of significance herein. Accordingly, notwithstanding any hostility which the Cubitts may have exhibited, I view her testimony regarding her emotional state of mind during the period just before she quit with great skepticism and place no reliance upon it.

The alleged unlawfully motivated “difficult or unpleasant” changes in Sutton’s working conditions, by the Respondent Cubitts, apparently take two forms. The first involves the assignment of more onerous job duties 5 days after her return to work following her suspension, and the Respondent Cubitts do not contest the applicable facts. Briefly stated, while performing her normal bagging duties, David Cubitt asked her to help in the freezer department. Then, while she was helping to fill the freezer, Brenda Cubitt approached and asked her to clean the break room. Sutton protested, but Mrs. Cubitt insisted that the alleged discriminatee do as she ordered. Subsequently, as she cleaned the break room and 5 minutes into her scheduled break, the head checker called over the grocery outlet’s intercom system for Sutton to retrieve some shopping carts. Emphasizing each Cubitt’s tone of voice, Sutton asserted that these three assignments caused her to believe the Respondent Cubitts “were trying to get me.”<sup>137</sup> There is no dispute as to these job assignments, and Counsel for the Acting General Counsel characterizes them as “unreasonable demands” on Sutton “. . . by ordering her to do many tasks at the same time and ordering her to abandon tasks others had assigned to her.” However, there is no record evidence that, when she asked Sutton to clean the break room, Brenda Cubitt was aware her husband had ordered Sutton to work in the freezer or that, when the head checker requested that Sutton retrieve shopping carts, the person was aware Sutton was working elsewhere in the grocery outlet on assignment from Brenda Cubitt. Moreover, Sutton conceded that no particular employee cleaned the break room and that she had previously voluntarily cleaned the bathroom, and the record evidence is that employees “took turns” at cleaning the break room. Also, Mrs. Cubitt did not demand that Sutton finish the freezer job and then clean the break room; Sutton was not required to complete the freezer work. Further, retrieving shopping carts was a routine part of Sutton’s job duties, and there is no record evidence that she could not have taken her full break after retrieving the shopping carts. Based upon the foregoing, and the record as a whole, utilizing the standard, established by the Board in *Lively*

<sup>136</sup> Specifically, Lawson asserted that she observed Sutton crying inside the grocery outlet the day after the picketing incident and that she observed David Cubitt criticizing Sutton’s work and continually questioning her about where she had been and complaining about Sutton not performing her job duties. Sutton herself failed to corroborate Lawson on these points, and I find them not worthy of belief.

<sup>137</sup> While I do not rely upon Sutton’s subjective feelings, I note that the Cubitts’ tones of voice, in giving these work assignments to Sutton, may well have been reflective of the unlawful animus, which they harbored for Sutton.

*Electric*, supra, I do not believe that the Cubitts' above-described unlawfully motivated, but not particularly onerous, work assignments for Sutton alone created an employment condition sufficiently "difficult or unpleasant" to cause a "reasonable person" to quit.

The other asserted unlawfully motivated "difficult or unpleasant" changes in Sharlene Sutton's working conditions concern what she described as changes in her work schedule and her job duties the next day. However, Sutton's assertions, as to the alleged changes, are patently at variance with the record evidence. Thus, while Sutton maintained that she was removed from the freezer job without notice, the Respondent Cubitts' weekly work schedules establish that a person named "David" was the freezer person and that Sutton was always listed with the bagger/trashers. Moreover, the said weekly schedules show only one other employee, who worked in the freezer—Van Buskirk. Perhaps realizing this flaw in her story, Sutton changed her testimony during cross-examination, averring that she was the freezer person just on "certain days." In fact, according to the weekly work schedules, there were no days in which Sutton was assigned to work in the freezer by the Respondent Cubitts. Finally, during cross-examination, Sutton conceded that her job always was as a bagger/trasher for the Respondent Cubitts. Further, Sutton's assertion that her normal hours of work were changed, without notice, on the work schedule for the next week was controverted by the weekly work schedules, which establish that Sutton's normal hours of work always were scheduled to begin on either 9 a.m. or 11 a.m., and that her schedule for the following week, beginning May 14, had her also starting some days at 9 a.m. and others at 11 a.m. There is no record evidence that Sutton was ever scheduled to start a workday at 10 or 10:30 a.m. Based upon the foregoing, and the record as a whole, given its utter variance with the record evidence, I do not credit Sutton's testimony, and I find that the above-described alleged job and starting time changes in her working conditions simply did not occur. Accordingly, inasmuch as I have concluded that the unlawfully motivated changes in Sutton's working conditions, which were imposed on the Thursday following her suspension, were not sufficiently difficult or unpleasant so as to require a reasonable person to quit, I find that the counsel for the Acting General Counsel has not met her burden of proof, as described in *Crystal Princeton*, supra, to establish that Sutton's voluntary quit was, in reality, an unlawfully motivated constructive discharge.<sup>138</sup> Therefore, I shall recommend dismissal of the allegation that Respondent constructively discharged Sharlene Sutton.

Concerning the amended consolidated complaint allegations that Respondent acted in violation of Section 8(a)(1) of the Act when David Cubitt informed employees that they would not receive their paychecks because of the Union and acted in violation of Section 8(a)(1) and (3) of the Act by withholding the employees' paychecks and raises, the basic facts are not in dispute. Thus, I find that, inasmuch as the Alvernazes' former employees had not received a wage increase for over a year, the Respondent Cubitts decided to implement a wage increase for most of their employ-

<sup>138</sup> I pass no judgement as to the actual reason underlying Sutton's decision to quit but note that she did accept a job offer from another employer prior to quitting.

ees, effective with the paychecks which were to be distributed on May 17, 1995; that the Respondent Cubitts previously had informed employees of their wage increases; that, while the Respondent Cubitts' employees normal payday is on a Wednesday, the paychecks usually arrive on the Tuesday and the Cubitts distribute the paychecks when they arrive at the grocery outlet; that the paychecks, including the wage increases, arrived at the grocery outlet on May 16; that, prior to distributing them, David Cubitt spoke to attorney Tiernan, who advised Cubitt not to implement the raises; and that, as a result, Cubitt decided to withhold the raises and posted an employee notice, in which he stated that, as the employees were aware, he and his wife had decided to give raises to most of the employees but that "I have just been informed by our company attorney . . . that the National Labor Relations Board prohibits raises while an election is pending before the [Board]" and, therefore, "regret I will not be able to give the raises."<sup>139</sup> I further find that Cubitt also instructed his accountant to draft new paychecks, not including the raises, and that these were distributed to the employees on Wednesday.

Board law is quite clear that, in the midst of a union organizing campaign, an employer must proceed with an expected wage or benefit adjustment as if the organizing campaign had not been in progress. *America's Best Quality Coatings Corp.*, 313 NLRB 470, 484 (1993); *Atlantic Forest Products*, 282 NLRB 855, 858 (1987). The Board has, however, recognized an exception to this rule—an employer may postpone the implementation of such a wage or benefit adjustment if it makes clear to its employees that the granting of the adjustment is not dependent upon whether or not they select the union as their bargaining representative and that the "sole purpose" of the postponement is to avoid the appearance of influencing the outcome of the pending election. *Atlantic Forest Products*, supra. In so doing, however, an employer acts in violation of Section 8(a)(1) of the Act if it attributes its failure to implement the expected wage or benefits adjustment to the presence of the union. *Twin City Concrete*, 317 NLRB 1313, 1318 (1995); *Atlantic Forest Products*, supra. I believe that, in his posted notice to the employees, by linking the withholding of the wage increase to the pending election before the Board, the basis for which was the representation election petition filed by the Union, David Cubitt, in fact, placed the onus for his and his wife's inability to implement the wage increases, which had been expected by the employees, squarely upon the Union. Further, Cubitt's explanation clearly had the effect of undermining the Union by creating the impression that, but for the pending election, Respondent would have implemented the announced raises. Accordingly, I find that David Cubitt's written explanation for the Respondent Cubitt's decision to withhold imple-

<sup>139</sup> Apparently, on Tuesday after the paychecks arrived at the grocery outlet, Cubitt met with some of the employees, including Carma Lawson and Ysidra Hundevadt, in his office. Relying upon the testimony of Hundevadt, who was a candid and forthright witness, I find that, with the stack of checks in plain sight, Cubitt told the employees that he had checks, which contained raises for them, but that "he could not give us the checks because it might appear to be as a bribe because it was before the vote." I place no reliance upon the testimony of the less than candid Lawson, specifically her assertion that Cubitt said the raise was to be delayed until all the Union "bull crap" was over.

mentation of the employees' raises was violative of Section 8(a)(1) of the Act. *Atlantic Forest Products*, supra. Moreover, as such was linked to the Union and as an employer must grant expected benefits as it would if a union was not "in the picture," the Respondent Cubitts' actual withholding of the wage increase was violative of Section 8(a)(1) and (3) of the Act. *Twin City Concrete*, 317 NLRB 313, 318 (1995); *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69 (1993).

Next, I turn to the amended consolidated complaint allegation that employees, who turned against the Union prior to the election were rewarded with more overtime, higher hourly wage increases after the election, and vacations in violation of Section 8(a)(1) and (3) of the Act. Initially, I find that, immediately after the Respondent Cubitts' refusal to hire Deborah Tahir, an upset Rebecca Vandergrift, who instigated the Union's organizing campaign, spoke to Brenda Cubitt and her daughter, saying "She was letting them know that she was for the Union" and "she didn't like the way the Union was handling things."<sup>140</sup> I further find that, as the preelection campaign continued, Vandergrift became disenchanted with the Union and eventually became an opponent of representation by the Union and informed other employees of her new opinions; that employees, David Mallette and John Slaughter, also were Union supporters, who changed their minds and became opposed to the Union; and that, along with Vandergrift, Mallette and Slaughter were the leaders of those employees, who were opposed to representation by the Union. As to pay raises, I find that the Respondent Cubitts gave the previously withheld wage increases to most of its employees in the pay period following the June 12, 1995 election and that employees Vandergrift, Slaughter, and Mallette received the highest hourly increases. Concerning overtime, I find that the Respondent Cubitts regularly assigned overtime hours to their employees before and after the election; that, during May through late September 1995, employee Mallette worked in excess of 101 overtime hours, Slaughter worked 54 hours of overtime, and Vandergrift worked 47 overtime hours; that only one other employee worked more overtime than did Vandergrift; and that Mallette, Slaughter, and Vandergrift worked the most overtime in the pay periods immediately preceding and subsequent to the election. With regard to vacations, I find that, as the employees' "new employer," the Respondent Cubitts' stated vacation policy was "after 1 year, 1 week" and "after 2 years, 2 weeks;" that, as David Cubitt stated, employees were not eligible to take vacations until April 1996;<sup>141</sup> that the Respondent Cubitts permitted employee Vandergrift to take an unpaid<sup>142</sup> 2-week vacation in late July 1995; and that no other employee was permitted to take any sort of vacation in said year.

<sup>140</sup> As between Vandergrift and Hundevadt, the latter was the more forthright witness, and, notwithstanding Vandergrift's denial, I credit Hundevadt that she overheard Vandergrift speaking to Brenda and Lori Cubitt.

<sup>141</sup> Given that David Cubitt corroborated her, in this instance only, I credit Carma Lawson that the Cubitts told her it would not be possible to take a vacation until April 1996.

<sup>142</sup> Notwithstanding that the Respondent Cubitts' payroll records establish that Vandergrift received a bonus check during the payroll period, which ended on July 28, and during which she did not work any hours, it appears that the check was for the regular quarterly bonus, paid to all department managers.

I believe that, given the Respondent Cubitts' adverse reaction to the picketing, which began in early May, their suspension of Sharlene Sutton, their unlawful solicitation for an anti-union petition, and their discriminatory withholding of the pay raise from their employees in mid-May, during the preelection period, David and Brenda Cubitt became increasingly oppugnant toward the Union and toward their employees, who supported the Union. Further, that the leading opponents of the Union received the highest hourly raises after the election and received the highest amount of overtime before and after the election and that, a month after the election, one of said individuals was permitted to take a 2-week vacation with her husband at a time when no employees were eligible for even 1 week of vacation appear to be, to the undersigned, rather implausible coincidences. In these circumstances, the inferences are warranted that the Respondent Cubitts became aware that Vandergrift, Mallette, and Slaughter were the leading opponents of the Union amongst their employees and that, in the above ways, the Respondent Cubitts rewarded the above three employees for their opposition to the Union. The Board has held that granting a raise in pay to an antiunion employee for informing on his fellow employees is discriminatorily motivated and has the effect of discouraging employee support for the Union. *Kenosha Auto Transport Corp.*, 302 NLRB 888, 895 fn. 3 (1991). Herein, I conclude that, by rewarding employees Vandergrift, Mallette, and Slaughter for their opposition to the Union, the Respondent Cubitts discouraged other employees from supporting the Union and, thereby, engaged in acts and conduct, blatantly violative of Section 8(a)(1) and (3) of the Act.

#### VII. THE PROPRIETY OF A BARGAINING ORDER REMEDY

The General Counsel seeks a bargaining order as the only appropriate remedy for Respondent's unfair labor practices herein. The record establishes that, on April 20, 1995, the Union obtained signed authorization cards from 14 of the 24 full-time and regular part-time employees, who had been hired by the Respondent Cubitts 2 days earlier when they became the operators of the grocery outlet in Grass Valley. Neither counsel for the Respondent Cubitts nor counsel for Respondent Canned Foods contest the validity of any of these authorization cards. Accordingly, based upon the foregoing, and the record as a whole, I find that, as of April 24, the day when representatives of the Union unsuccessfully sought recognition from the Respondent Cubitts, the Union was the majority representative of Respondent's bargaining unit employees.

In determining whether the 8(a)(1) and (3) violations in which Respondent engaged are sufficiently egregious to warrant the issuance of a bargaining order remedy, I am guided, of course, by the test set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Therein, the Supreme Court described two types of situations where such an order would be appropriate: (1) "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices and (2) "less extraordinary" cases marked by "less pervasive" conduct. Id. at 613-614. In the latter type cases, there must be showings that the labor organization enjoyed majority status "at some point" and that "the employer's unlawful conduct has a "tendency to undermine [the Union's] majority strength and im-

pede the election processes.” *Id.* at 614; *Mel’s Battery, Inc.*, 267 NLRB 420 (1983). One of the factors the Board may consider in cases where the unfair labor practice conduct is less flagrant is:

the extensiveness of [the] employer’s unfair conduct in terms of [its] past effect on election conditions and the likelihood of [the recurrence of said conduct] in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election by the use of traditional remedies . . . is slight, and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

*Id.* at 614–615.<sup>143</sup> Upon consideration of all the evidence and the record as a whole, I believe that the unfair labor practices, committed by Respondent, were neither so outrageous nor pervasive as to fall within the first category, described in *Gissel Packing Co.* Rather, these matters involve the second category of unfair labor practices and require a finding specifically as to whether the above-described acts and conduct were of the type which indelibly impede the electoral process and warrant the issuance of a bargaining order to protect employee sentiment as more reliably expressed through the signed authorization cards. On balance, while I have not found that Respondent engaged in any of the so-called “hallmark” violations of the Act,<sup>144</sup> I believe that, in the circumstances extant herein, a bargaining order remedy is necessary as the possibility of erasing the effects of Respondent’s serious unfair labor practices and of conducting a fair election by the use of traditional remedies is slight.

In this regard, Respondent committed serious unfair labor practices prior to and subsequent to the representation election, which was held on June 12, 1995. Thus, I have found that, prior to the representation election, in violation of Section 8(a)(1) and (3) of the Act, the Respondent Cubitts announced to the entire employee complement their intent to withhold, and, then, they, in fact, withheld an expected wage increase from their bargaining unit employees, placing the blame for their actions on the pending representation election, which had been the result of the union’s election petition. I have also concluded that, prior to the election, the Respondent Cubitts violated Section 8(a)(1) of the Act by interrogating an employee as to her support for the picketing and, inferentially, for the Union and by soliciting their employees to sign a statement, by which they would publicly disavow their support for the Union. Brenda Cubitt’s latter act was particularly coercive, for witnessing which employees signed and which refused to sign the document enabled her to ascertain the employees’ union sympathies. Moreover, I have concluded that, immediately prior to and subsequent to the election, after previously having discriminatorily withheld expected raises from the entire employee

complement, the Respondent Cubitts violated Section 8(a)(1) and (3) of the Act by egregiously rewarding the three employees, who became the most ardent and vocal opponents of the Union organizing effort, with the most overtime hours and the highest hourly raises in pay and by permitting one of them to take, albeit unpaid, a 2-week vacation at a time when no employees seemingly were eligible for, or permitted to have, a vacation.

In my view, resort to the Board’s traditional remedies will not effectively remedy Respondent’s unfair labor practices, which are described in detail above. In particular, with regard to the announcement and the withholding of the wage increase, the Respondent Cubitt’s bargaining unit employees could not have failed to understand their employer’s unstated but indelible message—that, but for the presence of the Union, they would have received their anticipated raises, and I do not believe that the coercive effect of the Cubitts’ unlawful conduct has been easily dissipated. *Groves Truck & Trailer*, 281 NLRB 1194, 1196 (1986). Likewise, just as the foregoing conduct gave employees the impression that, as long as the Union’s shadow remained, cast by the pending representation election, they would not be given expected benefits, by rewarding opponents of the Union with more overtime and higher hourly wage increases and one of them with a 2-week vacation at a time when no employee was eligible for a vacation, the Respondent Cubitts conveyed an equally untenable message to proponents of the Union—that opposition to the Union was in their pecuniary interest—and one, which they were not likely to forget. While not free from doubt, I believe that the inherent messages and the coercive effect of these two unfair labor practices will linger for a long time and that the traditional Board remedies, cease and desist orders and language in a notice, will be forgotten long before the Respondent Cubitts’ acts will be.<sup>145</sup> Thus, these and the Respondent Cubitts’ other unfair labor practices affected the entire relatively small bargaining unit, which consists of approximately 24 individuals and which, in Brenda Cubitt’s words, is “tightly knit.” Accordingly, with reasonable certainty, the conclusion is warranted that all bargaining unit employees became aware of each aspect of the Respondent Cubitts’ unlawful acts and conduct. *Astro Printing Services*, *supra*, at 1030. Further, the Respondent Cubitts remain the operators of the grocery outlet in Grass Valley, and there is no record evidence that they have ever acted to minimize or mitigate the coercive effect of their pernicious conduct. On this latter point, while it is unfortunate that the election occurred more than three years ago, given their coercive effect, I do not believe that the passage of time alone has dissipated the “chilling effect” of the Respondent Cubitts’ serious unfair labor practices on employee choice. *F & R Meat Co.*, 296

<sup>143</sup> The Court identified “still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order.” *Gissel Packing Co.*, *supra* at 615. For the reasons expressed *infra*, I do not believe Respondent’s unfair labor practices were of this less serious variety.

<sup>144</sup> These include threats of plant closure and job loss and actual, unlawful layoffs and discharges of union supporters. *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993).

<sup>145</sup> That I do not believe that Respondent violated Sec. 8(a)(1) and (3) of the Act by refusing to hire employees or by constructively discharging employees and that Respondent did not commit any other of the “hallmark” violations of the Act do not lessen the need for a bargaining order remedy herein. Thus, notwithstanding the absence of such violations of the Act, Respondent’s unlawful acts and conduct were serious, and the possibility of erasing their effects and of conducting a fair election by the use of traditional remedies is slight. *Astro Printing Services*, 300 NLRB 1028 (1990).

NLRB 759 (1989).<sup>146</sup> Based upon the foregoing, and the record as a whole, I must conclude that, in the instant circumstances, “employee sentiment once expressed through cards would, on balance, would be better protected by a bargaining order . . . [than a future election].” *Gissel Packing Co.*, supra, at 614–615. Therefore, I shall recommend that Respondent be ordered to recognize and bargain with the Union as the majority representative of its bargaining unit employees.<sup>147</sup>

Pursuant to Board law, I date Respondent’s bargaining obligation from the commencement of its unfair labor practices—on or about May 6, 1995.<sup>148</sup> Accordingly, as there is no dispute, and Respondent admits, that, after announcing its existence on January 27, 1997, in or about March 1997, the Respondent Cubitts implemented a retirement plan for bargaining unit employees without notice to the Union or affording it an opportunity to bargain. Clearly, Respondent’s unilateral implementation of such an employee benefit when it was under an obligation to bargain with the Union was violative of Section 8(a)(1) and (5) of the Act, and I so find. *Beverly Enterprises*, 310 NLRB 222 (1993).

#### CONCLUSIONS OF LAW

1. Respondent Canned Foods and the Respondent Cubitts (Respondent) constitute a single, integrated business enterprise and have been at all times, and are, 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. By harassing individuals, who are employees within the meaning of the Act and who were picketing outside its grocery outlet, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

4. By interrogating an employee as to her Union sympathies, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

5. By soliciting its employees to sign an antiunion petition, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

6. By informing its employees that they would not be receiving an expected wage increase because a representation election, based upon a petition filed by the Union, was pending before the Board, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

<sup>146</sup> I believe that, if a rerun election were scheduled for some future date, the Respondent Cubitts’ employees would remember their employer’s withholding of a wage increase from them because of the Union and their rewards to those who opposed the Union and, notwithstanding the words on a posted notice, that their employer might repeat the misconduct in order to defeat the Union again.

While, of course, such should not be considered as a factor in my decision as to the necessity for a bargaining order remedy, I note that there is no record evidence of employee turnover since the election.

<sup>147</sup> In these circumstances, I need not rule upon the objections or challenged ballots in Case 20–RC–17087.

<sup>148</sup> There is no record evidence of a formal bargaining demand and a refusal after May 6; I, therefore, shall recommend dismissal of the amended consolidated complaint paragraph alleging an unlawful refusal to bargain by Respondent at the time of the Union’s initial demand for bargaining—April 24, 1995.

7. By withholding an expected wage increase from its employees because a representation election, based upon a petition filed by the Union, was pending before the Board, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act.

8. By rewarding employees, who were opposed to representation by the Union, higher hourly raises than other employees and more overtime hours than other employees and permitting one such opponent of the Union to have a vacation at a time when no employees were entitled to vacation time, Respondent acted discriminatorily toward employees, who supported the Union, and, thereby, engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act.

9. Since on or about April 24, 1995, the Union has been the exclusive representative for purposes of collective bargaining of a majority of the employees, working in the following appropriate unit:

All full-time and regular part-time employees employed by Respondent at its grocery outlet in Grass Valley, California; excluding guards and supervisors as defined in the Act.

10. By virtue of the unfair labor practices described in paragraphs 3 through 8 above, Respondent has undermined the Union’s majority in the above-described appropriate unit and has precluded any likelihood that a fair election can be held in the future.

11. By unilaterally implementing a retirement plan for its employees in the above-described appropriate unit without notice to or affording the Union an opportunity to bargain, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

12. The unfair labor practices herein constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

13. Unless set forth above, Respondent engaged in no other unfair labor practices.

#### REMEDY

I have found that Respondent engaged in serious unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act. Accordingly, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative actions necessary to effectuate the purposes and policies of the Act. Specifically, with regard to the Respondent Cubitts’ implementation of a retirement plan for their bargaining unit employees in March 1997, I shall recommend that, upon request, Respondent revoke said retirement plan. I shall further recommend that Respondent post a notice, setting forth its obligations herein.

[Recommended Order omitted from publication.]